

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No. 83 of 2008

BETWEEN : **GREYSTONE HOLDINGS LIMITED** having its registered office at HLB House, Nadi Airport, Fiji Islands.

PLAINTIFF

AND : **FAIRDEAL-SILA JOINT VENTURE LIMITED** having its registered office at HLB House, Nadi Airport, Fiji Islands.

DEFENDANT

R U L I N G

INTRODUCTION

1. On 23 February 2011, I did make an Order granting leave to the plaintiff (“**Greystone**”) to serve interrogatories on the defendant (“**Fairdeal**”). That ruling is reported in *pacii* in **Greystone Holdings Ltd v Fairdeal - Sila Joint Venture Ltd** [2011] FJHC 88; Civil Action 83.2007 (23 February 2011). On 02 May 2011, Fairdeal served Greystone with the answers to the interrogatories. These answers were set out in an affidavit sworn by Parmod Kumar and filed on 02 May 2011. However, Fairdeal is not satisfied with the answers given by Greystone. The solicitors would start communicating with each other on this. On 13 July 2011, Greystone’s solicitors sent a letter to Fairdeal’s solicitors. Greystone would follow up on this on 12 September 2011 when it’s solicitors sent a reminder to Fairdeal’s solicitors.
2. Thereafter, the matter was adjourned over several times to give Fairdeal time to give better answers and particulars to the interrogatories.

THE NATURE OF THE CASE BETWEEN THE PARTIES

3. As I had observed in the above interlocutory ruling:
[2]. Connors J's ruling on that application dated 31st May 2007 is helpful. What I gather from it is that the plaintiff's substantive action seeks to recover from the defendant monies owing pursuant to an alleged agreement between them. The agreement pertained to the construction of the Navakai Sewerage Treatment Plant. The contract

sum was in excess of \$1.7m. The contract appears to have been formed out of various documents rather than a single "**formal**" agreement between the parties. The terms of the payment was to be on a "**progress payment**" basis. The defendant made some payments to the defendant until the events of 5th December 2006 when it was unable to continue. Ultimately, the contract was terminated by the defendant by letter. Connors J then observes as follows:

[16] The plaintiffs claim against the defendant as pleaded in the statement of claim appears to relate to payments outstanding together with loss of profits on monies that would have been earned pursuant to the agreement. It is this claim that appears to form the amount demanded in the notice issued under section 221 of the Companies Act.

ORDER 26 RULE 5

4. **Order 26 Rule 5** of the High Court Rules 1988 provides:

Insufficient answer (O.26, r.5)

5. If any person on whom interrogatories have been served answers any of them insufficiently, the Court may make an order requiring him to make a further answer, and either by affidavit or on oral examination as the Court may direct.

5. It seems that a Court faced with such an application must first determine whether the party on whom an interrogatory has been served has answered it sufficiently or insufficiently. If he has not, the court then has a discretion as to whether to order that he make a further answer either by affidavit or on oral examination.
6. From the cases referred to me by counsel, the general rule is that an affidavit of discovery is treated as conclusive (see **Finance Sector Union of Australia v Cwth Bank of Australia Ltd** [2000] FCA 1389 as per Moore J; **Mulley v Manifold** [1959] HCA 23; (1959) 103 CLR 341).
7. In **Lyell v Kennedy** (supra), Cotton LJ said at 19:
- The general rule is undoubtedly this, that in all questions of discovery where you have the oath of the party claiming discovery challenging the oath of the party giving discovery, the oath of the latter if for this purpose conclusive.
8. That rule applies also to an affidavit containing answers to interrogatories. Hence, the onus would be on the party who alleges that the answers in the other party's affidavit are insufficient, to establish so.
9. When the Court is faced with such an allegation of "insufficiency", it is important to keep in mind that the court is not involved in an inquiry as to

the truth or falsity of the answers sworn in an affidavit. As Cotton LJ said in **Lyell v Kennedy** [1884] ChD 1 at 21:

Then Rule 10 is, *“If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an Order requiring him to answer, or to answer further, as the case may be”*. Then an order may be made requiring him to answer by affidavit or *viva voce*. So that with regard to an answer to interrogatories, what the Court has to consider is this simply, whether the answer is insufficient, not to go into the question of the truthfulness of the answer, but to see whether it is sufficient or not, and if it is insufficient, then only can it require a further answer.

(my emphasis).

