IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 144 of 2018

BETWEEN:

MOHAMMED BINSAD
PLAINTIFF

AND:

MOHAMMED INTAZ
1ST DEFENDANT

AND:

REGISTRAR OF TITLES
2ND DEFENDANT

AND:

ATTORNEY GENERAL
3RD DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:

Jiten Reddy Lawyers for the Plaintiff
Jackson Bale Lawyers for the 1st Defendant
Attorney General's Chambers for the 2nd and 3rd Defendant

Date of Hearing:

By way of Written Submissions

Date of Ruling:

27th March 2025

RULING

01. The subject of this ruling is the 'Summons for Extension of Time to Furnish Better and Further Particulars' as filed by the Plaintiff on 20/09/2024. This Summons is supported by an Affidavit of Lilyan Luvu, an associate solicitor for the Plaintiff's solicitors, sworn on the same day.

02. As per the Affidavit in Support, it is averred by the deponent, **Lilyan Luvu**, an associate solicitor with the Plaintiff's firm of solicitors, that the Plaintiff was ordered by this Court on 01/08/2024 to furnish further and better particulars to the Defendants on paragraph 14 of the Plaintiff's Amended Statement of Claim within 07 days. She further avers that although the solicitors for the Plaintiff had prepared the particulars and given it to her to serve (though no date had been mentioned), it is stated that ***"I thought that I had ample time to serve as I thought that the last day to serve would be on the 19th August 2024"***.

03. Thus, she further avers that till 19/08/2024 she failed to attempt the service of the said particulars on the Defendants. Moreover, it is averred that she had attempted the service of the particulars on 19/08/2024 and the solicitors for the 1st Defendant had refused service since it was out of time and that it is ***"needed to get extension from Court to have the same served"***. She then avers that this was immediately allerted to the Plaintiffs solicitors, and it is stated that, ***"our solicitors straightaway drafted a summons and Affidavit in Support to have it filed at Suva High Court"***. She has further averred that this was a clear oversight on her part.

04. The 1st Defendant opposed this application. Thus, upon the Court's direction, both parties have filed written submissions on this application on 04/11/2024.

05. Having read the Affidavit in Support and the comprehensive written submissions on behalf of the parties, I now proceed to rule on the said Summons as follows.

06. At the outset, it is pertinent to reveal the history of this proceeding, as it would be an important factor to understand the real picture of this proceeding and equally an important factor when considering an application for extension of time.

07. The Plaintiff has filed this Writ of Summons and the Statement of Claim on 16/05/2018. The 1st Defendant has filed its Acknowledgment of Service on 29/05/2018 and the Statement of Defence on 14/06/2022. The 2nd and 3rd Defendants have filed their Acknowledgement on 04/06/2018 and the Statement of Defence on 27/06/2018. Plaintiff's Reply to Statement of Defence has been filed on 06/07/2018.

08. There were some interlocutory applications filed by the Plaintiff being heard before the Court at the outset of this matter.

09. Whilst those interlocutory matters were pending, the previous Master of the Court had on 08/08/2018 directed the Plaintiff to file the Summons for Directions and move the substantive matter forward. The Plaintiff, however, had failed to comply with the above direction and the Master again on 03/10/2018 directed the Plaintiff to file the Summons for Directions and put the Plaintiff on Notice of Order 25 Rule 9 of the High Court Rules. The Plaintiff still failed to comply with this order and the Master again on 03/12/2018 made orders for the Plaintiff to file Summons for Directions within 14 days.

10. The Plaintiff yet again failed to comply with the orders of the Master and ultimately filed the Summons for Directions only on 16/01/2019 and the orders on the Summons were made on 04/02/2019.

11. Following the orders on the Summons for Directions the Plaintiff's AVLD was filed on 18/02/2019 but the Plaintiff failed to serve the same on the Defendants till 26/11/2021 and the Master on this day made another order directing the Plaintiff to serve its AVLD by 03/12/2021.

12. The Plaintiff failed to comply with the above order too and the Master on 14/03/2022 again made an order for the Plaintiff to serve its AVLD to the Defendants by 15/03/2022.

13. On 18/03/2022, as the orders made on the Summons for Directions were not complied with, the Master extended the time for compliance of the orders by 14 days.

14. 1st Defendant thereafter filed a Summons to Strike Out the Plaintiffs claim on 22/03/2022. Having heard this Summons, the Master made a Ruling on 14/11/2022 and ordered the Plaintiff to file and serve an Amended Statement of Claim.

