

SELWYN DIKA (representing the Mamara Clan) -V-. JOSES LOTE (representing the Bulau Clan), CASPER BANA (representing the Etini Clan) AND DAVID SOMANA

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

Civil Case No. 242 of 1996

Date of Hearing: 23rd July 2003

Date of Judgment: 28th July 2003

Mr R. Kingmele for the Plaintiffs

Mr B. Upwe for the Defendant

JUDGMENT

Kabui, J. This is an application by Summons by the Plaintiff filed on 10th June 2003 seeking the following orders-

1. **The Defendant's defence and counter-claim be struck out for non-compliance with orders for directions;**
2. **Final judgment be entered against the Defendant as per statement of claim;**
3. **The Defendant pays the costs of and incidental to this application, if not agreed to be taxed.**

Brief Background.

By a consent order signed on 14th May 2001, a number of orders for directions were made for the benefit of both parties. The Defendant failed to complete discovery and the Plaintiffs sought to strike out the Defendant's defence and counter-claim. At the hearing of the application to strike out the defence and counter-claim on 27th June 2001, the Defendant delivered his list of documents whereupon the Plaintiffs abandoned the application on terms agreed by the parties. Inspection was to take place 7 days from 27th June 2001. In the meantime the Solicitor for the Plaintiffs received further documents from the Plaintiffs, which necessitated amendment to the Plaintiffs' list of documents. The amended list of documents was filed on 20th July 2001 and served on the Defendant's Solicitor with a covering letter that same day. Attempts by Mr. Marahare to inspect the Defendant's discovered documents failed because the Defendant's Solicitor repeatedly failed to give access to them for inspection purposes. Telephone calls had not been returned nor promises to appoint time kept nor requests to make photocopies answered. Since 27th June 2001, the Defendant's Solicitor had not taken any steps to inspect the Plaintiffs' discovered documents. No attempts to do this had been made in this regard by the Solicitor for the Defendant. Due to the non-payment of fees by the Plaintiffs, the matter was left in abeyance until the fees were paid towards the end of 2002. A Notice Intention to Proceed was later filed on 17th January 2003 and served on the Defendant's Solicitor.

Decision of the Court.

Order 33, rule 21 of the High Court (Civil Procedure) Rules 1964, 'the High Court Rules' state-

“...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 struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court for an order to that effect, and an order may be made accordingly...”

The reason for the delay in this case is a mystery. Counsel for the Defendant, Mr. Upwe, produced no evidence to this effect than to say from the bar table that only Mr. Ashley of A & A Legal Services would know any reason for the delay. Mr. Ashley had not filed any affidavit to explain the reason for the non-compliance with the Court's orders for directions. Mr. Ashley is the owner of A & A Legal Services and is currently on study leave overseas in New Zealand for 2 years. There is not simply any response from the Defendant's Solicitor as to why there has not been compliance with orders for directions. I order that the defence filed on 25th October 1996 be struck out. There is also the matter of the counter-claim being the other issue. The Plaintiffs' defence to the counter-claim was filed on 8th October 1999 but the Defendant so far has done nothing to prosecute his counter-claim. Non-compliance with the orders for directions obviously also affects the progress of the Defendant's action. Now that I have ordered the Defendant's defence to be struck out, so I must do the same to the counter-claim for the same reason of non-compliance with the relevant orders for directions. I order that the counter-claim be also struck out. The result is that final judgment be entered against the Defendant in the sum of \$12,131.10 as pleaded in the statement of claim filed on 22nd August 1996. The Plaintiffs also claim interest to be assessed by the Court. The law that applies here is the Law Reform (Miscellaneous Provisions) Act, 1934 of the United Kingdom. Section 3 of that Act states-

“... (1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or part of the period between the *date when the cause of action arose and the date of the judgment: Provided that nothing in this section-*

- (a) shall authorize the giving of interest upon interest; or**
- (b) shall apply in relation to any debt upon which interest is payable as of right by virtue of any agreement or otherwise; or**
- (c) shall affect the damages recoverable for the dishonour of a bill of exchange...”**

The first point is that the awarding of interest is a matter for the unfettered discretion of the court. (See **Riches v. Westminster Bank Ltd.** [1943] 2 All E. R. 725). The second point is that the term 'tried' as used in section 3(1) of the Law Reform (Miscellaneous Provisions) Act, 1934 cited above, means 'determined'. It also means the court giving summary judgment on affidavit evidence as in the case where the defendant has no defence. (See **Gardener Steel Ltd. v. Sheffield Brothers (Profiles) Ltd.**) 399. I think I should award 5% interest on the sum of \$12, 131.10. Nominal damages are to be assessed. The Defendant will also pay the Plaintiffs' costs. I order accordingly.

F.O. Kabui
Judge