

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 226 of 2013

BETWEEN : **SAFARI LODGE (FIJI) LIMITED** a limited liability company
having its registered office at C/ G H Whiteside & Co, 211 Ratu
Sukuna Road, Suva.

Plaintiff

AND : **THE TIKI (FIJI) LIMITED** a limited liability company having
its registered office at Level 8 Dominion House, Thomson Street,
Suva.

First Defendant

AND : **MICHAEL HARVEY** Upper Mount Gravatt, P O Box 6196,
Queensland, Australia.

Second Defendant

AND : **ATTORNEY GENERAL OF FIJI** as representative of
MINISTRY OF LANDS AND MINERAL RESOURCES and
DEPARTMENT OF ENVIRONMENT

Third Defendant

Before : Acting Master U.L. Mohamed Azhar

Counsels : Mr. Diven Padarath for the Plaintiff
Ms. M. Moir for the 1st and 2nd Defendants
Ms. Faktoufan for the 3rd Defendant

Date of Ruling : 26th January 2018

RULING
(Under Order 24 rule 16)

01. This ruling relates to the summons filed by the 1st and 2nd defendant on 09.12.2016 pursuant to Order 24 rule 16 of the High Court Rules and the inherent jurisdiction of this court seeking dismissal of plaintiff's action together with the cost for non-compliance

with the court's order dated 22.06.2016. The 1st and 2nd defendants urged the following ground for the relief they sought in that summons;

- (a) *The Plaintiff has failed to comply with the terms of the Order made on 22nd June 2016 and sealed on 26 October 2016 by failing and or refusing to discover and or disclose the following documents to the First and Second Defendants:*
- (1) *Financial statements (including Profit and Loss Statement and Balance Sheet) for the years 2000, 2002, 2006, 2008 and 2015;*
 - (2) *Final signed financial statement (including Profit and Loss Statement and Balance Sheet) for the year 2012;*
 - (3) *Books of account from which balance sheets were made up from year 2000 to year 2015;*
 - (4) *Company income tax returns for 2000, 2002, 2006, 2008, 2012 and 2015;*
 - (5) *VAT tax returns from year 2000 to year 2015;*
 - (6) *Business, guests/tourist booking sheets and reservations and any cancellations for Plaintiff's water sports activities, including windsurfing, from 2000 to 2015 received via email or on internet and or stored at locations other than Plaintiff's Ellington Wharf office destroyed by TC Winston; and*
 - (7) *Copies of complaints made by guests of the Plaintiff via email or on internet and or stored at locations other than Plaintiff's Ellington Wharf office destroyed by TC Winston.*

02. The summons is supported by an affidavit sworn by 2nd defendant who is the director of the 1st defendant company. Though the plaintiff company was granted time to file the affidavit in opposition of this summons, it did not file such an affidavit. However, the counsel appeared for the plaintiff company wanted to argue the question of law on this issue. At the hearing both counsels made oral submissions and filed their respective written submissions.

03. The facts of this matter, albeit brief, are that, the plaintiff owns and operates the resort known as Safari Lodge Fiji Adventure Island. The 1st and 2nd defendants are the owners of property known as The Bungalows Fiji, built on the neighbouring land to the plaintiff's resort. It was alleged that, the 1st and 2nd defendants commenced the

excavation works on 14th of June 2007 on the Lomanisue Beach and caused pollution to the beach which resulted the loss and damages to the plaintiff. The plaintiff further alleged that 3rd defendant failed to take steps to remove the pollution. The plaintiff therefore, prayed for, inter alia, judgment in the sum of \$ 2,554,280.00 and damages together with an order on the defendants to restore the sea and beachfront and to remove the pollution and nuisance. All the defendants filed their defence and after several applications including an application for Mareva Injunction, the court made orders on the summons for directions and directed the parties to file their affidavits verifying list of documents.

04. The plaintiff then convened the Pre-Trial Conference for the possibility of obtaining admission of facts, inspection, examination and discovery of documents etc. The 1st and 2nd defendant, being unhappy with delay of the plaintiff in discovery, took the summons, issued by the registry on 30.06.2015, pursuant to Order 24 rule 3 and 7 for specific discovery of certain documents. The plaintiff objected the said summons and filed the affidavit in opposition. The previous Master, after hearing counsels and reading the summons, made the following orders on 22.06 2016;

(a) All financial statements [including Profit and Loss Statement and Balance Sheet] of the Plaintiff since the year 2000 to present date (showing separate figures for each activity i.e. windsurfing / kite surfing / diving / sailing / kayaking / snorkeling / fishing adventures / stand up paddling etc.), audited by an independent auditor, or if no audited financial statements are available, all unaudited financial statements of the Plaintiff since the year 2000 to present date;

(b) All tax returns, showing income received and VAT paid, from the beginning of Safari Lodge (Fiji) Limited in 2000 to present;

(c) All the business, guest/tourist booking sheets and reservations and or any cancellation thereof for the Plaintiff's water sports activities, including windsurfing from 2000 to present (showing separate figures for each activity i.e. windsurfing / kite surfing / diving / sailing / kayaking / snorkeling / fishing adventures / stand up paddling etc.);

(d) Copy of all complaints made by guests of Safari Lodge (Fiji) Limited.

