KUMAGAI GUMI LIMITED –V- ATTORNEY GENERAL

High Court of Solomon Islands
(Palmer ACJ)

Civil Case No. 92 of 2002

Hearing: 22nd **July 2002**
Judgment: 26th **July 2002**

Motis Pacific Lawyers for the Plaintiff
S. Manetoali for the Defendant

Palmer ACJ: There are two applications for consideration of this court. The first application is a Notice of Motion filed 27th May 2002 by the Plaintiff for orders inter alia, for leave to enter judgment against the Defendant pursuant to the orders set out in its Statement of Claim filed 4th April 2002. The other application is an application by Amended Notice of Motion filed on 7th June 2002 by the Defendant for orders inter alia that the Writ and Statement of Claim of the Plaintiff be struck out for non compliance with Order 21 rule 4 of the High Court (Civil Procedure) Rules, 1964 ["the High Court Rules"]. In the alternative the Defendant be granted enlargement of time to file defence in this action.

The application to strike out

Defendant relies on Order 21 rules 4 and 29 of the High Court (Civil Procedure) Rules, 1964 ["the High Court Rules"] as the basis for the application to strike out. Rule 4 of Order 21 reads:

> *"Every pleading shall contain, and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers shall be expressed in figures and not in words. Where pleadings have been settled by an advocate they shall be signed by him; and if not so settled they shall be signed by the party if he sues or defends in person."*

Rule 29 reads:

> *"The court may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between advocate and client."*

Mr. Manetoali also relies on the case authority of *Philipps -v- Philipps (1878) 4 QBD 127, 133-134* and the text in *"Litigation Evidence & Procedure"* by Arosan Hunter, Wynberg 4th Edition 135-136.

Learned Counsel raises objection to the Statement of Claim filed on 4th April 2002 as follows:

- paragraph 4 merely lists documents, which the Plaintiff is relying on,
- paragraph 5, describes the clauses to be relied on,
- paragraph 6 is like an affidavit,
- paragraph 9 lists documents which form part of the supplementary agreement, and
- paragraph 10 refers to the clauses relied on in those documents.

Learned Counsel seeks to submit that the above paragraphs offend against Rule 4 of Order 21 in that it contains evidentiary material. He also says that he finds it difficult to plead to those paragraphs.

The Plaintiff's response

Plaintiff's response succinctly put in paragraph 4 of learned Counsel, Moti's written submission is three-fold. First, Order 69 rule 2 prohibits any application to strike out where fresh step has been taken. Mr. Moti submits, by filing unconditional appearance the Defendant effectively waived any irregularities. Secondly, Plaintiff contends that the detailed particulars furnished in its Statement of Claim did not offend against Order 21 rule 4 in that the material furnished were not evidence of non-material facts. Thirdly, the Defendant failed to identify particulars in the Statement of Claim which it alleged were *"scandalous"* or "tend to prejudice, embarrass or delay the fair trial of the action".

Findings of the Court

Rule 4 of Order 21 sets out how pleadings ought to be constructed. In summary, they must set out the facts and not law, the material facts and not evidence and must do so in summary form. Rule 29 of Order 21 in turn gives power to the court to strike out any pleadings that *"may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action...."*. These two orders in turn are to be read together with Order 69, which sets out the effect of non-compliance. In reality the application of the Defendant is for non-compliance under Rule 2 of Order 69. That Rule provides that no application to set aside shall be permitted where a party applying has taken fresh step after knowledge of the irregularity. There is clear authority in this jurisdiction which provides that where such action, that is an unconditional appearance is entered, that it virtually puts an end to the right to object to the jurisdiction of the court and amounts to an effective waiver of any irregularities raised in this application (see *Silvania Products (Australia) Ltd v. John William Storey [1990] SILR 41, 43-44, per Ward CJ; Tiffany Glass Ltd v. F Plan Ltd [1979] 31 WIR 470, 472, 478, 494).* The common approach usually taken in such circumstances is to file conditional appearance and then proceed to apply to have the Writ and Statement of Claim struck out for non-compliance with the Rules.

But even if no waiver may have been intended, the issue which must determined is whether there has been non-compliance with the requirements of rule 4 of Order 21 and whether it warrants thereby an order of striking out?

