

- iv. *That the costs of this application be costs in the cause.*
 - v. *Any further or other orders this Honourable Court deems fit.*
2. The 1st Defendant filed an Affidavit in Support of the said Summons. The Plaintiff filed an Affidavit in Opposition and the 1st Defendant filed a Reply. Thereafter, the Plaintiff filed a Supplementary Affidavit to which the 1st Defendant filed another Affidavit in Reply.
 3. The background of this proceeding is as follows:
 - (a) The Plaintiff and the 1st Defendant are neighbours.
 - (b) The Plaintiff filed his Writ of Summons and Statement of Claim (**SOC**) on 14 August 2020 seeking a declaration that the 1st Defendant was in illegal occupation of the Plaintiff's property by encroaching on the same. The Plaintiff is also seeking damages.
 - (c) The 1st and 2nd Defendants filed their Statements of Defence (**SOD**) on 11 September 2020 and 17 September 2020 respectively. The Plaintiff thereafter filed replies to both the Statements of Defence on 22 October 2020 and Summons for Directions on 26 October 2020.
 - (d) The Plaintiff's Affidavit Verifying List of Documents (**AVLD**) was filed on 19 January 2021, 2nd Defendant's AVLD was filed on 03 March 2021 and 1st Defendant's AVLD was filed on 19 April 2022.
 - (e) Before Pre-Trial Conference minutes were finalised among the parties, on 30 September 2022 the Plaintiff filed a Summons for Leave to Amend his SOC. On 07 November 2022, by consent the Plaintiff was ordered to file the Amended SOC by 21 November 2022 and the Defendants ordered to file their respective SOD's by 16 January 2023.
 - (f) The Plaintiff filed his Amended SOC on 21 November 2022 and a further Amended SOC correcting the name of the 2nd Defendant on 28 April 2023. Thereafter the matter was called on 17 May 2023, 28 June 2023 and 20 July 2023 and on each of these dates the Court ordered the 1st Defendant to file his SOD to the Amended SOC. On each occasion, counsel had appeared for the 1st Defendant and sought further time from Court to comply with the orders.
 - (g) When the matter was called on 28 August 2023, Plaintiff's counsel informed this Court that the 1st Defendant had failed to file his SOD to the Amended SOC since April 2023 and sought costs. The 1st Defendant's counsel submitted that he would file the SOD to the

Amended SOC by the following day (i.e. 29 August 2023) and agreed to pay costs of \$500.00.

- (h) This Court then made the following Unless Orders (**Unless Orders**):
- (i) the 1st Defendant to file the SOD by 29 August 2023; (ii) costs summarily assessed at \$750.00 to be paid before 04 September 2023; (iii) if the costs are not paid, the 1st Defendant's SOD will be struck out; and (iv) matter for mention on 06 September 2023.
 - (i) On 06 September 2023, there was no appearance by the 1st Defendant's solicitor and the 1st Defendant had failed to comply with the Unless Orders. As a result, this Court struck out the 1st Defendant's SOD.
 - (j) On 11 October 2023 a Notice of Change of Solicitors was filed on behalf of the 1st Defendant and the new counsel filed the current Summons on 13 October 2023.

4. The 1st Defendant, through his Affidavits, states the following:

- (a) He was not informed by his former solicitor of the Unless Orders and he was not aware that he had to file a SOD to the Plaintiff's Amended SOC.
- (b) The Plaintiff never served any sealed orders.
- (c) He has now paid the cost of \$750.00.
- (d) A SOD was already filed by the 1st Defendant on 11 September 2020.
- (e) A further proposed SOD to the Plaintiff's Amended Claim shows that the 1st Defendant has merits in his defence as he has not encroached onto the Plaintiff's property.
- (f) This matter should be decided at trial as the Court did not strike out the 1st Defendant's SOD on merits.

5. The Plaintiff, through his Affidavits, states the following:

- (a) It was the responsibility of the 1st Defendant to comply with the Court Orders and to keep himself informed of the same.
- (b) The 1st Defendant does not have a good defence in this matter.
- (c) The Summons is an attempt to abuse the Court process and if allowed will cause prejudice to the Plaintiff as he has waited long for the fruits of his litigation.
- (d) The 1st Defendant is delaying the matter.
- (e) The 1st Defendant's proposed SOD to the Plaintiff's Amended SOC has no merits as the 1st Defendant is introducing a new cause of action in the same.