15. The Plaintiff then filed an Amended Writ of Summons and a Statement of Claim on 30/11/2022. Thereafter, the Plaintiff filed another interlocutory application seeking injunctive orders and the Master had made various directions on the same.

16. On 27/01/2023, the 1st Defendant filed Summons for Further and Better Particulars and to Strike Out certain portions of the Amended Statement of Claim for irregularity pursuant to Order 18 Rule 11 (3) and Order 2 Rule 2 of the High Court Rules.

17. This Summons was first called before this Court on 11/05/2023 and the Court made orders for the Plaintiff to file and serve an Affidavit in Response by 20/05/2023 and for the Defendant to file an Affidavit in Reply. The Court further made an Unless Order against any party that would default the orders to pay a cost of $ 1000.00 to the other party.

18. However, when this matter was next mentioned before this Court on 06/07/2023, it was revealed that the Plaintiff has failed to comply with the orders made on 11/05/2023 and the Court whilst allowing further time to the Plaintiff to file an Affidavit in Response, imposed a cost of $ 1000.00 to be paid to the 1st Defendant within 07 days pursuant to the Unless Order made on 11/05/2023. Moreover, the Court on this day made another Unless Order to the effect that if the order on this day is defaulted then the defaulting party shall pay a cost of $ 2000.00 to the other party.

19. When the matter was mentioned on the next date, the Plaintiff had duly filed the Affidavit in Response and its Written Submissions on the 1st Defendant's Summons for Further and Better Particulars and Striking Out portions of the Statement of Claim.

20. Upon this Summons being fixed for Hearing, the parties moved to file further written submissions and for the Court to make its Ruling on written submissions. Accordingly, the Ruling in respect of this Summons was delivered by this Court on 01/08/2024.

21. Various orders were made in the said ruling regarding the Summons by the 1st Defendant as well as on the substantive matter, considering the lengthy delay in this proceeding.

22. I shall reproduce the orders that were made on 01/08/2024 by this Court in the above ruling, for clarity.

> 36. *Consequently, the Court makes the following orders:*
>
> 1. (a) *Summons dated 27/01/2023 as filed by the 1st Defendant is hereby partially allowed subject to the following orders of the Court,*
>
> (b) *Plaintiff shall provide within 07 days from the date of this Ruling (That is by 12/08/2024) all particulars as requested by the Defendant under Order. 01 of the Defendant's summons dated 27/01/2023.*

(c) *1st Defendants' application to have paragraphs 15 to 18 of the Amended Statement of Claim filed on the 30/11/2022 to be struck out is refused and dismissed.*

(d) *Plaintiff's Amended Statement of Claim as filed on the 30/11/2022 shall wholly stand as a regular pleading and as amended with the leave of the Court.*

(e) *Plaintiff shall pay a cost of $ 3000.00 to the Defendant as summarily assessed by the Court, as costs of these proceedings,*

2. *Considering the delay in these proceedings and the fact that the Defendant is yet to file its Statement of Defence to the Amended Statement of Claim, the Court directs the Defendants to file and serve its Amended Statement of Defence within 14 days from the service of the particulars by the Plaintiff as per Order no. 1 (b) above (That is on or by 26/08/2024).*

3. *Plaintiff shall, 07 days after, file and serve its Reply to the Amended Statement of Defence (That is by 04/09/2024).*

4. *Both parties shall be at liberty to file and serve a supplementary AVLD (if the need be) 07 days after (That is by 13/09/2024).*

5. *Discovery and Inspection of documents shall be concluded 07 days after (That is by 24/09/2024).*

6. *Plaintiff shall convene the PTC and file and serve PTC minutes 14 days after (That is by 08/10/2024).*

7. *Plaintiff shall thereupon file and serve the Order 34 Summons and the Copy Pleadings 07 days after (That is by 17/10/2024).*

8. *In failure to comply with any of the above orders from order No. 1 (b) and (e) and from No. 2 to 7, the pleadings of the defaulting party shall be struck out subject to a cost of $ 5000.00, as summarily assessed by the Court, to be paid by the defaulting party to the other party."*

23. I shall now move to consider the relevant legal principles relating to the nature of this application.

24. Pursuant to the Summons filed on 20/09/2024, the Plaintiff is moving for an order ***"that leave be granted to the Plaintiff for extension of time to serve Further and Better Particulars as per paragraph 14 of Statement of Claim"***. It is surprising to see, however, that there is no application for the 'Unless Order' made on 01/08/2024 to be extended and the Affidavit in Support fails to mention anything about the 'Unless Order' that was made on 01/08/2024.

