

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 155 of 2009

BETWEEN : **BRETT WHITTAKER AND LOUISE WHITTAKER**

PLAINTIFFS

AND : **BANK OF SOUTH PACIFIC**

DEFENDANT

(Ms) Barbra Kristine Angco Doton for the Plaintiffs
Mr. John Leslie Apted with (Ms) Wen Fi Chen for the Defendant

Date of hearing :- 22nd September 2016
Date of ruling :- 16th December 2016

RULING

- (1) The matter before me stems from the Defendant's "Summons", dated 12th January 2016 for;
 - ❖ Order dismissing Action for failure to give inspection.
(Dismissal application)
 - ❖ Order for further and better discovery
(Discovery application)
- (2) The two applications are made pursuant to Order 24, rule 16 and Order 24, rule 7 of the Fiji High Court Rules, 1988 and under the inherent jurisdiction of the Court.
- (3) The Defendant's two applications are vigorously contested by the Plaintiffs.

- (4) What are the facts and circumstances that give rise to the applications before me?
The Plaintiffs are business people whose business has varied from Property Development, property speculation and house rentals and construction.

They became customers of the Defendant in June 2005.

The Plaintiffs alleged, *inter alia* (By the Second Amended Statement of Claim filed on 27th November 2012).

- (a) *in December 2005 and January 2006 (by way of telephone conversations between Mr Whittaker and Jasmin Khan from 13 – 15 December 2006, and Mr Whittaker and Ajay Singh on or about 20 January 2006), the Whittakers informed BSP that they intended to draw down on their overdraft facility to purchase 18 and 19 Marina Point, Denarau (see paragraph 18 (and particulars));*
- (b) *by way of telephone conversation on or about 1 February 2006, BSP “on 2 February 2006” approved the Whittakers’ proposal to purchase 18 and 19 Marina Point, Denarau subject to the giving of additional security over the properties by way of first registered mortgages, agreed to increase the limit of LOO 1 (Letter of Offer -1) to fund the purchases, and acknowledged the Whittakers’ request to make draw down on the overdraft facility to pay stamp duty on the purchases (see paragraph 19 (and particulars));*
- (c) *on 3 February 2006, the Whittakers entered into a contract to purchase 19 Marina Point, Denarau and paid \$65,500 deposit and \$13,100 stamp duty by drawing down on the Construction Facility (see paragraph 20);*
- (d) *by way of telephone conversation in or about February-early March 2006, BSP informed the Whittakers that it had withdrawn the Construction Facility and refused to provide funds to pay the balance on the purchase price of 19 Marina Point, Denarau if they did not accept LOO 2 (see paragraphs 22 and 24);*
- (e) *on or about 2 March 2006, BSP issued LOO 2 (see paragraph 23);*
- (f) *on or about 3 March 2006, the Whittakers signed LOO 2 under duress, and LOO 2 (Letter of Offer -2) is voidable and is avoided (see paragraphs 29 and 30).*

- (5) The Plaintiff claimed, *inter alia*;

- A. Damages;
- B. Further or alternatively to “A” above – equitable compensation;

- C. *Further or alternatively to "A" and "B" above – a declaration that the terms of the First Letter of Offer are as set out in paragraph 16 hereof;*

- D. *Further or alternatively to A, B and C above – specific performance of the First Letter of Offer;*

- E. *Further or alternatively to A, B, C and D above – a declaration that the Plaintiffs are not obliged to pay to the Defendant any interest or penalty interest.*

- F. *An injunction restraining the Defendant from taking any steps to enforce any of the securities or any other securities provided by the Plaintiffs to the Defendants subsequent to the First Letter of Offer;*

- G. *Further or alternatively to "A", "B" and "C" above – orders pursuant to Section 147 of the Commerce Commission Decree;*
 - (a) *for compensation;*
 - (b) *further or alternatively to (a) above – that the terms of the First Letter of Offer are as set out in paragraph 16 hereof;*
 - (c) *further or alternatively to (a) and (b) above – that the Defendant perform its obligations under the First Letter of Offer.*
 - (d) *restraining the Defendant from taking any steps to enforce any of the Securities or any other securities provided by the Plaintiffs to the Defendants subsequent to the First Letter of Offer.*

