IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

HBC 240 of 2017

BETWEEN: **JUXTA BEACH (FIJI) LIMITED** a limited liability company having its registered office at 74 Ellis Place, Fantasy Island.

PLAINTIFF

A N D: **EXTREAM SPORT FISHING (FIJI) LIMITED** a limited liability company having its registered office at HLB Crosbie & Association, Chartered Accountants, Top Floor, HLB House, 3 Cruickshank Road, Nadi Airport, trading as Fantasia Resort

FIRST DEFENDANT

A N D: **FIJI ELECTRICITY AUTHORITY** a body corporate under the Electricity Act, Cap 180 and its head office located at 2 Marlow Street, Suva

SECOND DEFENDANT

Appearances: Ms. Lata & Mr. Narayan A. for the Plaintiff
Mr. Tunidau for the first Defendant
Ms. Prasad L. for the second Defendant
Date of Hearing: 29 June 2020
Date of Ruling: 31 August 2020

RULING

INTRODUCTION

1. There are two applications before me now. The first is the plaintiff's application for judgement against the first defendant, Extreme Sport Fishing (**"ESF"**). The second is an application by the plaintiff for specific discoveries against the second defendant, Energy Fiji Limited (**"EFL"**).

BACKGROUND

2. The plaintiff (**"JBFL"**) is the registered proprietor of State Lease 13905. It is the developer of Fantasy Island.

3. At some point, located near JBFL's Fantasy Island project, sits State Lease 14775. It is not clear to me how far apart these properties are.

4. In 2013, SL 14775 was owned by a Mr. Turnbull. Turnbull owned, and was operating a hotel on this land. He called it the Wellesley Palms Hotel.

5. It is common ground between the parties that on or about 02 July 2013, JBFL granted approval for a power extension to pass over JBFL's land (SL 13905) to SL 14755. A letter to this effect is annexed to an affidavit filed for and on behalf of EFL.

6. The said letter states:

> *Dear Sir*
>
> ***Easement for Placement of Power Poles, Stays & Lines FEA reference G714-12***
>
> *We confirm approval of easement for extension of power supply to our hotel through Juxta Beach property as required by FEA letter dated 1s July 2013.*
>
> *However, approval is granted for a temporary extension only and it should be removed once permanent 3 phase underground power is available on the site.*
>
> *It will be your responsibility to extend your own underground cables from the high Voltage Transformer once it is installed on the site.*

7. Based on that arrangement, Energy Fiji Limited (**"EFL"**), then installed power poles and lines on the plaintiff's land.

8. I gather that, some years later, Turnbull would lose SL 14755 by mortgagee sale when he default on his mortgage payment. ESF acquired SL 14755 through that mortgagee sale. It has since renamed the hotel.

9. One of the key issues in this case is – what exactly was the arrangement which saw JBFL grant the approval for a power extension to pass over JBFL's land.

10. I also note that JBFL is raising issues as to who exactly were the parties to the arrangement.

11. As is clear from the above letter, JBFL's intention, at all times, was to upgrade the power for the rest of Fantasy Island. Ms. Lata said in court that both Turnbull/ESF

and EFL were always aware of this. This is why the plaintiff only allowed temporary power poles to be installed.

12. Ms. Lata further highlighted, in setting out the background, that JBFL now wishes to "upgrade", and now requires the power poles and lines to be removed. The defendants however are resisting JBFL's attempt to remove the power poles – obviously, relying on the original arrangement between JBFL and Turnbull.

13. Notably also, JBFL highlights that the arrangement which JBFL itself had approved, that is, for the installation of the power poles and lines on the JBFL's land, was not consented to by the Director of Lands, hence, ESF cannot claim any interest out of it.

14. JBFL appears to justify its having approved the arrangement without the Director's consent on the ground that the arrangement was intended to be temporary only.

ORDER 24 APPLICATION – SEEKING JUDGEMENT AGAINST ESF

15. The first application seeks an Order for judgement against ESF. It is submitted that JBFL is simply refusing to comply with the court's Orders by not disclosing documents in their possession and/or not disclosing documents which were previously in their possession and when it parted with possession with these documents. I gather that ESF has not filed a list of documents.