25. I shall first consider the law relevant to an application for extension of time and then proceed to consider the consequence of the 'unless order'.

26. The Summons has been made pursuant to Order 3 Rule 4 of the High Court Rules which governs the applications for leave to extend time to file pleadings, etc. This Rule reads as follows.

> *Extension, etc., of time (O.3, r.4)*
>
> *4.-(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.*
>
> *(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.*
>
> *(3) The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose. Provided that wherever the period for filing any pleading or other document required to be filed by these rules or by the Court is extended whether by order of the Court or by consent a late filing fee in respect of each extension shall be paid in the amount set out in appendix II by the Party filing the pleading or other document unless for good cause the Court orders that some or all of the same be waived.*

27. When dealing with an application for extension of time pursuant to Order 3 Rule 4, the law is well settled. Pursuant to the relevant case authorities in this regard, the criteria in considering an application for extension of time pursuant to this Rule needs evaluation of the following factors,

i) length of delay
ii) reason for delay
iii) whether a party has a claim or defence on merits
iv) whether the respondent will be prejudiced.

(See ***Vanualevu Hardware (Fiji) Limited v Labasa Town Council*** *[2016] HBC 29/12B 10 February 2016 at [3.32]* where the Fiji Courts applied the factors identified in ***Skinner v Commonwealth of Australia*** *[2012] FCA 1194* (31 October 2012)

28. The Plaintiff has referred to the High Court ruling in ***Kunavula v Khan****; HBC208.2011 (20 February 2024),* where the Court had expanded upon the factors to be considered as set down in ***Vanualevu Hardware (Fiji) Limited v Labasa Town Council*** (Supra). At paragraph 29 of this ruling, it is stated,

"Though not exhaustive in the exercise of discretion under Order 3 rule 4 of High Court Rules 1988, the following may be considered, and their cumulative effect is taken and they are;

a. *The interests of justice and specially the failure to exercise the power of extension and consequences. E.g. If the failure to enlarge time would result denial of access to a party.*
b. *Whether the application for extension has been made promptly.*
c. *Whether the failure to comply was intentional, for e.g. non-compliance of unless order or after an extension of time delaying taking further steps.*
d. *Whether there is a good explanation for the failure.*
e. *The conduct of the party seeking extension prior to the said application. The extent to which the party in default has complied with rules, court orders or any unless orders were made prior or in this instance.*
f. *whether the failure was caused by the party or his legal representatives. E.g. mistake of law or fact*
g. *Effect of extension have on the trial, if the action is still pending before the court.,*
h. *The effect which the failure as opposed to granting extension, on all the parties including interest of public if any.*
i. *If the extension will result in an appeal or leave to appeal the merits or the prospects of such application.*
j. *The effect of extension on case management and right of a party for determination of a civil action without delay.*
k. *Whether the defect is curable, and if so the prejudice to other party."*

29. I have further considered the Fiji Supreme Court decision in ***Extreme Business Solution Fiji Limited v Formscaff Fiji Limited****; CBV 0009 of 2018 (26 April 2019)* where in the majority Judgment of the Court it was held,

"[65] I accept that there was in this case a failure to comply with a court order as to time but it is to be noted that the discretion to extend time, conferred by order 3 rule 4, contemplates that such breaches are not of themselves necessarily fatal, although one might observe that the position would be different in the case of an "unless" order[6]. Nonetheless, what this all amounts to in this particular case is the refusal to extend time for service of a notice of appeal where service was a mere three days out of time, where the notice of appeal was filed in the time stipulated, where the judge had held that, prima facie, the prospective appeal had merit and where it is impossible to discern that Formscaff could have been in the least prejudiced by an extension. To refuse in these circumstances a three-day extension of time seems to me to permit minor breach to trump merit and that must, I respectfully suggest, be inimical to the objective of the Rules.

