IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. 68 of 2010.

BETWEEN : **LEO BELLIS JONES** of 4 Inkerman Drive, Hazelmere, High Wycombe, Buckimhamshire, United Kingdom, HP 15 7JJ..

PLAINTIFF

AND : **JONE SAU** Boatman/Employee of South Seas Cruises Ltd a limited liability company having its registered office at Denarau Island, P.O Box 718, Nadi.

DEFENDANT

AND : **SOUTH SEA CRUISES LIMITED** a limited liability company having its registered office at Denarau Island, P.O Box 718, Nadi.

2ND DEFENDANT

RULING

BACKGROUND

1. Leo Bellis Jones is a resident of the United Kingdom. He describes himself in the statement of claim which he filed on 08 April 2010 that he *"is a student at Leeds University"*. Jones travelled to Fiji and arrived here on 09 April 2007 as part of a 5-month gap year. Some two weeks or so after his arrival, Jones travelled to Mana Island on 21 April 2007. He travelled to the island on a boat operated by Awesome Adventures which is a business of the second defendant. On 23 April 2007, Jones and two of his friends decided to do some snorkelling off a reef near the island. Jones is suing both defendants for severe personal injuries (with consequent loss, damage and suffered some disability) he sustained when, whilst he was snorkelling, he was hit on the head by a twin engine power boat named *MV Daurogo Kaci*. It is alleged that, at the time of the accident, *MV Daurogo Kaci* was under the control of Jone Kau (first defendant) who was operating the vessel during and in the course of his employment with South Sea Cruises Limited (**"SSCL"**).
2. A police report *(Mana Island Resort –Boat Accident dated 05 June 2008)* obtained by Jones' solicitors which he has discovered to the defendants appears to confirm that the area where Jones was snorkelling was prohibited to vessels. This would suggest that the *MV Daurogo Kaci* had traversed into an area of water where it should not have gone.

3. The defendants concede to the following in their statement of defence:

(i) that Jone Kau is an employee of SSCL (see paragraph 2 of the statement of defence).
(ii) that Jones did travel to Mana Island on 21 April 2007 after booking a 3-day package with Awesome Adventures.
(iii) that Awesome Adventures is a tour operator owned by SSCL (at paragraph 4 of the statement of defence).
(iv) that Jones did travel to Mana Island in a boat operated by Awesome Adventures (paragraph 5 of defence).
(v) that Jones was hit by *MV Daurogo Kaci* (paragraph 8 of the defence).

ISSUES YET UNRESOLVED BY THE PLEADINGS

4. The following issues are yet unresolved by the pleadings:

(i) whether Jone Kau was operating the *MV Daurogo Kaci* at the time of the accident?
(ii) whether, even if Jone Kau was operating the said vessel at the time of the accident, he was acting in the course of his employment with SSCL?
(iii) granted that SSCL has conceded to the fact that it did (through Awesome Adventures) operate the vessel in which Jones travelled to Mana Island – which vessel is not named in the statement of claim, was the *MV Daurogo Kaci* (which is identified as the vessel which hit Jones) a vessel operated by SSCL at the time of the accident?

5. I should point out that the rest of the statement of defence is littered with bare denials. These are either phrased as an assertion that the defendants **"has** (sic) **no knowledge of and therefore denies** (sic) **the allegation"** OR, that the defendants **"has** (sic) **no knowledge of and therefore puts** (sic) **the plaintiff to strict proof"** or to **"the strictest of proof"** of his allegations. In a civil proceeding, the court only has to determine the issues on the balance of probabilities. Accordingly, such sketchy pleadings do nothing to assist the party pleading so - nor do they do anything to increase the burden of proof on the other party. All they do is create an impression that the party pleading is being evasive. That may prove counterproductive to the pleader's case.