16. Mr. Tunidau refers to two affidavits filed previously in 2018 and in 2019 which he says set out ESF's position that all documents which were once in the possession of JBFL were destroyed in a fire.

17. Order 24 Rule 16 states:

> *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) that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and*
>
> *(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.*

(2) *If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.*

(3) *Service on a party's barrister and solicitor of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the application that he had no notice or knowledge of the order.*

(4) *A barrister and solicitor on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal.*

18. I agree that Order 24 Rule 16(1)(b) gives power to the Court to dismiss a statement of claim, or, strike out a defence, if the plaintiff or defendant fails to comply with any pre-trial discovery order.

19. However, the court is not *carte blanche* to dismiss a claim or strike out a defence whenever there is a failure by a party to comply with a pre-trial discovery order.

20. The Fiji Court of Appeal in **Bhawis Pratap v. Christian Mission Fellowship** (ABU0093.2005) cautioned that *"to deprive a defendant of the right to defend is a serious step, only to be taken in the clearest cases"*.

21. The FCA shortly after **Bhavis Pratap**, took the matter further in **Native Land Trust Board v Rapchand Holdings Ltd** [2006] FJCA 61; ABU0041J.2005 (10 November 2006).

22. In **Rapchand**, the NLTB failed persistently to comply with certain production and inspection orders. This led the High Court to strike out NLTB's defence. The orders in question were non-peremptory orders.

23. NLTB applied to set aside the order which had struck out its defence. However, the High Court dismissed that application. The reason why the High Court dismissed NLTB's application to set aside the striking-out order was because NLTB was found to be laxing - even in pursuing that application.

24. The High Court then proceeded to assess damages. NLTB however appealed to the FCA.

25. Before the FCA, NLTB explained its failure to comply and argued that:

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

(ii) (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[ii].

26. The FCA sympathized with the plaintiff's interest in having his claim resolved quickly. It also acknowledged the High Court case- management obligations.

27. The FCA also took note of the delaying tactics of NLTB in the court below – and was very critical of it.

28. However, the FCA observed that there was a very substantial monetary claim against NLTB and that the High Court had given no written ruling or any written reasons as to why it decided to strike out the defence. Having observed all this, 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"*[iii].

29. In the course of its reasoning, the FCA accepted that what the High Court judge should have asked himself before striking out the defence was, whether NLTB's conduct "was sufficiently unsatisfactory to warrant it being denied its right to defend itself"[iv].Then, on further review of the case, the FCA took the view that NLTB's failures in that case were not *"sufficiently serious to warrant the order striking out the defence"*.

30. In reaching this conclusion, the FCA took the following into account that 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. It then opined that what is required is actual evidence of contumacious conduct or deliberate disobedience of the discovery orders on the part of NLTB.

31. The FCA said that the High Court should have examined the evidence and make a finding of fact of contumacious conduct and/or deliberate disobedience of court orders. Such evidence would have been sufficient to warrant the striking out of its defence. It said that delay per se does not necessarily amount to contumacious conduct, but disobedience of an unless order or a peremptory order is sufficient to constitute contumacious conduct.

32. One might construe the FCA's reasoning in **Rapchand** rather narrowly as 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.

33. The onus to establish these lies with the plaintiff who is seeking 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.

34. I am of the view that ESF has not committed any contumacious conduct and/or deliberate disobedience of the non-peremptory orders such as to warrant this court granting an order to strike out of ESF's defence and the entering of judgment.

