WAYNE FREDERICK MORRIS AND BENJAMINST GILES PRINCE (as Trustees of the Estate of Rex Fera in Bankruptcy) **–V- SHELL COMPANY PACIFIC ISLANDS LIMITED**

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Civil Case No. 028 of 2002

Date of Hearing: 22nd January 2003
Date of Ruling: 24th January 2003

Mr J. Sullivan for the Plaintiff
Mr C. Hapa for the Defendant

RULING

Kabui, J. This is an application by the Defendant filed on 17th December 2002 seeking to set aside the orders for directions I made on 12th November 2002. Order 2 was a guillotine order in that if the Defendant failed to file and serve its affidavit of documents within 14 days, its defence would be struck out and judgment entered against the Defendant as if no defence had been filed. The Defendant having failed to do so within 14 days as aforesaid, judgment by order was accordingly entered against the Defendant on 4th December 2002.

This case is to do with discovery and inspection of documents before trial. It concerns the application of Order 33, rule 21 of the High Court (Civil Procedure) Rules 1964, "the High Court Rules." Rule 21 states-

"...**If any party fails to comply with any order to answer interrogatories, or for discovery or production or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and an order may be made accordingly**..."

So the defence can be struck out automatically at the end of the stated time limit specified in the self-executing order. No summons is necessary to effect the result of a self-executing order unless there is some doubt to the contrary. (See **Noel Bonagi v. Solgreen Enterprises Limited**, Civil Case No. 33 of 2002). Once this has happened, the action is at an end subject to an appeal, if needs be. This is the old position. (See **Noel Bonagi v. Solgreen Enterprises Limited** cited above). The present position is now governed by rule 28 of Order 33 of the High Court Rules cited above. It states-

"...**Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made**..." Clearly, a "guillotine" or an "unless order" can be revoked or varied under rule 28 cited above if sufficient cause is shown to justify such revocation or variation as the case may be. Counsel for the Defendant, Mr. Hapa, argued that I should exercise my powers under rule 28 in favour of his client because sufficient cause was demonstrated in his own affidavit filed on 17th January 2003 and that of Mr. Noka filed on 16th January 2003.

The Defendant's Case

The approach taken by Counsel, Mr. Hapa, was based upon the procedure, which permits judgments or orders made by the Court to be set aside on the basis of default committed by the other

party to the proceeding prior to trial. Examples of this procedure can be found in Order 13, rule 8 where judgment is entered in default of appearance, Order 29, rule 12 in the case of default of pleading and Order 38, rule 7 in the case of entering a judgment in the absence of the other party at trial. This case does not fall into any of the above examples. However, Counsel argued that the same procedure would apply all the same to this case where a judgment was entered against the Defendant as a result of default on a guillotine or unless order. Counsel relied upon rule 28 of Order 33 cited above in support of his argument. Counsel argued that the affidavit evidence filed in Court was sufficient in substance to demonstrate sufficient cause so as to warrant this Court to set aside the default judgment. Counsel also argued that the Defendant had an arguable defence and urged this Court to bear that in mind.

The Plaintiff's Case

Counsel for the Plaintiff, Mr. Sullivan, opposed the setting aside of the default judgment. Counsel argued that the guillotine order in question was an order by consent and being so could not be vitiated unless by reason of fraud, mistake, surprise or some reason sufficient to induce the Court to say the complaining party ought not to be bound by the consent order. Counsel cited a number of authorities to demonstrate this point. Counsel also argued that the affidavit material filed in Court and the content of the defence filed by the Defendant failed to throw up any arguable defence. Counsel also cited authorities in support of his argument.