- H. *Interest;*

- I. *Costs;*

- J. *Such further or other order as the Court deems appropriate.*

(6) **Dismissal Application**

The Defendant's Dismissal Application stems from the default by the Plaintiffs in producing the following documents disclosed in the Affidavit Verifying Plaintiffs List of Documents filed on 26th November 2014. They are;

- ❖ document 50 → copy internal memorandum by Lowing, Nandan &

Associates, dated 22nd December 2009 (for brevity, I shall refer to as “**the Lowing Memo**”)

❖ document 72 → copy of notes of meeting between Mr. Whittaker (the First named Plaintiff) and Jasmin Khan dated 22nd October 2010 (for brevity I shall refer to as “**the 2010 Khan Notes**”)

(7) At the oral hearing of the “Dismissal Application” the Plaintiffs and the Defendant sought to read and rely on the following Affidavits.

- (a) Affidavit of Amrit Harshil Chand **in Support** of the Defendant’s Summons for Order Dismissing Action for Failure to Give Inspection filed on 14 January 2016 (“Mr Chand’s Dismissal Affidavit of 14 January 2016”);
- (b) Affidavit of Brett Whittaker **in Opposition** to Defendant’s Application for Dismissal of Proceeding pursuant to Order 24 Rule 16 filed on 18 July 2016 (“Mr Whittaker’s 1st Answering Affidavit on 18 July 2016”);
- (c) Affidavit of Amrit Harshil Chand **in Reply** to Brett Whittaker’s Affidavit in Opposition to Defendant’s Summons for Order Dismissing Action for Failure to Give Inspection filed on 26 July 2016 (“Mr Chand’s 2nd Dismissal Affidavit on 26 July 2016”);
- (d) Second Affidavit of Brett Whittaker **in Opposition** to Defendant’s Application for Dismissal of Proceeding pursuant to Order 24 Rule 16 filed on 29 August 2016 (“Mr Whittaker’s 2nd Answering Affidavit of 29 August 2016”);
- (e) Affidavit of Amrit Harshil Chand **in Reply** to Second Affidavit of Brett Whittaker in Opposition to Defendant’s Summons for Order Dismissing Action for Failure to Give Inspection filed on 15 September 2016 (“Mr Chand’s 3rd Dismissal Affidavit of 15 September 2016”).

(8) As I understand it, the Defendant’s “**Dismissal Application**” is prompted by the Plaintiffs failure to produce the two documents despite;

- (a) seven requests from BSP on 2 March, 20 August, 19 October, 23 October, 28 October, 5 November and 26 2015 (see paragraphs 26, 29, 34, 37, 39, 40 and 43 and annexures AHC 4, AHC 6, AHC 9, AHC 10, AHC 12 of Chand’s Dismissal affidavit of 14th January 2016.)

- (b) BSP putting the Whittakers on notice of its Dismissal Application on four occasions (see paragraphs 34, 39, 40, 43 of Chand's Dismissal affidavit of 14th January 2016.)
- (c) BSP serving on the Whittakers a formal Notice (see paragraph 44 and annexure AHC 13 of Chand's Dismissal affidavit of 14th January 2016.)

(9) In 'adverso', the Plaintiffs say;

- (i) *they could not address BSP's requests for the Lowing Memo and the 2010 Khan Notes because of difficulties in communicating with, and the poor services of, their previous solicitors, AP Legal whom they engaged in June 2015 (see paragraph 3, 4 & 8 of Mr Whittaker's 1st Answering Affidavit of 18 July 2016);*
- (ii) *they could not find a copy of the Lowing Memo despite many attempts to retrieve it including conducting searches at the offices of Lowing & Associates (see paragraph 6 of Mr. Whittaker's 1st Answering Affidavit of 18 July 2016).*

(10) But the Defendant says;