APPLICATION FOR SPECIFIC DISCOVERIES AGAINST EFL

35. The application for specific discoveries was made under Order 24 Rules 3 and 16. Ms. Lata seeks the following:

	Nature of Document(s) sought	Relevance (as argued)
Part (b)	*Copies of all Cheques & other documents pertaining to the payment of $17,910.95 for which receipt number 958830 was issued by EFL on 16/07/13.*	*Which entity actually paid the amount? Which entity? Was it as the Plaintiff claims Wellesley Palms Hotel or Mr. Turnbull or was it actually the first Defendant.*
Part (c)	*Abandoned*	*Abandoned*
Part (d)	*Copies of all documents, deeds, instruments, papers, records, and titles evidencing the grant of any permission licence, easement or similar rights over crown lease 13905 for the installation of power lines and poles given by Plaintiff or the Director of Lands in favour of the first Defendant and or second Defendant.* NB. EFL admits no instrument of easement given by Turnbull/JBFL. **Quaere** – In any application for commercial power supply, the EFL has always required inter alia, an easement to enter into someone else's land to install such power poles or lines as necessary.	*Whether the Defendants had the legal right or interest to enter the Plaintiff's land and install the power poles? Is the Plaintiff entitled to the reliefs as claimed?*
Part (e)	*Copies of all payments, vouchers, receipts, invoices, cheques, bank*	*Section 37 of the Electricity Act.*

	Nature of Document(s) sought	Relevance (as argued)
	statements and on any document evidencing the payment of any compensation or monies paid by the first Defendant or second Defendant to the Director of Lands or the Plaintiff. ***(refer EFL submissions filed 30/01/19)***	*"The authority or the licensee as the case may be, shall at the expense of the authority or the licensee as the case may be remove or alter such work or shall give reasonable compensation as may be agreed".* *To ascertain if the Defendants had legal right or interest to enter the Plaintiff's land.*
Part (f)	*Copies of all service and plans providing for an easement /wayleave clearance or other rights for the installation of power lines and poles over the Plaintiff's land.*	*As far as Plaintiff is aware, from experience with dealing with EFL, EFL requires complete survey plans and an easement to be granted over someone else's land, before EFL will install or erect power poles on that person's land. That easement should be shown in the survey plans.* *Also, in this case, in the process of installing the power poles, EFL prepared its own survey plans. And those survey plans would have reflected the easement. EFL has not disclosed this. EFL has only disclosed rough sketches – and which is not complete discovery.* *Was any easement granted by the Plaintiff or the Director of Lands?*
Part (g)	*Copies of each and all application for the supply of power to the businesses known as Ocean's Edge, Wellesley Palms Resort, Namaqumaqua Shores Pte Limited, Fantasia Resort and/or the first Defendant and/or the property on Crown Lease.*	*An application for power supply would have been filed by the relevant businesses prior to the installation of power. These applications would have been similarly submitted to the second Defendant by such businesses.* *Annexure AA7 of Abbas Ali affidavit shows meter account details of Namaqumaqua Shores Pte Limited (operating from SL 14775).* *Entry date of connection was 3rd October 2013 & final date of connection was 7th July 2014.* *This shows that during that period when the Plaintiff had given approval, another*

	Nature of Document(s) sought	Relevance (as argued)
		business had actually applied for power between 03 October 2013 and 07 July 2014. *So - there was an application for power supply by other entities. Who did the Plaintiff give the temporary approval to? And if the temporary approval was given to another entity then the first Defendant does not have the easement. Because as demonstrated to your Lordship earlier the application for commercial power supply, every time you lodge that you have to provide the easement.*
Part (h)	*Copies of invoices or bills and records of payments for power for the power supply by EFL to all businesses mentioned earlier.*	*Relevant in determining who were the relevant parties to whom the Plaintiff had actually given the temporary approval for extension of power.* *Whether the first Defendant had the actual consent or easement to erect the power poles in the first place.*
	Documents, papers, correspondence, evidence in the grant of consent from the Director of Lands for any permission, licence, easement or similar rights given by the Plaintiff for the installation of power lines and poles over Crown Lease 13905.	*Whether there was any consent from the Director of Lands.* *EFL says the issue does not concern them but is only between JBFL & EFL.* *But consent concerns EFL as well!* *They were equally involved and their own document requires statutory consent.*

36. Ms. Prasad raised objection that none of these Rules (Order 24 Rules 3 and 16) deals with specific discoveries. She argued that if JBFL wanted orders for specific discoveries of particular documents, JBFL should have come under Order 24 Rule 7. I agree.