APPLICATION BEFORE ME

6. Before me is a summons under Order 24 Rule 16 and Order 23 of the High Court Rules 1988 to strike out the statement of defence and for damages to be assessed. This application is prompted by the defendants' failure to discover documents in compliance with Discovery Orders made on 15

November 2010 and sealed on 19 November 2010 and subsequent Orders made on 19 January 2011, 21 February 2011 and 10 March 2011, extending the initial Discovery Orders. The plaintiff also seeks an Order that the sum of FJD$20,000 in security for costs that he had paid into the Judicial Trust Fund on 10 November 2010 be released to his solicitors' Trust Account.

7. The affidavit of Leo Bellis Jones sworn on 22 June 2011 and filed in support of the application sets out the following:

   (i) at close of pleadings, the plaintiff did file a Summons for Directions on 16 September 2010.
   (ii) however, the defendants would not consent to the Summons for Directions unless the Plaintiff pay into Court the sum of FJD$20,000 in security for costs.
   (iii) on 10 November 2010, the plaintiff did pay the sum of FJD$20,000 into the Judicial Trust Fund as security (Receipt No. 675324).
   (iv) Order in Terms of Summons for Directions was then granted by the Court on 15 November 2010. The Orders were sealed and served by the plaintiff's solicitors to the defendants' solicitors.
   (v) the case was then adjourned to 19 January 2011.
   (vi) following 19 January 2011, the matter was adjourned several times over to allow the parties to file and serve their respective lists of documents. The plaintiff did file and serve their list in due course. The defendants' solicitors however would inform the court on 29 March 2011 that the defendants had no documents to discover.

8. I observe that the defendants have not filed a list of documents.

THE LAW

9. This court does have a power to strike out a statement of defence and enter judgement accordingly where a defendant has either failed to make discovery of documents or has failed to produce any documents for inspection.

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

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

11. In modern civil litigation, discovery is central to the system of fact finding and decision making and parties are encouraged to make available for inspection, all relevant documents, regardless of whether the document(s) support(s) their case or the other party's case[1].

12. 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.

13. 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

14. E Bray, **The Principles and Practice of Discovery** (1885), 1 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.

15. However, to strike out a statement of defence on account of a defendant's failure to make discoveries is such a drastic step and the power under Order 24 Rule 16(1)(b) is exercised with great caution. In any given case, a defendant's right to defend his case is one not to be quickly or lightly written-off, and even more so, in terms of the right conferred under section 15(2) of the 2013 Constitution of Fiji[2].

16. In **Bhawis Pratap v. Christian Mission Fellowship** (ABU0093.2005), the Fiji Court of Appeal cautions that the power to strike out a defence for want of compliance with discovery orders should only be exercised in the

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[1] See Australian Law Reform Commission Report on Discovery in Federal Courts (ALRC CP 2) Published on 15 November 2010. Consultation Paper was released on 15 November 2010.

[2] Section 15(2) provides:
(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.

clearest of cases and that *"to deprive a defendant of the right to defend is a serious step, only to be taken in the clearest cases".*

17. As to what constitutes the "clearest of cases", the FCA in **Native Land Trust Board v Rapchand Holdings Ltd** [2006] FJCA 61; ABU0041J.2005 (10 November 2006) is insightful. In that case, the defendant failed repeatedly to comply with certain production and inspection orders. The High Court struck out the defence. The orders in question were non-peremptory orders. The defendant then applied to set aside the order which had struck out its defence. However, that application was dismissed by the High Court because the defendant was laxing even in pursuing that application. The High Court then proceeded to assess damages. The defendant however appealed to the FCA.

18. Before the FCA, the defendant explained its failure to comply and argued that:

    (i) it's conduct was not contumacious as it had not withheld the documents deliberately[3] and,

    (ii) the power to strike out a defence is exercisable only if there was evidence that it deliberately disobeyed discovery orders, or, if a fair trial would not be possible[4].

19. The FCA sympathized with the plaintiff's interest in having his claim resolved quickly as well as the (High) Court's case- management obligations. It was also critical of the defendant's delaying tactics. However, the Court took into account that there was a very substantial monetary claim against the defendant and that the High Court had given no written reasons to explain why it struck out the defence. The FCA then warned, as it had done in **Bhawis Pratap v. Christian Mission Fellowship** (ABU0093.2005), that," *to deprive a defendant of the right to defend is a serious step to be taken only in the clearest of cases*"[5].