[66] The guiding principle is this:

"The object of the rule is to give the court a discretion to extend time with a view to avoidance of injustice to the parties. 'When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not to be listened to and any injury caused by delay may be compensated for by the payment of costs.'"[7]

[67] The principles are more fully canvassed in Finnegan v Parkside Health Authority [[1997] EWCA Civ 2774; 1998] 1 All E R 595 in its reference to a number of other authorities and it is a judgment which merits study. The theme emerges that whilst the rules are devised to promote expedition and are requirements to be met, procedural default should not stand in the way of judgment on the merits unless the default causes prejudice which cannot be compensated by an award of costs. That said, an eye must be trained on the particular circumstances so as, for example, not to allow a wealthy plaintiff to flout the rules knowing that he has a deep pocket to meet such costs orders as might be made. "A rigid mechanistic approach is inappropriate."[8] *No doubt the length of the delay will be a relevant factor but generally the question is what the overall justice of the case requires.*[9]

[6] An unless order is an order which provides that unless an act is done within a specified time, a certain unwelcome consequence will follow e. g. the defence will be struck out. They are not intended to be used regularly or as a matter of course but only as a last resort where there has been a history of a failure to observe orders or directions or rules and the line must finally be drawn or where otherwise the other party will be materially prejudiced by a (further) failure by the errant party to observe a direction or rule and where a costs order is not appropriate to meet that prejudice. See the Supreme Court Practice 1999 in the commentary at pp 762-763 in relation to Order 42 rule 2 of the Rules then applicable in England and Wales.

[7] Supreme Court Practice 1999 p 18 citing Bramwell LJ in Atwood v Chichester [1878] UKLawRpKQB 4; (1878) 3 QBD 722 at 723 in relation to Order 3 rule 5 which is mirrored in its relevant part by the High Court Rules, Order 3 rule 4.

[8] Costellow v Somerset CC [1993] 1 All ER 256 at 263-264

[9] Ibid cited in Finnegan at 599 c"

30. In the case of ***Seru Taralailai & Tevita Seniviavia Volanacagi Taralailai*** *[2020] Civil Action No. HBC 89 of 2017 (Judgment) 24 July 2020,* it was held that:

"Extension of time in terms of Order 3 Rule 4 (1) of the High Court Rules 1988 needs careful exercise of discretionary power of the court, that can eliminate injustice, but if exercised wrongly can deny justice and or access to justice" and later on ***"The discretion of the court should not be in favour of refusal of extension of time when***

there are merits…prolonging the matter may serve justice than quick disposal of that without consideration of merits".

31. In considering the merits of the claim, it is to be noted that this Court in the ruling made on 01/08/2024, found that there is a real controversy between the parties that needs to be resolved at a trial (See paragraph 28 of the ruling dated 01/08/2024). However, without the particulars that had been ordered to be provided to the Defendants as per that ruling it is pertinent to note that this claim could not proceed to trial. As such the Court had ordered that such particulars be submitted to the Defendants and considering the lengthy delay in the proceedings have ordered strict timeline for doing so. Moreover, to ensure that the Plaintiff complies with the orders, and especially considering the Plaintiff's past conduct in defying Court orders, the Court made an 'unless order' in the said ruling.

32. However, it is evident that even with an 'unless order' in place, the Plaintiff had defied the orders made on 01/08/2024 and failed to provide the particulars as ordered in the ruling of this Court made on 01/08/2024 to the Defendants. In this absence of the particulars, the Plaintiff's claim may lack clarity and may fail to make proper sense. Similarly, it shall be clearly prejudicial to the Defendants to be compelled to plead to such a claim without proper particulars.

33. In respect of the length and reasons for the delay, I do find that there is a considerable delay in the proceedings, which is by all standards, unconventional and unreasonable. In this particular instance, the Plaintiff was clearly ordered to provide the particulars to the Defendant by 12/08/2024. The solicitors for the Plaintiff admit that they failed to attempt service of the said particulars till 19/08/2024.

34. Furthermore, when considering the reasons for the delay, as submitted in the Affidavit in Support, an associate solicitor from the Plaintiff's firm of solicitors claim that the particulars were due to be served by 19/08/2024. What the Court cannot fathom is, whilst being a solicitor for the Plaintiff, this solicitor claims that she thought she had till 19/08/2024 to serve the particulars to the Defendants when the Court had penned in black and white that the particulars must be submitted by 12/08/2024. I am puzzled as to the fact that whether this solicitor is simply trying her luck to misguide the Court or whether she is unable to read what is penned in black and white. In either way, I find this reason to be frivolous and vexatious at the least.

35. Moreover, it is to be noted that this application for leave to extend time has been filed only on 20/09/2024 which is 40 days after the particulars were due to be served on the Defendants. There is simply no explanation for this delay.