05. The 1st and 2nd defendants claimed that, they complied with the order of the court and filed their undertaking with the court, but the plaintiff failed to comply with the order despite the several adjournments granted for the same. It was further alleged by the 1st

and 2nd defendants that, the supplementary affidavit filed by plaintiff contained only 10 items, being 6 income tax returns and 4 financial statements. This alleged non-compliance of the plaintiff prompted the 1st and 2nd defendants to file the instant summons for dismissal, under Order 24 rule 16.

06. The discovery is one of the pre-trial steps in a lawsuit, where the parties, subject to the relevant rules of the court, investigate the facts of a particular case, by obtaining the evidence from the other parties. The modes of discovery will be requests for answers to interrogatories, requests for production of documents and things, requests for admissions, and depositions. The ultimate purpose of the discovery is to enable the courts, by providing all necessary information, to do justice between the parties and not to put the parties in ambush. Sir John Donaldson MR explained the justification for the discovery procedure in *Davies v Eli Lilly & Co. and Others* [1987] 1 WLR 428, and said at pages 431 and 432 that;

“Let me emphasize that the plaintiffs’ right to discovery of all relevant documents, saving all just exceptions, is not in issue. This right is peculiar to the common law jurisdiction. 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. But that said, there have to be safeguards. The party who is required to place all or most of his cards face up on the table is entitled to say, “Some of these cards are highly confidential. You may see them for the purpose of this litigation but, unless their contents are disclosed to all the world as part of the evidence given in open court, their contents must be for no other purpose.” This is only fair, because, as has been well said, discovery of documents involves a serious invasion of privacy which can be justified only in so far as it is absolutely necessary for the achievement of justice between the parties”(emphasis added).

07. *Halsbury’s Laws of England*, Fourth Edition, Volume 13, paragraph 1 states that;

“The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their respective cases, and thus to provide the basis for the fair disposal of the proceedings before or at the

trial. Each party is thereby enabled to use before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to documentary evidence and to reduce the costs of the litigation.” (Emphasis added).

08. However, the discovery is not without limit. First of all, allowing the discovery is the discretion of the court and the courts must, first, be satisfied that, (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party. *The Supreme Court Practice* (1999) at p 471 24/7/2 state the procedure for discovery as follows:

“Under the present rule an application may be made for an affidavit as to specific document or classes of documents. This must be supported by an affidavit stating that in the belief of the deponent the order party has or has had certain specific documents which relate to a matter in question. But this is not sufficient unless a prima facie case is made out for (a) possession, custody or power, and (b) relevance of the specified documents (Astra National Productions Ltd v. Neo Art Productions Ltd [1928] W.N.218). This case may be based merely on the probability arising from the surrounding circumstances or in part on specific facts deposed to. See too Berkeley Administration v. McChelland [1990] F.S.R. 381 where at p.382 the Court restated the principles as follows: (1) There is no jurisdiction to make an order under RSC, O.24,r.7, for the production of documents unless (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party.(2) When it is established that those three prerequisites for jurisdiction do exist, the court has a discretion whether or not to order disclosure. (3) The order must identify with precision the document or documents or categories of document which are required to be disclosed....” (Emphasis added).

09. The Order 24 of the High Court Rules provides for the discovery and inspection of documents. All seventeen rules under this Order, basically deal with (a) mutual discover, (b) discovery by order of the court and (c) the failure to comply with the requirement for discovery. The discovery of documents, on one hand, involves a serious invasion of

privacy of the parties. On the other hand, it may be absolutely necessary for the achievement of justice between the parties. On reading these rules it reveals that, the vast discretion is given to the court when ordering for discovery in order to strike balance between the conflicting interests of the parties. This is the special feature of these rules under Order 25. There are several local and foreign cases which deal with the issue of discovery. However, it is not necessary to deal all or some of those cases in this ruling, because, the instant summons was filed for the failure of the plaintiff to comply with the requirement for discovery as ordered by the previous Master in his ruling dated 22.06.2016. The emphasis is made on the issue of failure only. The relevant Order of the High Court is the Order 24 rule 16 which reads:

