

**BETWEEN :** MOORE ELECTRONIC COMPANY LIMITED - Plaintiff;

**AND :** NATIONAL PACIFIC INSURANCE - Defendant.

**BEFORE THE HON. CHIEF JUSTICE WARD**

**Counsel:** Mr Tu'utafaiva for the Plaintiff  
Petunia Tupou for the Defendant.

**Date of hearing:** 30 June 1999.

**Date of ruling:** 6 August 1999.

**Ruling**

The plaintiff company insured its stock with the defendant company against loss or damage. Following a fire in September 1997 which destroyed much of the stock and records of the plaintiff, a claim was made for a little over half a million pa'anga. It has not been paid and the plaintiff sues for the sum.

The defendant made discovery in September 1998 and, since that time, has been seeking discovery of the plaintiff's documents. The plaintiff has maintained throughout that its business papers were destroyed in the fire and, as a result, it cannot produce many of the documents.

I do not need to set the matter out in detail. Over a period of some months there have been repeated attempts by the defendant to obtain various documents and repeated claims by the plaintiff that it cannot produce them because they have been destroyed.

The defendant claims this is hindering it in the preparation of its defence and I accept this is the case. The defendant points out that, even if the documents were destroyed in the blaze, the vast majority of the transactions that led to the introduction of the goods to, or their removal from, the warehouse must be provable by copies from the other party to many of the transactions, tax returns and similar sources.

There have been two applications by the defence to strike the case out. After the first, I ordered that the defendants should supply a detailed list of the documents they sought and the plaintiffs then either produce them or file an

affidavit explaining the failure. The defendant has complied with the order and the plaintiff has not.

The present application is to strike out on the double ground that the failure amounts to a contempt of court and the defendant is so frustrated that it cannot prepare its case without this information.

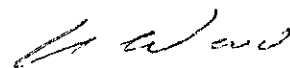
I do not consider the failure of the plaintiff to obey the Order of 9 March amounts to contempt. Other remedies are available and appropriate to deal with a failure to comply with the procedural rules and orders of the court.

I have every sympathy with the defence over its frustration to prepare its case. It is correct, as counsel suggests, that an insurance company faced with a claim should be able to see the documents that will be used to prove the claim. However, the defendant's argument is based, it would appear to me, on a failure to have regard to the burden of proof. This claim has been brought by the plaintiff. If it is to succeed it will have to satisfy the court that it had the stock claimed. If no documents are produced by it to support the claim and the defendant persuades the court that they could and should have been produced, it seems unlikely the claim will succeed.

If, at the trial, documents are produced that establish a prima facie case and need to be rebutted by the defence expert, I have little doubt the defence will apply for an adjournment on the ground that these were the very documents they have been seeking for so long. In such circumstances the court will be easily persuaded to grant the application with costs.

I consider the correct course in this case is to set the case for trial. I shall order that all documents to be used must have been filed within the next 28 days and no further document will be admitted in evidence at the trial without leave of the court.

I also consider that the plaintiff has caused the delays so far in this action and I order that it shall pay the defendant's costs incurred in both applications to set aside in any event.



**NUKU'ALOFA:** 6 August, 1999.

**CHIEF JUSTICE**

After giving this ruling, counsel informed me that the case may settle and suggested the better course at this stage would be to fix one further chambers hearing to see if that has been achieved or, alternatively, to ascertain which documents have been filed in accordance with this order. Once that is known a realistic estimate of the length of trial will be possible.