36. Furthermore, it is admitted by the Plaintiff in their written submissions that the Plaintiff has failed to pay any of the costs due pursuant to the orders of this Court to the 1st Defendant. However, the Plaintiff fails to seek time to comply with the costs orders. As per the Defendant, the total costs payable by the Plaintiff are $ 6000.00. To this figure another $ 5000.00 costs shall be added due to the Plaintiff flouting unless order made on 01/08/2024. The total costs therefore will come to $ 11000.00. The Plaintiff's Affidavit in Support fails to mention anything regarding the payment of

costs. As such the Defendant is clearly prejudiced by the conduct of the Plaintiff as the Plaintiff keep on flouting Court orders and disregard all attempts made by the Court to compensate the Defendant over the prejudiced caused by the Plaintiff's conduct.

37. In considering the legal matrix relating to an 'Unless Order', I refer to the Fiji Supreme Court decision in ***Extreme Business Solution Fiji Limited v Formscaff Fiji Limited*** (Supra) where it was held (at foot note [6]) that,

> *"An unless order is an order which provides that unless an act is done within a specified time, a certain unwelcome consequence will follow e. g. the defence will be struck out. They are not intended to be used regularly or as a matter of course but only as a last resort where there has been a history of a failure to observe orders or directions or rules and the line must finally be drawn or where otherwise the other party will be materially prejudiced by a (further) failure by the errant party to observe a direction or rule and where a costs order is not appropriate to meet that prejudice. See the Supreme Court Practice 1999 in the commentary at pp 762-763 in relation to Order 42 rule 2 of the Rules then applicable in England and Wales."*

38. In the case of ***Kento (Fiji) Ltd v Naobeka Investment Ltd****; HBC027.2016 (21 February 2022)* it was held,

> *"67. What I extract from the above cases are as follow:*
> *(a) if proper particulars are not served within a certain time, the action shall stand dismissed or the defence struck out (Davey v Bentinck (1893).*
> *(b) initially, the view in England was that a Court does not have a discretion to modify the effects of an unless order which had not been complied with. In other words, an unless order was self-executing, so if there was to be non-compliance, the striking out took place automatically leaving no discretion in the Court (Reiss v Wolf [1952] 2 All ER 3.*
> *(c) however, at some point, some English Courts began to move away from the above position and to hold that when an unless order was not complied, the court still has a discretion to extend time for compliance (Samuel v Lingi Dress Ltd [1981] 1 QB 115)*
> *(d) the above case however, as Sir Nicolas Browne-Wilkinson VC noted in Re Jokai Tea Holdings Ltd [1993] 1 All ER 630 "did not give any direct guidance as to the approach to the exercise of the court's discretion except to say that such a discretion should be exercised 'cautiously'.*
> *(e) Sir Nicolas Browne-Wilkinson VC then attempted to lay some guideline in Re Jokai Tea Holdings Ltd when he held that the Court should only strike out a pleading for disobedience to an unless order for further and better particulars if the failure to comply was intentional and contumacious.*
> *(f) As Sir Nicholas Browne-Wilkinson V.V said at p. 637:*
> *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 the 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 docs not disentitle the litigant to rights which he would otherwise have enjoyed."

(g) There is also a view, albeit an obita view, that where an unless order was breached, the Court should consider whether to strike out the whole pleading or only the affected paragraph (as per Purchas LJ in the English Court of Appeal in Grand Metropolitan Nominee (No 2) Co Ltd v Evans [1992] 1 WLR 1191 at p.1195

(h) In Hytec Information Systems Ltd[1996] EWCA Civ 1099; , [1997] 1 WLR 1666, Lord Justice Ward said at pp.1674-1675:

1. *An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order;*
1. *Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed;*
2. *This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure;*
3. *It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred), flouts the order then he can expect no mercy;*
4. *A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order;*
5. *The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice;*
6. *The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weigh very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two;" (our emphasis)*

68. Finally, Mr. Apted refers to the English Court of Appeal decision in QPS Consultants Ltd v Kruger Tissue (Manufacturing) Ltd [1999] BWCA 6; [1999] BLR 366 and submitted as follows:

121. The authorities were surveyed and principles were restated by the English Court of Appeal in 1999 in QPS Consultants Ltd v Kruger Tissue (Manufacturing) Ltd [1999] BWCA 6; [1999] BLR 366 which is the last English authority on this point decided before England adopted the Code of Civil Procedure. The Court surveyed the earlier decisions on unless orders generally and in relation to orders for further and better particulars.