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[3] The relevant extract from the Fiji Court of Appeal Ruling:

[16] Both counsel filed helpful written submissions. Mr. Vuataki conceded that the Appellant's handling of the litigation fell far short of what was acceptable. He did not deny that orders of the High Court had not been complied with and that as a result numerous delays had been occasioned. However, he rejected the assertion that the Appellant's conduct had been contumacious. In particular, while it was accepted that there had been a failure to comply with the order for discovery, the non compliance was not a deliberate attempt to suppress documents. The main reason, Mr. Vuataki explained, for the Appellant's failure to comply with the orders and rules of the court was the overall weakness of the Appellant's legal department. As previously had been explained by Mr. Qoro to the judge, the fact was that several legal officers had resigned from the Appellant's legal department and the remaining staff who were based in Suva had simply been unable adequately to manage the files re-allocated to them.

[4] The relevant extract from the FCA ruling:

[17] Mr. Vuataki submitted that on 25 February the only question before the court was whether the failure by the Appellant to make discovery as ordered (and, possibly, the failure to attend a pre-trial conference) justified striking out the defence. While it was not doubted that the Court had power to act as it did, Mr. Vuataki suggested that in the absence of anything to suggest deliberate disobedience or to suggest that a fair trial could no longer be held, the order should not have been made. As an alternative, he suggested that the Court should have considered making an "unless order" (and see also Samuels v. Linzi Dresses Ltd[1981] QB 115; [1980] 1 All ER 803).

[5] The FCA said:

[20] ....We understand the frustration of the Respondent, keen to have its claim resolved as soon as possible. We sympathise with the position of the judge whose conscientious commitment efficiently to manage the case load of his court was repeatedly thwarted by wholly unacceptable conduct by the Appellant. At the same time however we have to ask ourselves whether, in the face of what was clearly a very substantial monetary claim it was right, on 25 February, absolutely to debar the Appellant from defending.

20. The FCA accepted the argument that the High Court judge first ask whether the defendant's conduct "was sufficiently unsatisfactory to warrant it being denied its right to defend itself"[6] before striking out the defence.

21. After reviewing the case, the FCA went on to hold that the defendant's failure in the circumstances of that case were not *"sufficiently serious to warrant the order striking out the defence"*. In coming to that conclusion, the FCA took into account the following:

(i) NLTB's default amounted to just twelve days and three days respectively in relation to the filing of list of documents and pre-trial conference. These were not *"sufficiently serious to warrant the order striking out the defence"*[7].

(ii) what is required is actual evidence of contumacious conduct or deliberate disobedience of the discovery orders on the part of NLTB. The court should actually have examined the evidence and make a finding of fact of contumacious conduct and/or deliberate disobedience of court orders[8]. Such evidence would have been sufficient to warrant the striking out of its defence.

(iii) delay per se does not necessarily amount to contumacious conduct (see footnote 7).

(iv) but disobedience of an unless order or a peremptory order is sufficient to constitute contumacious conduct[9].

ANALYSIS

22. In my view, **Rapchand** is authority that a Court may strike out a defence on account of a defendant's failure to comply with a non-peremptory order, if there is evidence of contumacious conduct and/or deliberate disobedience of the non-peremptory orders. The onus to establish *contumacious conduct and/or deliberate disobedience of the non-peremptory orders* lies with the plaintiff who seeks to strike out the defence. However, where the defendant disobeys a peremptory order or an unless order, that in itself is sufficient evidence of contumacious conduct, enough to justify striking the defence out.

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[21] Unfortunately, when he made the 25 February order, no ruling was given by the judge. In Bhawis Pratap v. Christian Mission Fellowship (ABU0093.2005) we referred to a number of authorities illustrative of the principle that to deprive a defendant of the right to defend is a serious step, only to be taken in the clearest cases. We also referred to the importance of giving sufficiently adequate reasons for decisions, especially decisions of a final nature

[6] The FCA said:

[22] ..... the question before the judge on 25 February was .... whether the Appellant's conduct subsequent to that date was sufficiently unsatisfactory to warrant the Appellant being deprived of its right to defend.