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

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

(a)

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

10. Whilst the 1st and 2nd defendants seeking the court to exercise its discretion to dismiss the action filed by the plaintiff, the latter seeks to dismiss the instant summons filed by the former. The supporting affidavit filed by the second defendant, who is the director of the first defendant company, traces the default of the plaintiff in providing proper documents back to year 2014. It is stated that, the then Master ordered the parties on 4th November 2014 to attend to inspection of documents within 14 days, however, the plaintiff did not provide its bundle of documents to the 1st and 2nd defendants till 10th of February 2015- approximately 4 months after the request. The said affidavit further states that, the 1st and 2nd defendant requested further discovery on 27th of March 2015, however the plaintiff did not provide the same. This led the 1st and 2nd defendants to file a formal application on 25th June 2015. The plaintiff objected this summons for specific discovery and filed the affidavit in opposition. The previous Master, after hearing both counsels and reading the submissions filed by them, delivered the ruling on 22.06.2016 ordering the plaintiff to provide certain documents as mentioned in paragraph 04 of this ruling and also ordered

the 1st and 2nd defendants to give a written undertaking to the court that they will not use or permit others to use those documents for the purpose other than the purpose of defending this action. As ordered by the court, the 1st and 2nd defendants gave written undertaking to the court. However, the plaintiff failed to comply with the orders made by the court in relation to the specific discovery of the documents that were clearly identified by the court.

11. The affidavit of the second defendant chronologically states the requests made to the plaintiff after the ruling dated 22.06.2016 and the continuous failure of the plaintiff to provide the same. There were several documents as per the ruling and I do not see it necessary to narrate all the documents. Most importantly, the financial statements and income tax returns were not disclosed to the defendants, though the court specifically mentioned those documents in its ruling. The plaintiff sought substantial amount of damages for loss of income, which is claimed to have been caused by the alleged pollution created by of the 1st and 2nd defendants. Those documents are relevant and necessary to determine the issues between the parties.
12. Despite the number of allegations contained in the affidavit filed by the 2nd defendant, the plaintiff, as stated above, did not bother to file the affidavit in opposition, though enough time was given for the same. As a result, all the averments in that affidavit become unchallenged and incontrovertible. At the hearing, the counsel for the plaintiff argued that, the current application was made under Order 24 rule 16, however, the defendant failed to make any application under Order 24 rule 11. As I stated above, the rules under Order 24 include three parts in relation to discovery and inspection of documents. The First Part deals with the mutual discovery, the Second Parts deals with the discovery by order of the court and the Third Part provides for the sanction for failure to comply with the order of the court. Under the second part which deals with the discovery by order of the court, the court may make various orders, depending on the requirements, under the rules 3, 7, 11, 12, and 14.
13. The Order 24 rule 16, which imposes the sanction, starts with the following wording;

If any party who is required by any of the foregoing rules, or by any order made thereunder.....

This rule, in its plain and unambiguous meaning, applies to all above rules, under which the court may make order on either party to an action to discover and to allow the inspection of any document, that the court considers relevant to the administration of justice between the parties. If any party fails to comply with any of the orders made under the forgoing rules, the other party will be fully entitled to revoke the jurisdiction of the

court under this rule 16. Therefore, I am forfeited in my opinion that, the 1st and 2nd defendants in this case are fully entitled to file the summons under rule 16 and the argument urged by the counsel for the plaintiff is misconceived and ought to be rejected.

14. The reason stated by the counsel for the plaintiff, for not complying the above order of the court, was that those documents were destroyed by the Tropical Cyclone Winston. As mentioned by the counsel for the defendants, the court can take judicial of notice that, the said Cyclone made landfall on 20.02.2016 and thrashed the entire country causing comparatively more damages in the west. Though the original summons for discovery was filed on 25.06.2015, it was heard on 18.04.2016 and the ruling was made on 22.06.2016. However, the plaintiff never informed the court that, the documents sought by the defendants were destroyed by the said cyclone. If those documents were actually destroyed by the cyclone, the plaintiff should have informed the court at the time of hearing, which was taken up two months after said cyclone. However, the plaintiff never mentioned that to the court, but took up the defence that those documents were confidential and not relevant to this proceeding. The paragraphs 6 to 10 of the affidavit filed by the plaintiff, for the initial discovery application by the defendants, are self-explanatory to the defence taken by the plaintiff.
15. After hearing counsels for parties and reading the said summons, the previous Master was satisfied that (a) there was sufficient evidence that the documents existed which the plaintiff had not disclosed; (b) the document or documents related to matters in issue in this action; (c) there was sufficient evidence that the documents were in the possession, custody or power of the plaintiff. The said ruling has clearly stated that, the existence of those documents was never challenged by the plaintiff in its affidavit evidence. Therefore, I am unable to accept the plaintiff's argument, that those documents were destroyed by the cyclone. The reason is not only unconvincing, but also misleading. The plaintiff advanced the reasons in a very irresponsible way, which ought to be denounced by the court.
16. The counsel for the plaintiff further argued that, the documents so far disclosed by the plaintiff, were sufficient for the purpose of discovery in this case. At this point, I wish to emphasis two important points. Firstly and more importantly, the order of any court must be obeyed by the respective parties, unless and until the same is varied or set aside by the court superior to the court which made the said order, even though the said order was wrong in the opinion of a party or its lawyer. The parties or their solicitors should not be allowed to decide whether it was right or wrong and thereby avoid compliance of it. Romer LJ in Hadkinson v Hadkinson [1952] 2 All ER 567 at page 569 held that:

