IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

NO.C.596/98

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

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

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mr Tu'utafaiva for Plaintiff
Mr Garrett for Defendant

Hearing: 26 January 2000.
Ruling: 8 February 2000.

Ruling

This is a claim for payment of insurance money following a fire at the plaintiff's business.

From the early history of the action, the defendants have been complaining about the failure of the plaintiff to provide details of the stock it claims has been destroyed. The plaintiff's answer has been that the company's business papers were also destroyed in the fire.

Various applications have been made to have the action struck out on the basis that, in consequence of the failure to provide the information, the defendant has been unable properly to prepare its case. None has been successful. My previous rulings have been based to a substantial extent on the fact that, as the burden of proving the case rests with the plaintiff, any failure to produce documentary support for the claim will have to be considered at the trial and is likely to work against the plaintiff.

The plaintiff has not helped itself by repeated failures to comply, or to comply timeously, with the various interlocutory orders of the court.

On 23 November 1999 following yet another application by the defence to have the claim struck out, I ordered that the defendant should file a list of documents it required to be discovered within two days and gave the plaintiff four days to lodge any objection. None was filed and I ordered that the action would be struck out unless those documents or legible copies were produced within 28 days thereafter. That time expired on 28 December 1999.

Prior to the hearing on 23 November, I had ordered that interrogatories be filed. A series of questions have been filed by the defendant and answers given by the plaintiff.

The defendant now moves for the 'unless' order to be brought into effect and, in addition seeks to have action struck out on the ground that the answers to those interrogatories are inadequate and evasive.

I deal with the application to bring in the 'unless' order first. The document, the failure to produce which is the basis of the application, is referred to as an Account Quick Report for June 1997 to September 1997.

Lists of documents were exchanged in late 1998 and early 1998 and it was not mentioned in the plaintiff's list. However, the defendants included it in a list of documents it required to be discovered and the Managing Director of the plaintiff, Lisiate Teulilo, swore an affidavit on 19 April 1999 in which he stated:

> "10. The reference in paragraph 9 of the list to the Account Quick Report for June 1997 to September 1997 is correct and a copy has been located in our office and available for inspection by the defendant."

The defendants promptly sought a copy of that report but it was not forthcoming and so this application to apply the 'unless' order was filed. Following that, Lisiate Teulilo swore a further affidavit. In it he stated;

> "2. I refer to paragraph 10 of my affidavit sworn on 19 April 1999 and say that at present I do not remember the reason for deposing as such. I have looked into my files in the office and no copy of the Quickreport could be located. Furthermore, I am not concealing any report from the defendant.
>
> .....
>
> 4. At present I have difficulties with my memory and also my concentration, and I have sought medical assistance accordingly."

Counsel for the defendant suggests to the court that this is simply not good enough. The deponent cannot simply, at the eleventh hour, deny his earlier statement. He also points to the answers to the interrogatories as further evidence that Mr Teulilo's attitude is deliberately obstructive rather than, as he would have the court believe, a case of a person doing his best to co-operate but hindered by a failing memory.

The position previously held in England that failure to comply with an 'unless' order effectively prevented the court from taking any other course no longer applies. Since the decision in Samuels v Linzi (1981) QB 115, it has been accepted that the court always retains the power to vary the order although it should only do so in rare cases because such orders are made to be complied with and should not lightly be ignored.

I have no means at this stage of deciding the truth of the conflicting statements by the deponent. If his statement is true that he is not concealing anything from the other side and that the earlier statement was made in error, it would be an impossibility to produce this document. If that is the case, it would plainly be an injustice to bring the 'unless' order into effect and strike out the action on that ground alone. Had that been stated at the previous hearings, the court could not have felt the plaintiff's conduct was so contumelious as to make an 'unless' order appropriate.

In the particular circumstances of this case, I set aside the 'unless' order. The imposition of such an order was the result of the plaintiff's failure accurately to state its position and I order that the plaintiff shall pay the defendant's costs incurred in relation to that order in any event.

The courts in England and elsewhere have become much firmer in dealing with cases where they see the parties wasting time. However, the passing of time militates against the plaintiff in this case far more than the defendant. Already the effect of the defendant's repeated applications in this case has been to vacate one date fixed for trial. Counsel for the defence has applied that, if he should fail in this application, the court should once again vacate the fixture on 1 May.

I pass to the answers to the interrogatories. I agree that many are casually answered and would suggest no real effort by the plaintiff to supply the information requested. That is not satisfactory.

Counsel for the defendant also complains that some are answered literally with the result that, where, for example, there is a mistake in the name of the person referred to in the question, the answer is simply that he did not work there. The responsibility for the interrogatory lies with the asking party. His opponent is entitled to take a literal approach to the question and answer on that basis and I find no ground for that complaint.

However, the sufficiency of the other answers is a matter the court can consider. A party answering interrogatories must answer them to the best of his knowledge, information and belief and if that requires inquiry from his employees or agents or any other relevant source, he must make the necessary inquiries before answering.

The plaintiff has not challenged the propriety of any of the interrogatories but has simply repeatedly stated that the information requested was on the main server hard disc which has been damaged to the extent that no further information can be retrieved from it. That may be an adequate answer to many of the interrogatories but, where the information could be obtained from alternative sources, it should have been supplied.

I consider the defendant's complaint that the answers to the following interrogatories are inadequate is justified;
2.1, 2.2, 2.3 © to (g), 4.1, 4.2, 4.3, 6.1, 6.2, 6.5, 6.7, 6.8, 6.9, 6.10, 6.11, 6.12, 7.1, 8.1 (a) (b), 8.2 (b), 8.5(a) (b) (c).

Counsel for the plaintiff has contended that his client has authorised the defendant to contact the various agencies who may have such information directly. Generous though that gesture may be, it is not a sufficient response to the interrogatories.

I order that the plaintiff shall answer the interrogatories listed above within six weeks. Failure to do so will result in the action being struck out. The time will not be extended without good cause. If it is impossible to obtain the information requested for any particular interrogatory, the answer must set out the steps taken in detail and the reason why they were unsuccessful.

Counsel for the defendant has asked that the trial date should be vacated because he has not been able to submit the evidence to an expert in New Zealand. I do not accede to that request. The trial will remain fixed for 1-4 May 2000.

DATED: 8th February 2000. **CHIEF JUSTICE**