[7] This is what the FCA said:

[23] The affidavit filed in support of the Respondent's 29 November 2004 application to re-instate the default judgment complained that the Appellant had failed to file its list and affidavit of documents. According to the Registrar's order these should have been filed on or about 17 November. It also appears probable that the Appellant had not attended a pre-trial conference fixed for 26 November. The default in compliance with the first order amounted to just twelve days while the application to debar the Appellant from defending was made three days after its failure to attend the pre-trial conference. Against the whole background of default by the Appellant these further failures were certainly vexing but, we do not think, sufficiently serious to warrant the order striking out the defence.

[8] The Court said:

[24] As has already been noted, in paragraph (4) of the affidavit supporting the Respondent's 29 November application, the Respondent referred to the "delaying tactics" of the Appellant. In the absence of reasons for his decision, the first paragraph of the order made on 25 February, also already referred to, appears to us to suggest that the judge accepted that "delay tactics" in other words contumacious conduct by the Appellant, had been proved. Had it indeed been proved, then undoubtedly the Appellant's claim to have been unfairly treated would have been considerably weakened (see Grovit & Ors v. Doctor [1997] 2 All ER 417). Without, however, any examination and finding of fact relating to the Respondent's claim we do not think that the conclusion that the Appellant had deliberately resorted to disobedience and delaying tactics was safely arrived at.

[9] The FCA said:

[25] In our view, on 25 February 2005 the Court should have made an "unless" or other suitable peremptory order (almost certainly coupled with an order mulcting the Appellant in costs) the breach of which would afford the Appellant no arguable grounds for complaint. For the reasons we have given, however, we take the view that an order, having the effect of striking out the defence, should not have been made.

23. The English Court of Appeal in **Star News Shops v Stafford Refrigeration Ltd** [1998] 4 All E.R. 408 at 415; [1998] 1 W.L.R. 536 at 545, CA:

> I am reinforced in this conclusion by considering the approach of the court in cases of failure by a party to comply with the terms of an 'unless' order. In **Caribbean General Insurance Ltd v Frizzell Insurance Brokers Ltd** [1974] 2 Lloyd's Rep 32 the Master made an unless order against the plaintiffs in respect of specific discovery and allowed 28 days for compliance. Thereafter two judges granted final extensions. The defendants entered judgment in default of compliance with the unless order. At trial the plaintiffs applied to set aside the default judgment. The trial judge set aside the judgment and extended the time for compliance with the original unless order. The Court of Appeal held that the judge was wrong to do so in the exercise of his discretion, failed to ask himself the right question and erred in law. Peremptory orders were made to be obeyed. Final, peremptory or 'unless' orders were only made by a court when the party in default had already failed to comply with the requirement of the rules or an order, the court was satisfied that the time already allowed had been sufficient and the failure of the party to comply with the orders was inexcusable.....
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> .....
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> Accordingly, I have come to the conclusion that although the terms of Ord 24, r 16(1) gave the judge jurisdiction to make the order that he did, he none the less erred in principle in striking out a defence for breach of a non-peremptory order, that he should have made a final or 'unless' order and that he was plainly wrong in the exercise of his discretion in making such an order.
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> The only question which remains is whether the judge was under an obligation to make an unless order in the absence of a specific application to do so supported by an affidavit. In my judgment the judge had an inherent power to do so of his own initiative and the absence of an application and affidavit did not preclude him from doing so.

24. The Singaporean Court of Appeal in **Mitora Pte Ltd v Argritrade International (Pte) Ltd** [2013] 3 SLR 1179 cautions that a routine use of unless orders would be the forensic equivalent of using a sledgehammer to crack a walnut. That is a warning that Courts should be wary of granting unless orders in light of the drastic consequences of the slightest non-compliance.

