NOEL BONAGI-v- SOLGREEN ENTERPRISE LIMITED

HIGH COURT OF SOLOMON ISLANDS
(F. O. KABUI, J.)

Civil Case No. 33 of 2002

Date of Hearing: 3rd July 2002
Date of Ruling: 4th July 2002

Mr C. Ashley for the Plaintiff
Mr C. Hapa for the Defendant

RULING

(F.O. Kabui, J.) This is an application by Summons filed by the Plaintiff on 21st June 2002 for the following orders-

1. **That judgment be entered against the Defendant for failing to comply with the order of the Court on 15th May 2002.**
2. **Costs be made against the Defendant.**

The Background

The Plaintiff by Writ of Summons and Statement of Claim filed on 8th February 2002, claims against the Defendant SBD33, 600.00 unpaid salary and USD6,000.00 for breach of contract. He also claims accrued NPF contributions and benefits plus interests and costs. The Defendant duly entered a Memorandum of Appearance on 6th March 2002. It filed its defence on 20th March 2002. The Plaintiff filed on 25th March 2002 a request for further and better particulars of the defence. By Summons filed on 11th April 2002, the Plaintiff applied for two orders. The first being that unless the Defendant within 7 days file and serve particulars as requested, its defence would be struck out and judgment entered for the Plaintiff. The second order was for costs and any further order as the Court deemed fit. The application was heard by the Registrar on 15th May 2002. The Registrar made two orders. The first order was that the Defendant was to file and deliver within 14 days the requested further and better particulars. The second order was that failing to comply with the first order would result in the striking out of the defence and the entering of judgment for the Plaintiff. The Defendant filed the further and better particulars on 31st May 2002. Further particulars were subsequently filed on 28th June 2002.

The Law

The starting point is Order 21, rules 7, 8, 9 and 10 of the High Court (Civil Procedure) Rules 1964, "**the High Court Rules**". These rules provide for the supplying of further and better particulars in the course of pleading. This is the basis of the Court's power to make orders for further and better particulars to the requesting party. These rules are however silent on how far and in what manner these rules can be applied by the Court. That is to say, what kind of orders can be made by the Court in the exercise of its powers under these rules. To get a glimpse of what the Courts have done, one must turn to the case law. But first to what Bernard C. Cairns says in his book, **Australian Civil Procedure**, 1981 at pages 120-121. On the question of orders for particulars, the author says, ..."**Usually an order for particulars specifies what particulars are to be supplied. However, the court does not order particulars which it is satisfied that a party cannot give. Neither does it compel particulars to be given where it would be harsh and oppressive to do so, such as where they could be given only after great labour, expense or searching. If it is appropriate, an order for particulars may reserve leave for them to be supplemented after discovery; or the order may require the delivery of the best particulars, the party can give, with leave to amend them before the trial**"...

..."**Penalty clauses are often included in orders for particulars. Typically the provision is that if they are not delivered within a specified time, a penal consequence follows. Where the plaintiff has been ordered to supply particulars, the order may be that the action be struck out in default of compliance. The corresponding penalty for a defendant is for the defence be struck out or that the plaintiff be at liberty to enter judgment. These orders are usually made in a self-operating form. Once the default occurs, the penalty follows as a matter of course. Care needs to be taken to express the conditions of the order, so that no difficulty is experienced in interpreting it**"... Now to the case law. In **Davey v. Bentinck** [1893] 1 Q. B. 185, the Plaintiff's claim was for damages for libel. An order for particulars was made by the master on the application of the Defendant. The Plaintiff did not comply. A further order of the same nature was again made directing the Plaintiff to deliver the particulars within 10 days. Yet another order was made that the action would be dismissed with costs unless the Plaintiff delivered his particulars within a week. The Plaintiff finally delivered the particulars but such particulars were deemed insufficient. The Defendant then took out a summons for further particulars. An order was then made for proper particulars and that unless they were delivered within 10 days, certain paragraphs of the statement of claim should be struck out. A second set of particulars were produced but again were deemed insufficient. The Defendant again took out a summons for certain orders one of which was to dismiss the action unless the Plaintiff within 7 days delivered proper particulars as previously ordered. The summons was heard and the action was dismissed. An appeal to a judge was dismissed. On appeal to the Divisional Court, it was ordered that the action be dismissed unless the Plaintiff would deliver the particulars within 15 days. The Plaintiff did not deliver the particulars but gave notice that an appeal was to be lodged against the decisions of the master, the judge and the Divisional Court. The appeal was dismissed by the Court of Appeal. At page 188,