- (f) The 2nd Defendant, through a letter, has already confirmed that the 1st Defendant is encroaching onto the Plaintiff's property.
6. The 1st Defendant, through his struck-out SOD and proposed SOD to Amended SOC, states that he purchased his property from the Plaintiff and the Plaintiff's mother. The 1st Defendant alleges that at the time of the purchase, the house and fence were already constructed, and he did not construct the same. The 1st Defendant also alleges that the 2nd Defendant was aware of the said construction as the 2nd Defendant had given consent for the transfer of the lease over the property.
 7. In the proposed SOD to the Amended SOC, the 1st Defendant has a counterclaim as well alleging that the Plaintiff had illegally excavated soil from the 1st Defendant's property in April 2018 thereby causing damage to vegetation and potential risk for the house to collapse. As a result of the Plaintiff's alleged conduct the 1st Defendant is seeking damages.
 8. Decisions as to whether or not to grant relief from sanctions are always discretionary and are highly case-sensitive.
 9. In deciding an application for reinstatement, the following factors are taken into consideration: (i) adequate reason; (ii) whether the application was made promptly; and (iii) prejudice (see *Maharaj v Matuka* : HBC 92 of 2015L (04/10/2019); *WM Angus (Fiji) Ltd v Karan* HBC 426 of 1986L (30/07/2008); *Sharma v Sharma & Others* HBC 204 of 2018S (28/10/24) and *Livingstone Fuels (Pte) Ltd v Total (Fiji) Ltd* [2025] FJHC 629; HBC234 of 2018 (19/08/25).
 10. Relying on *Samat v Qelelai* [2012] FJHC 844 and *Trade Air Engineering (west) Ltd v Taga* [2007] FJCA 9 the counsel for the 1st Defendant highlighted in her submissions that the 1st Defendant had not been aware of the Unless Orders as his former counsel had not informed him. Counsel further submitted that the current Summons was filed without delay and the Plaintiff will neither incur any additional costs nor be prejudiced if this Court grants orders sought by the 1st Defendant.
 11. The Plaintiff's counsel relied on various case law to support his submissions that a litigant bears ultimate responsibility for the conduct of their case and failure of their solicitor does not absolve them of this duty.
 12. Counsel further submitted that the Plaintiff will be prejudiced if the Summons is successful as he would face delays in benefitting from the fruits of his litigation.

13. **Samat** [supra] relied on by the 1st Defendant is distinguishable because in **Samat** the parties had not been in court when unless orders were made and the Court had held that the plaintiff therein should have had knowledge of the unless order. While the 1st Defendant states that he was unaware of the Unless Orders and that is why he did not comply with the same, this Court notes that his former solicitor was present in Court when the said orders were made. Hence there was no need for the Plaintiff to seal the Unless Orders and personally serve the same on the 1st Defendant personally.
14. **Trade Air Engineering (west) Ltd** [supra] was an appeal from the High Court where the plaintiff's claim was struck out for want of prosecution under Order 25 Rule 9. The Court of Appeal had in that instance reinstated the matter on the grounds that the claim therein had been struck out on insufficient grounds – which are different from the grounds relied on by the 1st Defendant in this matter. As such, this case also does not apply to the facts of this present case.
15. The other major reason proffered by the 1st Defendant gives for the non-compliance, is that his former solicitor had not informed the 1st Defendant of the Unless Orders and that he had relied on his former solicitor to comply with any and all directions/orders of the Court.
16. Paragraph 3.9.19 of the 2025 Civil Procedure Rules 2025 (White Book) at page 145 reads as follows on where failure to comply with orders is caused by the legal representative:

“Sometimes the failure to comply with a rule, practice direction or order is not caused by a litigant but is solely the fault of his legal representative. Is this a factor which makes the grant of relief from sanctions more likely? Guidance on this was given by Peter Gibson LJ in Training in Compliance Ltd v Dewse [2001] C.P. Rep 46 at [66], CA:

“Of course, if there is evidence put before the court that a party was not consulted and did not give his consent to what the legal representatives had done in his name, the court may have regard to that as a fact, though it does not follow that it would necessarily, or even probably, lead to a limited order against the legal representatives. It seems to me that, in general the action or inaction of party’s legal representatives must be treated under the Civil Procedure Rules as the action and inaction of the party himself. So far as

the other party is concerned, it matters not what input the party has made into what the legal representatives have done or have not done. The other party is affected in the same way ; and dealing with a case justly involves dealing with the other party justly. It would not in general be desirable that the time of the court should be taken up considering separately the conduct of the legal representatives from that which the party himself must be treated as knowing, or encouraging, or permitting.” ...