25. In **Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani** [1999] 1 SLR (R) 361., the Singaporean Court of Appeal opined that, when dealing with the consequences of non-compliance of an unless order, the Court is not concerned with why the unless order was made, but rather, why it was not complied with.

26. Tan Boon Heng, **Case Note - Mitora: The Mantra of " Unless Orders"?** (2014) 26 SAcLJ at page 295 cites case law in Singapore which endorse the view that the enforcement of an unless order would be harsh and unjust where the consequences or the penalty for non-compliance is grossly disproportionate to the default in question.

The decision in **Teeni Enterprise** had created a renewed awareness that the courts must balance the importance of compliance with Court Orders with the need to ensure that a party would not be summarily deprived of its legal rights without any hearing of the merits especially when the non-compliance or breach was not so serious or aggravating as to warrant such a serious consequence. The Court in Teeni Enterprise agreed with the party who breached the unless order that it was a draconian punishment to allow the massive counterclaim of over $1.2 million and that the dismissal of the whole of the plaintiff's claim was disproportionate, taking into account the relatively trivial breach by the plaintiff which did not occasion any real prejudice to the defendant.

27. The English Court of Appeal shares the same view in **Marcan Shipping (London) Ltd v Kefalas** [2007] 1 WLR 1864 where, at [36] Moore-Bick LJ said:

> [B]efore making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified. I find it difficult to imagine circumstances in which such an order could properly be made for what were described in *Keen Phillips v Field* as "good housekeeping purposes".

28. Browne-Wilkinson VC in **In re Jokai Tea Holdings** [1992] 1 WLR 1196 at 1203B said:

> In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless" order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

29. Parker LJ opined at 1206 that:

> I have used the expression "so heinous" because it appears to me that there must be degrees of appropriate consequences even where the conduct of someone who has failed to comply with a penal order can properly be described as contumacious or contumelious or in deliberate disregard of the order, just as there are degrees of appropriate punishments for contempt of court by breach of an undertaking or injunction. Albeit deliberate, one deliberate breach may in the circumstances warrant no more than a fine, whilst another may in the circumstances warrant imprisonment.

CONCLUSION

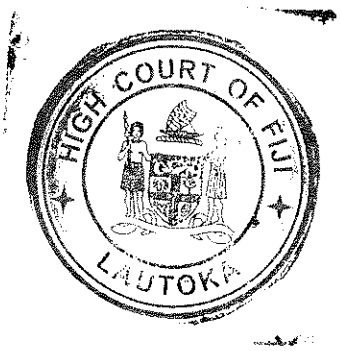
30. In this case, there was no unless or peremptory order given. In terms of the authorities cited above, the onus would then be upon the plaintiff to establish contumacious conduct and/or deliberate disobedience of the non-

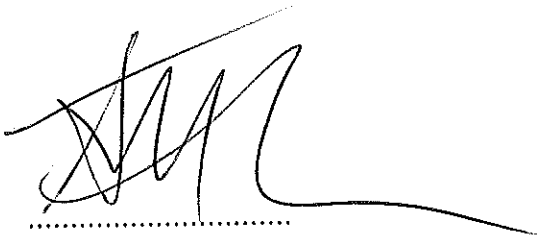
peremptory orders on the part of the defendants. No such clear evidence has been placed before me.

31. In any event, I am of the view that the plaintiff's application under Order 24 Rule 16 is rather premature. General discovery can only be ordered against a party who has indicated that he has relevant documents in his possession and yet refuses or neglects to discover them to the other party.

32. However, where, as in this case, a defendant has indicated that he has no documents to discover, it would be most inappropriate for the plaintiff to apply to this Court to strike out the defence on account of the defendant's non-compliance with general discovery orders. If the plaintiff is adamant that the defendants have documents in their possession (or within their power to produce) which they are "hiding", the plaintiff should first apply for specific discoveries. Alternatively, or in addition, the plaintiff could apply for interrogatories.

33. Accordingly, I dismiss the application. Costs in the cause. Case adjourned to **Thursday 08 September 2016** for mention at **10.30 a.m.**





Anare Tuilevuka
JUDGE
25 August 2016