- (i) *BSP requested the two documents in March 2015 when VP Lawyers were still the Whittaker's solicitors, and 3 months before they engaged AP Legal. Specifically, on or about 8 April 2015, VP Lawyers informed BSP that they would "revert shortly" on the two outstanding documents (see paragraph 6 of Mr. Chand's 2nd Dismissal Affidavit of 26 July 2016);*
- (ii) *in the 16 months between March 2015 to July 2016, the Whittakers never produced the two documents, despite being put on notice about the Dismissal Application on a Notice for production (ibid);*
- (iii) *the Whittakers' lawyers have falsely informed the Court on 21 October 9, November, 23 November and 7 December 2015 that they had provided all the documents BSP requested (ibid);*
- (iv) *on 22 October 2015, the Whittakers' lawyers told BSP that they would produce the Lowing Memo by 26 October 2015 but BSP never received the documents (see paragraph 8 of Mr Chand's 2nd Dismissal Affidavit of 26 July 2016).*

- (11) The Plaintiffs annexed as BWW-2 in Mr. Whittaker's 1st Answering Affidavit of 18th July 2016 a document purporting to be a "true copy" of the 2010 Khan Notes which they say is a "a note of a phone conversation (Mr. Whittaker) had with Jasmin Khan on or about 22nd October 2010.

As against this, the Defendant alleges, *inter alia*;

- (a) *does not match its description in the 1st AVSLD which is described as "copy note, re meeting between Brett Whittaker and Jasmine Khan" dated 22 October 2010" whereas annexure BWW-2 are notes of a phone conversation between Mr Whittaker and Jasmin Khan on or about 22 October 2010 (see paragraph 10 of Mr Chand's 2nd Dismissal Affidavit of 26 July 2016);*
- (b) *appears to be incomplete –*
 - (i) *it begins abruptly with Mr Whittaker allegedly saying "The whole thing is that it gets down to Laurie Melsop, not only in my case but in other peoples case as well" and ends equally abruptly with Ms Khan saying "You do, you do. I know exactly what you are going through. It what I went through";*
 - (ii) *the page numbered "1" suggesting that there are other pages (see paragraph 11 of Mr Chand's 2nd Dismissal Affidavit of 26 July 2016).*

- (12) In Mr. Whittaker's 2nd Answering Affidavit of 29th August 2016, the Plaintiffs annexed as BWW-3 a document purporting to be the Lowing Memo.

As against this, the Defendant alleges, *inter alia*;

- (a) *the page is numbered "1" suggesting that there are other pages;*
- (b) *the text only goes up to paragraph 4 under a heading titled "Summary of Facts";*
- (c) *there is no closing or sign-off by the author as can be expected in Memos. (see paragraph 10 of Mr Chand's 3rd Dismissal Affidavit of 15 September 2016).*

- (13) Against this factual background, it is necessary to turn to the applicable law and judicial thinking in relation to the principles governing the exercise of the discretion to make the Order the Defendant now seeks.

This Court does have a power to strike out a Statement of Claim where a Plaintiff has either failed to make a discovery of documents or has failed to produce any documents for inspection.

This power is provided for under **Order 24, Rule 16 (1) (b)** of the High Court Rules, 1988.

I should quote Order 24, rule 16 which provides;

**Failure to comply with requirement for
discovery, etc. (O.24, r.16)**

16. –(1) if any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1),-

(a)

(b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

What is the purpose of discovery?

In Davies v Eli Lilly & Co. [1987] 1 WLR 428, Sir John Donaldson MR explains the “justice” behind this approach:

In plain language, litigation in this country is conducted “cards face up on the table”. Some people from other lands regard this as incomprehensible. “Why”, they ask, “should I be expected to provide my opponent with the means of defeating me?” The answer of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object.

C.Cameron & J Liberman, 'Destruction of Documents Before Proceedings Commence – What is a Court to Do?' (2003) 27 Melbourne University Law Review 273, 274 explain the same policy thus:

The primary aim of discovery is to ensure that litigants disclose to each other all relevant, non-privileged documents whether that disclosure helps or hurts their respective cases, so that they will know the case they have to meet and judges will have the evidence they need to do their job effectively.