Lord Esher, M.R. said, ..."**The other ground on which the order may be supported is that Order XIX., rr. 6, 7, give to the Court power in certain cases to order particulars and to impose terms, and that this includes the power to add as a consequence that if the order is not complied with in a certain time the action shall be dismissed"...** With this, Lopes, L. J. agreed. In **Reiss v. Woolf** [1952] 2 A. E. R. 3, the master made an order that further and better particulars of a defence be delivered not later than 4 o'clock on 21st day from the date of the order in default of which paragraphs 2 and 3 of the defence would be struck out. The Defendant delivered particulars within time but were deemed to be insufficient. The Defendant was of the view that he would not give particulars of certain matters until after discovery. The Plaintiff then took out a summons to have the matter transferred to the short cause list because paragraphs 2 and 3 of the defence had automatically been struck out. The application was refused. The Plaintiff appealed. The appeal was dismissed. The issue before Devlin, J. was whether or not insufficient compliance was no compliance at all. Devlin, J. found that there had been no default on the part of the Defendant because the particulars had been delivered in time and the need for further particulars could be followed up with further summons. There were however remarks made which are relevant to this case. Devlin, J. called this sort of orders a time order. As regards the argument that a time order did require a summons for it to be struck it out, His Lordship said at page 6, ..."**The contention that the paragraphs are not struck out until the court, on a fresh summons, declares that they are is, in my judgment, unsound: see Whislter v Hancook (3). A dead man is dead with or without the death certificate, although, of course, a party who tries to conduct the funeral before the death is certified may find his efforts wasted and himself in a difficulty. It is always wise and convenient where there is doubt to have the matter determined. In this type of order I think it could be done in case of controversy at the instance of either side under the liberty to apply. But I cannot hold that it is compulsory. It is usual, for example, to take out a summons to set aside a writ which is a nullity, but the failure to do so does not bring such a writ to life"....** In this passage, His Lordship cited the position with time orders that resulted in the dismissal of the action under Order 33, rule 21 of the High Court Rules as being the same. In **Whistler v. Hancock** [1877-78] 3 Q. B. D. 83, the Defendant obtained an order that unless the Plaintiff delivered the statement of claim within a week, the action should be at an end. Instead of complying with the order, the Plaintiff took other steps and in so doing failed to comply with the time order. The Court held that the time order had taken effect and the action was gone. At page 84, Cockburn, C.J. said, ..."**It cannot be contended that the taking out of a summons to set aside the appearance in the meantime could keep the action alive after the period when by the operation of the master's order it was defunct"...** Another case was **Wallis v. Hepburn** with the same citation above where an order was made in Chambers that unless the Plaintiff delivered a statement of claim within 10 days, the action would be dismissed. The time order having expired, it was extended. The Defendant appealed against the extension order. The appeal was allowed on the ground that an order that was dead could not be extended. A similar situation

arose in **King v. Davenport** [1878-79] 4 Q.B.D. 402. However, there is a warning. Care must be exercised to ensure that further pleading is not barred. (See **Turner v. The Bulletin Newspaper CO. Pty. Ltd.** (1974) 131 C.L. R. 69 and the paragraph quoted in **Reiss v. Woolf** cited above.

This Case

Clearly, the Plaintiff has come to the Court to determine the effect of the order made by the Registrar on 15th May 2002 in his favour. This is one way of putting the Plaintiff's case. The other way which I think correctly reflects the intention of the Plaintiff is that the Plaintiff feels it is necessary to obtain a Court order to fortify the intention of the time order made by the Registrar. He feels it is only a matter of formality because the time order speaks for itself. Before I can say anymore, I should first look at the content of the request for further and better particulars of the defence. In its defence filed on 20th March 2002, the Defendant, in paragraph 3, denied paragraph 2 of the Statement of Claim except to admit that the Defendant was registered in Solomon Islands and involved in fishing. That is, the Defendant denied being the employer of the Plaintiff. If indeed this was the case, the Defendant will produce evidence to prove this point. The burden of proof lies on the Plaintiff to prove his case on the balance of probability. The Plaintiff cannot probe into the Defendant's case at this stage to establish his case. Similarly, the Defendant, in paragraph 4, denied paragraph 3 in the Statement of Claim. That is, the Defendant denied employing the Plaintiff all of the time alleged by the Plaintiff. Again, the Plaintiff bears the burden of proof. It is for the Plaintiff to prove that the Defendant had employed him all of the time. In paragraph 5, the Defendant admitted that the Plaintiff was employed by another Company between late December 1995 to early June 2001 but denied the rest of paragraph 4. Similarly, in paragraph 6, the Defendant admitted that the Plaintiff had been employed as a deck- hand by that other Company but denied the rest of that paragraph. Again, it is for the Plaintiff to prove that the Defendant did employ him and not that other Company as alleged by the Defendant in its defence. In paragraph 7, the Defendant admitted that the Plaintiff did renew his contract with that other Company for 2 years commencing from 8th January 2001 to 7th January 2003 but otherwise it denied paragraph 7. The Defendant had consistently denied that it had employed the Plaintiff. Counsel for the Defendant, Mr. Hapa, did tell me that it was proving difficult to get instructions from overseas on the points raised in the Plaintiff's request for further and better particulars. He said he had tried to impress this fact upon the Registrar at the hearing on 15th May 2002. I think the particulars requested by the Plaintiff are by their nature oppressive. (See **Roderick Terry Kera v. Attorney-General, Civil Case No.15 of 1998**). Unfortunately in this case, the Defendant did not apply to set aside the Registrar's order or appeal against it. If I grant the orders sought by the Plaintiff, there will be injustice to the Defendant because all along the Defendant has been saying that the employer of the Plaintiff was Yung Huang Marine Co. Limited and not the Defendant. The terms of the Registrar's orders are however clear and emphatic in tone. Even if I do have a discretion I would not know what orders to make in this

sort of case where I feel the order that was made should not have been made in the first place. However, Counsel for the Defendant, Mr. Hapa, did say that in counting the period of 14 days, 20th May 2002 being a public holiday should not have been counted. I am not too sure about this remark because Order 64 of the High Court Rules seems to say that only in cases where the time limit is less than 6 days would Sunday, Christmas day and Good Friday be discounted. In this case, the 14 days time limit would have anyhow expired on 28th May 2002. In considering this point, I found that the order made by the Registrar on 15th May 2002 was perfected, signed and sealed on 21st May 2002. This was the date the order took effect and not 15th May 2002. (See **Liliau v. Trading Company (Solomons) Limited (No.2) [1983] S.I.L.R. 40), Samson Siamakna v. Pirivosoro & Others (Civil Case No. 253/1999) and (Francis Saemala v. Gordon Kiko Zinehite) (Civil Case No. 162/1999).** Clearly, the Defendant was within time when it filed the particulars on 31st May 2002 because the time limit would have expired on 3rd June 2002. The Plaintiff's application must therefore be dismissed with costs.

F.O. Kabui
Judge