The decision of the Court

This case is about a guillotine order made by consent of the parties. Can a guillotine consent order be made under rule 21 of Order 33 of the High Court Rules? I do not see any reason why it cannot be made. I think it can. It can also be revoked or varied by consent under rule 28 of Order 33 of the High Court Rules. A consent order by its nature is a result of an agreement by both parties ratified by the Court in the usual manner. So it was, as I said, in this case. If it is to be varied or revoked, it must be done with the mutual consent of the parties as well. I do not think this Court can unilaterally vary or revoke it upon the application of one party without the consent of the other party. (See **Fareast Enterprises Limited (S.I.) v. Martin Tsuki**, Civil Case No. 042 of 2001). This Court cannot be asked to unravel an agreement made by the parties themselves. It is for them to unravel it and then ask the Court to ratify it in the usual manner making it a consent order being a variation or a revocation of the original consent order. There is of course an exception. The only time where one of the parties may unilaterally unravel a consent order is when fraud, mistake, surprise or some supervening reason is alleged against the agreement upon which the order is based and proven by the other party. Counsel for the Plaintiff, Mr. Sullivan, adequately covered this point. Counsel cited three cases in this regard. The first is **Harvey v. Croydon Union Rural Sanitary Authority** (1884) 26 Ch. D. 266. The second is **Huddersfield Banking Company, Limited v. Henry Lister & Son, Limited** [1895] 2 Ch. 273. It is pertinent to cite some of the remarks made by the Law Lords in that case on this point. At page 280, Lindley, L.J. said-

"...**A consent order, I agree, is an order; and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppels as any other order. I have not the slightest doubt that a consent order can be impeached, and not only on the ground of fraud, but also upon any grounds which invalidate the agreement it expresses in a more formal way than usual**..."

At page 283, Lopes, L.J. said-

"...**The law seems to be that a consent order may be set aside for the same reasons as those on which an agreement may be set aside. It appears to me that when a common mistake is established you can set aside an agreement**..." Kay, L.J. repeated the same sort of remarks at page 284. The same position was taken in Australia in **Deputy Commissioner of Taxation v. Chamberlin**

(1990) 26 F. C.R. 221 though the decision on appeal is not available to the Court. As pointed out by Mr. Sullivan, there is no evidence of fraud, mistake, surprise or any material reason in this case to induce me to set aside the default judgment. Mr. Sullivan was correct in this regard. Counsel for the Defendant, Mr. Hapa, did not seem to dispute that position. What he was about was the desire to extend time beyond 14 days specified in the guillotine order. He was coming from that angle more than anything else. To be accurate, he should have been asking for the variation of the order rather than for setting it aside. Be that as it may, he continued to pursue his line of attack by attempting to demonstrate that on the basis of the affidavit material and the pleading before the Court, the Defendant did have a defence on the merits of the case. He stressed that in view of that arguable defence, justice required me to give it a chance. That is a powerful argument because dispensation of justice is the ultimate wish of the Court. Mr. Sullivan however said that the Defendant's application was not a case of seeking leave to defend following a summary judgment but rather seeking to set aside a regularly entered judgment. He said that in the latter case, the onus was heavier upon the Defendant to show an arguable defence to the point of conviction. He cited **Ross Mining (Solomon Islands Ltd) v. Slater & Gordon**, Civil Case No. 230 of 1998, **Alpine Bulk Transport Co. Inc. v. The Saudi Eagle Shipping Co. Inc.** [1986] Lloyds Rep. 221, **Gordon & Slater v. Ross Mining (Solomon Islands) Ltd**, Civil Appeal No. 7 of 1999, **Kayuken Pacific Ltd. v. Harper** [1987] S.I.L.R. 58 and **Evans v. Bartlam** [1937] A. C. 473 as being in support of his argument. I agree with Mr. Sullivan on this point. I have read the affidavits filed by Mr Hapa and Mr Noka respectively and come to the conclusion that each of them lacks the necessary facts to support a defence on the merits. Paragraph 11 of Mr. Noka's affidavit simply refers to the defence filed on 19th March 2002 as showing serious issues in dispute. A copy of the filed defence was not even attached to Mr. Noka's affidavit. This is a case where the defence had been struck out and to reinstate it would be an uphill process for the Defendant. That is why according to the authorities cited above, the Defendant needs to do more than just producing a copy of the struck out defence. That is why the burden is heavier than in the case of seeking to defend in a summary judgment situation. I find that the Defendant has failed to show by any evidence that it has an arguable defence to the point of conviction. This is why I have said above that this being a guillotine order by consent; the Defendant should have sought a variation by consent from the Plaintiff for an extension of time in order to wriggle out of the guillotine order. This is why I have also said that the Court cannot unilaterally unravel the guillotine order on its own. Although it is possible for the struck out defence to be restored under rule 28 of Order 33 cited above, it cannot be done in this case for the same reason. (See **Walker & Sons Ltd.v. Ost (Henry) & Co. Ltd** [1970] Reports of Patent Cases). That is, I cannot extend time on my own. I am fortified in my view on this point by the remarks of Kay, L.J. at page 284 referred to above in Harvey's case cited above. At that page His Lordship said- ..."**Now, what is this consent order? After all, it is only the order of the Court carrying out an agreement between the parties. Supposing the order out of the way and the agreement only to exist, there can be no sort of doubt that the agreement could be set aside, not merely for fraud, but in case it was based upon a mistake of material fact which was common to all the parties to it. Then, if it could be set aside on that ground, why should the Court be unable to set it aside simply because an order has been founded upon it? It seems to me that, both on principle and on authority, when once the Court finds that an agreement has been come to between parties who were under a common mistake of a material fact, the Court may set it aside, and the Court has ample jurisdiction to set aside the order founded upon that agreement**"... So, the agreement is the basis of the consent order. That is the foundation of the consent order. If the consent order is to be altered, the agreement must first be altered. This is where I stand.