122. At p.371, Simon LJ –

"In short, the position is now very different to that obtaining at the time of Reiss v Woolf. If today an unless order is breached, the court, so far from being powerless,

has a wide general discretion to do whatever is required in the interests of justice. In these circumstances there can be no justification for construing unless orders for particulars as narrowly (and I would add, artificially) as in times past.

... It was not, I conclude, necessary for the judge to have found the particulars as a whole "illusory" and nor, therefore, was it necessary, as the plaintiffs supposed, to establish that "in relation to a substantial number of the requests no genuine attempt had been made to answer them". The order should properly have been found breached and the court's discretion thus engaged on a less exacting test than this."

123. Simon Brown LJ further said at pp.371-372 –

"First, an order for further and better particulars (whether or not in Unless form) is not to be regarded as breached merely because one or more of the replies is insufficient. If the answers could reasonably have been thought complete and sufficient, then the correct view is that they require only expansion or elucidation for which a further order for particulars should be sought and made.

Second, although I would regard an unless order as breached whenever a reply is plainly incomplete or insufficient, I would not expect the court's strike out discretion to be invoked, let alone exercised, unless the further and better particulars considered as a whole can be regarded as falling significantly short of what was required. Whether this would be so would depend in part on the number and proportion of the inadequate replies, in part upon the quality of those replies (including whether their inadequacies were due to deliberate obstructiveness, incompetence or whatever), and in part upon their importance to the overall litigation. Satellite strike out litigation is not to be encouraged and it must be recognised that even to strike out part of a pleading (unless of course ... that would in any event be appropriate because, unparticularised, it is "vague and embarrassing"), is essentially penal."

124. Waller LJ said at pp.375-376 –

"It is clear that where an order for particulars is made it is in breach of that order to respond "not entitled" or to give an answer which suggests that the matter is already sufficiently pleaded or which does not deal in any way with the request ... It is also worth mentioning that if a pleading is defective for want of particularity, although it will not normally be struck out where that lack can be remedied, it may well be struck out if the failure to particularise is in blatant disregard of court orders ... The extent and quality of the breach must obviously be taken into account in considering as a matter of discretion whether and to what extent the sanction should be enforced...

... what the court is concerned to examine is whether there has been a genuine attempt to answer the request. That is so, because the court will not contemplate enforcing the sanction of strike out either of the particular allegation unparticularised or of the whole pleading, unless there has been a failure, or failures, to make genuine attempts to answer the request or requests."

39. In considering the conduct of the Plaintiff in this proceeding, specifically his conduct in flouting Court orders, this Court finds that the delay in serving the particulars as ordered by the Court in its ruling dated 01/08/2024 is, in fact intentional and contumelious.

40. The Defendant has clearly been unfairly prejudiced by this conduct of the Plaintiff. Furthermore, this conduct is a clear breach of the constitutional right guaranteed in Section 15 (3) of the Constitution of Fiji where a litigant is guaranteed a fair trial within a reasonable time.

41. In this case, however, since the inception of the cause on 16/05/2018 almost 07 years have passed just for the pre-trial steps. Still, there is no guarantee in this matter that the pre-trial steps could be finalized without further delay due to the unscrupulous conduct of the Plaintiff in this case.

42. In considering all the above facts and the legal matrix relevant to this current application, it is the considered view of the Court that it shall not be in the interest of justice to allow this application for leave for extension of time. With regard to all the facts and circumstances in this case, as discussed in the foregoing paragraphs in this ruling, it is my overall conclusion that a fair trial is no longer possible in this matter by any means.

43. Accordingly, the Court makes the following orders.

1. The Summons filed by the Plaintiff on 20/09/2024, for Extension of Time to Furnish Better and Further Particulars is hereby refused and struck out subject to the following orders,

    I. The Plaintiff shall pay a cost of $ 2000.00, as summarily assessed by the Court, to the 1st Defendant, as costs of this proceeding.

2. Pursuant to the 'unless order' made on 01/08/2024, the Plaintiff's Amended Writ of Summons and the Amended Statement of Claim is struck out and dismissed subject to the payment of costs of $ 5000.00 as summarily assessed by the Court Pursuant to the said unless order.

3. Total costs payable by the Plaintiff shall now be $ 13000.00 and these costs shall be paid in full by the Plaintiff to the 1st Defendant within 28 days from today.

HIGH COURT OF FIJI SUVA

L.K. Wickramasekara,
Acting Master of the High Court.

At Suva
27/03/2025