10. It is also important to keep in mind that, because of the general principal stated above (paragraphs 6 to 9), “insufficiency” cannot be established by a contentious affidavit (see **Mulley v Manifold** (supra)).
11. Bowen LJ in **Lyell v Kennedy** offers some guidance as to how the court might establish “sufficiency” or otherwise in an answer to an interrogatory:

I think myself when an answer is couched in a form which makes it embarrassing, that is to say, which prevents the person who asks for it from using it without having thrust upon him irrelevant matter as part of it, that the answer is insufficient, and that the proper course to pursue is to ask that a further answer shall be made; and on this ground, that even if it may be dealt with in another way, as by having the whole of the affidavit taken off the file, that would be a cumbrous and expensive mode of curing the evil I think an answer is not sufficient which is so involved and so insufficient in the particular statement as not to be capable of being used. In my opinion that is very well covered by authority on the common Law side in a case which has been followed as good law ever since, that is the case of **Peyton v Harting** Law Rep. 9 C.P..9. which lays down that answers to interrogatories may be insufficient within the meaning of the Common Law Procedure Act, sect 54, if impertinent or otherwise objectionable in their matter under the circumstances.....And Mr. Justice Keating says in the same case...

“If the Judge is satisfied that the answers contain matter which is improper or impertinent, as destroying the effect of the answers or introducing irrelevant topics, all which is matter for his discretion, he has jurisdiction i.e. to require a further answer”

12. Counsel for the plaintiff refers me to the Australian Federal Court decision in **Procter v Kalivis** [2009] FCA 1518 (17 December 2009) which discusses various other authoritative English and Australian decisions.

ARE THE ANSWERS IN THIS CASE INSUFFICIENT?

13. The interrogatories that were ordered, and the answers provided in the Affidavit of Parmod Kumar sworn on 02 May 2011, I set out below:

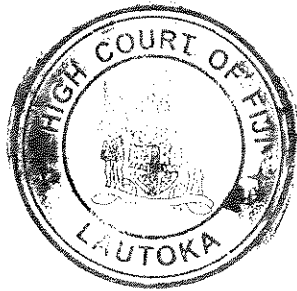
Interrogatory	Answer (Parmod Kumar Affidavit sworn on 02 May 2011).	Plaintiff's Attitude (letter 13 July 2010 annexed "GHL05" in S. Cheer Affidavit s/o 16/10/11)
(a) How much of the works (as defined in the Plaintiff Statement of Claim) have been completed? Provide particulars including but not limited to: (i) date of completion of various portions of the works (ii) the description of the works	Annexure "A" in Kumar is an Interim Certificate detailing the: (i) Description (of each Work) (ii) Contract Amount for Each Work. (iii) % Completed (iv) Claimed to date	"... <i>certain essential parts of the annexed documents, which were or are to serve as answers are either deliberately left out or not annexed by mistake. Could you please provide the documents immediately. For your ease of reference, we enclose (1) a copy of the Affidavit of Parmod Kumar; and (2) copies of the Navakai Sewage Treatment Plant Augmentation Interim Certificates that we have in our records</i> ".
(b) how many interim certificates in relation to the works have been issued by Sinclair Knight Mertz? Provide the following particulars: (i) dates on the interim certificates (ii) description of the works for which the interim certificates were issued (iii) amounts certified by the interim certificates for payment to the defendant	Paragraph 3 in Kumar Affidavit refers to 3 Interim Certificates in relation to the works. These Certificates are annexed marked "B", "C" and "D". Relevant dates, particulars and description of works, and corresponding amount are set out.	
(c) how much has been paid to the defendant by the Government of Fiji in relation to the works?	Paragraph 4 says: "..to the best of my knowledge, information and belief the sum of \$297,303.20 has been paid by the Government of Fiji to the Defendant in relation to the works carried out by the Plaintiffs"	As above.
(d) how many payments has the government of Fiji made to the defendant in relation to the works?	Paragraph 5 says: "..to the best of my knowledge, information and belief, the Government has paid 3 payments to the Defendant in relation to the works carried out by the Plaintiffs".	As Above.
(e) what were the amounts paid to the defendant in relation to the works and when (provide the dates of payment alongside the amounts paid in chronological order).	Paragraph 6 says: "..the amount s paid to the Defendant in relation to the works carried out by the Plaintiff and the dates are as follows:- (i) First Payment 24/10/06 \$44,551.45 (ii) Second Payment 23/11/06 \$178,004.05 (iii) Third Payment 8/12/06 \$74,747.70	As above.

OBSERVATIONS

14. The answers given in the affidavit of Kumar appear to me to be sufficient. It seems that what the plaintiff is alleging is that there are “...*certain essential parts of the annexed documents, which were or are to serve as answers are either deliberately left out or not annexed by mistake*”.
15. I would be much more comfortable to direct the defendant to file a further affidavit had the plaintiff been more precise about what essential parts of the annexed documents were left out. Otherwise, the truth or falsity of this could be a matter left for cross-examination at trial and to be determined on the balance of probabilities.

CONCLUSION

16. Application dismissed. Parties to bear their own costs. Case adjourned to Wednesday 19 October 2016 for mention.



A handwritten signature in black ink, appearing to be "Anare Tuilevuka". The signature is written in a cursive style with a long horizontal line extending to the right.

Anare Tuilevuka
JUDGE
11 October 2016