E.Bray, The Principles and Practice of Discovery (1885), explained the purpose of discovery thus:

To ascertain facts material to the merits of his case, either because he could not prove them, or in aid of proof and to avoid expense; to deliver him from the necessity of procuring evidence; to supply evidence or to prevent expense and delay in procuring it; to save expense and trouble; to prevent a long enquiry and to determine the action as expeditiously as possible; whether he could prove them aliunde or not; to facilitate proof or save expense.

- (14) In Landauer Ltd –v- Comins & Co. (a Firm) The Times August 7, 1991 the Court of Appeal held that the test for an application to strike out under Order 24 Rule 16, since the decision of Mr Justice Millet in Logicrose Ltd. –v- Southend United Football Club (The Times March 5 1988) was whether there had been a real or substantial or serious risk that a fair trial was no longer possible. However if the Court were satisfied that a fair trial was possible, but that there had been conduct which was contumacious such as the deliberate suppression of a document, the Court could allow the application to strike out.

The relevant passage in the English Court of Appeal decision in “Landauer Ltd v Comins & Co , is this;

“While it was accepted that the normal pre-requisite for the striking out of an action under Order 24, rule 16 of the Rules of the Supreme Court for failure to comply with a requirement for discovery of documents was the existence of a real or substantial or serious risk that a fair trial was no longer possible, it might be that cases of contumacious conduct, such as the deliberate suppression of a document, would justify striking out even if a fair trial were still possible”

It is this principle I apply.

I can see no reason why the rule of law enunciated by the English Court of Appeal in "Landauer Ltd -v- Comins & Co" should not be applied in the case before me. I have no hesitation whatsoever in relying on the above judicial decision in the instant matter before me.

- (15) Turning to the facts, it is of interest to note that Mr. Whittaker deposed that;
- (A) he could not address BSP's request for the Lowing Memo and the 2010 Khan Notes because of difficulties in communicating with, and the poor services of, their previous Solicitors, AP Legal whom they engaged in June 2015 (see, paragraph 3, 4 and 8 of Mr Whittaker's first Answering Affidavit of 18th July 2016).
 - (B) he could not find a copy of the Lowing Memo despite many attempts to retrieve it including searches at the office of Lowing and Associates. (see, paragraph 6 of Mr Whittaker's 1st Answering Affidavit of 18th June 2016).

If that is the case then why did Mr. Whittaker **falsely and repeatedly informed this Court** (through his Solicitor and agent) on 21st October 2015, 09th November 2015, 23rd November 2015 and 07th December 2015 **that he had produced all documents requested by BSP ?**

The question I ask myself is, does it matter?

It surely matters in the sense that the repeated misinformation to Court is one in my Judgment, which is clearly a deliberate suppression of documents.

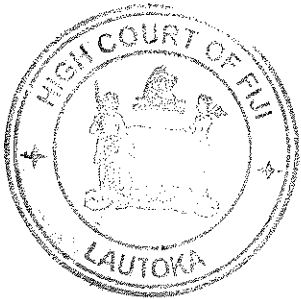
The Plaintiffs conduct is contumacious and therefore the consequences of contumely and deliberate suppression of documents should follow. Thus, I am satisfied that it is right in all the circumstances to shut out the Plaintiffs action for deliberate suppression of documents even if a fair trial is still possible.

In view of the approach, I have adopted in relation to the Defendant's "Dismissal application", the "Discovery application" does not call for consideration.

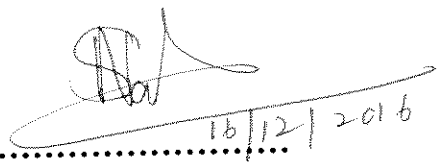
Thus, it will be at best a matter of academic interest only or at worst an exercise in futility to express my conclusion on the merits of the Defendant's application for Discovery.

ORDERS

- (1) The Plaintiffs claim is struck out for failure to give inspection.
- (2) The Plaintiffs to pay costs of \$1500.00 (summarily assessed) to the Defendant within 14 days hereof.



**At Lautoka.
16th December 2016.**


..... 16/12/2016 .
Jude Nanayakkara
Master.