37. I also agree that Order 24 Rule 3 only deals with the normal order to file affidavit verifying list of documents, which, in this case, EFL has duly complied with.

38. I note that in this case, there has been no previous application or order under Order 24 Rule 7 against EFL for specific discoveries of particular documents. That is what

JBFL appears to be seeking in the present application, *albeit* under Order 24 Rule 3, which, I agree, is not the correct Rule under which to pursue such an application.

39. As to whether the plaintiff can seek orders under Order 24 Rule 16 against EFL, I think not for two reasons – firstly, because EFL has discovered all documents in their list of documents and – secondly – in any event – for the same policy reasons I have discussed above, I do not think that there has been any contumacious conduct and/or deliberate disobedience of the non-peremptory orders on the part of EFL in this instance.

40. As a side note, Ms. Lata's argument that Order 24 Rule 16 also applies to non-compliance with Order 24 Rule 3 as it does to non-compliance with Order 24 Rule 7 is interesting. Indeed, there is nothing in Order 24 Rule 7 that limits the application of its sanctions only to instances of non-compliance with Order 24 Rule 7. In my view, a non-compliance with Order 24 Rule 3, if that non-compliance can be classified as amounting to *contumacious conduct and/or deliberate disobedience of the non-peremptory orders*, or, to a breach of a peremptory order – may attract the sanctions under Order 24 Rule 16, in keeping with **Rapchand** and **Bhavis Pratap v Christian Mission Fellowship** (supra). As I have said above, in this case, I do not think that EFL's conduct has been such, given that it has discovered all documents in its list of documents.

41. If JBFL wishes specific discoveries of particular documents, then it must apply under Order 24 Rule 7, which it has not used.

42. I am not inclined to grant the orders sought for specific discoveries as the application has not been brought under Order 24 Rule 7.

COMMENTS

43. While I am not inclined to grant the Orders for Specific Discoveries sought, I would like to say this at this time.

44. In my view, if the parties can agree that:

(i) the arrangement in question was a "dealing in land" within section 13 of the State Lands Act and;
(ii) that the prior consent of the Director of Lands was therefore required before the power lines could be installed, and;
(iii) that no such prior consent was ever obtained from the Director of Lands

– then the real issues in this case could be narrowed down considerably.

45. Otherwise, if the parties do not agree, the issue of whether or not there was consent of the Director and/or whether that consent was required at all in the arrangement in question, and how that affects the parties' respective positions in terms of the power poles on the defendant's land, should be determined as a preliminary point.

46. The answers to the above questions may or may not determine whether the parties are all *in pari delicto* in this arrangement – but I keep an open mind at this stage.

47. Also, still keeping an open mind, I am of the view that if JBFL wishes to pursue the discoveries, perhaps a better approach is to start by interrogatories and, depending on the answers, apply for specific discoveries.

48. However, as I have speculated, if the Director of Lands' prior consent was required but never obtained, then no amount of discoveries will ever cure that irregularity, for which, from where I sit, the parties are all *in pari delicto*, and out of which no right or relief can be asserted, although, as I have said, this is a mere observation not intended to have any substantive declaratory effect. The parties should seriously explore the option of settling this if they are *in pari delicto*.

ORDERS

49. The application for judgment against the first defendant is dismissed. The first defendant however should still file a list of documents within 14 days, even if it has no document to discover. The Orders for specific discoveries sought against EFL is dismissed. I order costs only in favour of the second defendant which I summarily assess at $800-00 (eight hundred dollars only).

HIGH COURT OF FIJI
LAUTOKA

.....

Anare Tuilevuka
JUDGE
Lautoka

31 August 2020

[i] 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.

[ii] 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).

[iii] The FCA said:

> [20] ....We understand the frustration of the Respondent, keen to have its claim resolved as soon as possible. We sympathize 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.
> [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.

[iv] 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.