*...In Hayden v Charlton [2011] EWCA Civ 791, ... claimants were permitted to adduce evidence that they had not been kept informed by their then solicitors, despite their attempts to contact them, and they had not known the true position until after the strike out had been ordered. **The Court of Appeal accepted that evidence is an important factor in favour of granting reliefs.** However, it also took into account other factors, including the considerable burden the proceedings had placed upon the defendants, who were litigants in person. That hardship would have no remedy if relief was granted whereas the claimants would have an opportunity for redress against their former solicitors if the appeal was refused. Overall, it was held that the less unfair result was for the claim to stay struck out.*

[emphasis added]

17. Master Azhar [as his Lordship then was] in **Tamani v Commissioner of Police** [2019] FJHC 713; HBC135.2011 (19 July 2019) at paragraph [22] held as follows:

*“...In any event, the plaintiff cannot enjoy any immunity with this deplorable conduct of his solicitors for two reasons. Firstly, as a general rule a party is bound by, and responsible for the conduct of his or her solicitors (see: **Lownes v Babcock Power Ltd** [1998] EWCA Civ 211). In addition the incompetence or negligence of legal advisers is not a sufficient excuse (see: **R v. Birks** [1990] 2 NSWLR 677). Secondly, Lord Diplock, in **Birkett v. James** (supra) clearly articulated that, the inordinate and inexcusable delay to be on the part of the plaintiff or his lawyers....”*

18. Applying both **Tamani** [supra] and **Hayden** [supra], this Court notes that the 1st Defendant did not produce any evidence whatsoever in his

Affidavits to show that he had been in contact with his former solicitor and that it was his former solicitor who had failed to inform the 1st Defendant about the Unless Orders and the progress of this matter. The 1st Defendant had had ample time from May 2023 to August 2023 to request for update from the former solicitor on the status of this matter. However, the 1st Defendant has not produced any evidence on whether or not he has made any such attempts to update himself.

19. As such, this Court is not satisfied that the 1st Defendant has provided adequate reason for his failure to comply with the Unless Orders.

20. Moreover, this Court also notes that the application for reinstatement was not made promptly as it was filed more than a month (37 days) after the 1st Defendant's SOD was struck out. There is no explanation nor any evidence before this Court to justify the reason for this delay.

21. Since no sufficient reason has been given for the non-compliance, nor any explanation or evidence for the delay in filing the Summons, the 1st Defendant's conduct clearly causes prejudice to the Plaintiff at the very least by delaying the proceedings in this case.

22. Therefore, this Court finds that the 1st Defendant neither provided adequate reasons nor made a prompt application for reinstatement in this matter. As a result, I find that the Summons for reinstatement of the 1st Defendant's SOD should not be allowed.

23. The case for the Plaintiff is one of encroachment and illegal occupation by the 1st Defendant whereas the 1st Defendant claims that it was the Plaintiff himself who had constructed the fence and the house which is the subject for the encroachment. Should the Plaintiff file an application for Formal Proof in this matter, the 1st Defendant will have the opportunity to cross-examine the Plaintiff and his witnesses under that process. To prove encroachment, even at Formal Proof the Plaintiff will have to bring expert witnesses whom the 1st Defendant will also be able to cross examine.

24. Furthermore, the issues which the 1st Defendant wished to raise in the proposed counterclaim can be raised by the 1st Defendant in a separate action, should the 1st Defendant still wish to make such claims against the Plaintiff. The 1st Defendant is also at liberty to institute an action against his former solicitor if there are legitimate grounds to do so.

25. Accordingly, I make the following orders:

- (a) The 1st Defendant's Summons filed on 13 October 2023 for reinstatement of his Statement of Defence is refused and the Summons dismissed; and
- (b) Costs summarily assessed at \$1,000.00 to be paid by the 1st Defendant to the Plaintiff within 28 days (by 16 December 2025).



P. Prasad
Master of the High Court

At Lautoka
18 November 2025