*It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. "A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it. ... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed." (Per Lord Cottenham L.C. in *Chuck v. Cremer*. Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise.*

17. Secondly, when the previous Master made his ruling, he was satisfied that, those documents mentioned in his ruling were relevant and necessary to do justice between the parties to this action. The court was mindful of Order 24 rule 13 when it ordered the plaintiff to discover those documents identified its ruling. Thus the plaintiff cannot be allowed, now, to say that those documents, that were disclosed hitherto, were sufficient. If the plaintiff and its counsel were of the view that, those documents were sufficient and more discoveries was not necessary, they should have applied under Order 24 rule 17 to have the order of previous Master varied or revoked showing sufficient cause to the court. The said Order 24 rule 17 operates as an exception to the rule that rehearing of same issue by the same court should be avoided (*Trade Air Engineering (West) Ltd v Taga* [2007] FJCA 9; *ABU0062J.2006* (9 March 2007) and *In re Dayals (Fiji) Artesian Waters Ltd* [2011] FJHC 112; *HBE126.2008* (4 February 2011)). The rationale of the incorporating this rule 17 is that, there can be situations where the non-compliance may be unavoidable, and in those circumstances, the litigants must act quickly to rectify the situation and if necessary apply to the court for appropriate relief. However, the plaintiff did not take any step either under Order 24 rule 17 or to appeal the ruling of previous Master. In this context, the argument of the plaintiff and its counsel, on the sufficiency of discovery so far done, cannot be accepted.

18. The counsel for the plaintiff further submitted that, the failure of the plaintiff to comply with the order of the court did not render the trial unfair. It is true that, the fair trial is heart of the rule of law and cornerstone of the public faith in the justice system. The norm of fair trial has been the yardstick in both civil and criminal suits in making the decisions which might affect one party to the actions. This had, therefore, influenced the courts to set a test for an application to strike out under Order 24 Rule 16. This was affirmed by Mr Justice Millet in Logicrose Ltd. -v- Southend United Football Club (*The Times March 5 1988*). However, the Court of Appeal in Landauer Ltd. -v- Comins & Co. (a Firm) (*The Times August 7, 1991*), was of the view that, the striking out of action may be justified in cases of contumacious conduct, such as the deliberate suppression of documents, on the analogy of striking out for want of prosecution, even if a fair trial were still possible. It was held in that case that;

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

19. The plaintiff has been in complete disregard to the peremptory orders that, this court made from time to time, in the instant case in relation to discovery. The affidavit of the 2nd defendant, which is uncontroverted by the plaintiff, is evident that the plaintiff had deliberately suppressed those documents identified by the court for discovery. This amounts to a contumacious conduct, which justifies the striking out of this action. Sir Nicholas Browne Wilkinson VC said in Christy Hunt -v- Davis and Another (*The Times Law Reports January 24, 1990*) that;

“A totally relaxed approach to complying with court orders must not go unmarked by the disapproval of the court”.

20. As stated above, the continuous conducts of the plaintiff, since date the court ordered for affidavit verifying list of documents and the specific order made in relation to discovery, have been very far from satisfactory. The very casual attitude of the plaintiff to the orders of the court should be denounced and deprecated without any reservation. It should be placed on record that, the courts are entitled to expect strict compliance with the all orders and non-compliance with the orders should be expected and shall usually have a consequence. For these reasons, the action of the plaintiff should be dismissed with fairly reasonable costs to the 1st and 2nd defendants.

21. In result, the final orders are;

- a. The action of the plaintiff is hereby dismissed, and
- b. The plaintiff should pay summarily assessed costs of \$ 1,500 to the 1st and 2nd defendants within a month from today.




U.L. Mohamed Azhar
Acting Master