Counsel for the Defendant, Mr. Hapa, did admit from the bar table that he was at fault in not being able to file and serve Mr. Noka's affidavit by 3pm on 26th November 2002. This is of course obvious from reading his affidavit. Nevertheless, he urged me to consider the plight of the Defendant and allow justice to prevail. The guillotine consent order was made on 12th November 2002 and therefore 14 days time limit would have expired on 26th November 2002. It was a Tuesday being a

working day. Mr. Noka's affidavit was sworn on 26th November 2002 and filed the next day. The swearing of that affidavit and the filing of it were both out of time. I have read Mr. Hapa's affidavit filed on 17th January 2003. In paragraph 19 of his affidavit, he explains that he was not able to contact Mr. Noka on Friday 22nd November 2002. The same happened on Monday 25th November 2002. However, Mr. Noka was available on Tuesday 26th November 2002 in the afternoon. This was the last day and the affidavit required under the guillotine consent order must be filed and served on this day. Mr. Hapa did not give the details of his conversations on 22nd November 2002, 25th November 2002 and 26th November 2002 in terms of how many times he called Mr. Noka and whether he had told Mr. Noka that the Defendant would run the risk of losing its case if he did not co-operate especially on the last day to swear and file his affidavit. No evidence is produced on such details. Also, if Mr. Hapa had a feeling that it was impossible to get Mr. Noka on that day for some reason, it was prudent to inform the Solicitor for the Plaintiff of his difficulty and seek an extension of the 14 days time limit. The formality of varying the guillotine order could be done later but at least the Defendant would not fall foul of the having failed to comply with the guillotine order. Such a step would have avoided the Plaintiff's Solicitor thinking the Defendant had deliberately failed to comply. Mr. Hapa had not done enough in an effort to comply with the guillotine order. I noticed that Mr. Hapa's affidavit filed on 17th January 2003 was filed at 3:35pm. Mr. Noka's affidavit filed on 27th November 2002 was done so at 15.30pm whilst the other one filed on 16th January 2003 was done so at 3.10 pm. I am certain that had Mr. Hapa telephoned the Registrar of his predicament on 26th November 2002, he would have been allowed to file the necessary affidavit on time. Or he could have turned up at the Registry personally and filed the affidavit. He took none of these steps and simply assumed that he would not get access after 3pm on 26th November 2002. This omission on his party has prevented his case from getting to trial. Having said much, my decision simply turns on the fact that any extension of time under the guillotine order could have been possible only if that had been mutually agreed and a consent order was put in place to that effect. I cannot extend it unilaterally on my own without the consent of the parties in the absence of proof of fraud, mistake, surprise or some compelling reason that it is not right for the Defendant to be bound by the guillotine order. The law does not seem to say that a consent order can be vitiated if there is a defence on the merits for such argument obviously cannot alter the agreement upon which a consent order is based. I do not think that tardiness on the part of Mr. Hapa is a sufficient reason within the meaning of rule 28 of Order 33 cited above to compel me to exercise my discretion in favour of the Defendant. I would refuse the Defendant's application. The application is refused with costs.

F.O. Kabui
Puisne Judge