On this point, I must agree with the observations of learned Counsel, Mr. Moti that in seeking to have the pleadings of the Plaintiff struck out, the Defendant had failed to comply with rule 3 of Order 69. That rule requires that the objections insisted upon shall be stated in the summons or notice of motion. Defendant had failed to do that. Neither in the Notice of Motion filed 28th May 2002 nor the Amended Notice of Motion filed 7th June 2002, or the affidavit evidence filed in support, contained any particulars of his objection.

The only objection raised seems to be that the particulars pleaded in paragraphs 4, 5, 6, 9 and 10 amounted to evidence of the facts pleaded and therefore ought not to have been pleaded. Unfortunately I fail to see how those paragraphs can be described as *"unnecessary...scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action"*. To the contrary, they form a necessary part of the material facts, which needed to be pleaded for purposes of establishing what the claim of the Plaintiff is (see J Jacob and I S Goldrein, Pleadings: Principles and Practice (London, Sweet and Maxwell, 1990) 45-49, 52). For instance, in paragraph 3 of the Statement of Claim, the Plaintiff refers to a written contract, which it relies on. It then identifies in paragraph 4, the composition or make up of that written contract. That obviously must be a necessary and relevant fact otherwise, the Defendant will be left in the dark as to what contract is being relied on (see *Spedding v. Fitzpatrick (1883) 38 Ch D 410, 413 – 414).* The

Plaintiff then goes on in paragraph 5 to particularize the clauses in that written contract which it will be relying on. Again I fail to see how this is not a necessary and relevant fact to be pleaded. It sufficiently informs the Defendant of the relevant clauses the Plaintiff will be relying well in advance of trial and thereby saving the Defendant time and expense having to find out for himself or filing an application for further and better particulars, as well as being from taken by surprise. Perhaps, the only criticism is that the Plaintiff need not have spelled out in full the details and contents of those clauses. All the same, I fail to see how that can ever warrant the issue of an order for striking out. The effect would have been the same.

Also those clauses are material to the Plaintiff's case it will be relying on them for proof of its claim (see *Millington v. Loring (1880) 6 QBD 190, 194 – 195 per Lord Selborne LC and 196 per Lord Brett LJ).*

The same can be said of paragraphs 6, 9 and 10 of the Plaintiff's Statement of Claim. They specify the particulars of material facts on which the Plaintiff's case hinges upon and summarize with sufficient clarity the claim of the Plaintiff.

I have also been referred to precedents developed, settled and applied in the Australian construction industry which have been adapted for use by the Plaintiff in these proceedings: DJ Cremean, Booking on Building Contracts (Sydney, Butterworths, 1995) 8; JB Dorter and JJA Sharkey, Building and Construction Contracts in Australia: Law and Practice (2nd Edition, Sydney, LBC, 1990) 7341 – 7343, 7363 – 7373; A Batterby, 'Buildiing Contracts' in L Street et al, Court Forms Precedents & Pleadings – NSW (Sydney, Butterworths) 37,509-37,525), which confirm that the particulars pleaded are necessary and relevant to the claim of the Plaintiff.

I am satisfied accordingly the application for striking out must be dismissed.

Application for enlargement of time to file defence

Two grounds are relied on in support of this application. The first one relates to the irregularities raised in connection to the Plaintiff's Statement of Claim. I've dealt with those objections and over-ruled in this judgment. They cannot be relied on for purposes of justifying an enlargement of time. The mere fact that some material is objected to does not prevent the Defendant from filing defence unless the Defendant contends that the material pleaded has been insufficient to enable him to enter defence. Clearly that has not been the case here. To the contrary, the material pleaded had provided a clear synopsis of the claim of the Plaintiff.

The second ground relied on, which again I find with respect to be unconvincing is the failure of the respective Ministries and Government Departments to respond to learned Counsels requests for instruction. I have said in this court many times that when a Government Department is sued, it is paramount that the relevant persons in authority run to the Attorney-General's Office to give instructions. Any delays and failures to do so is tantamount to negligence. In this instance it is clear delay cannot be placed at the feet of the Attorney General's Office but that of the responsible Government Ministry. Learned Counsel Manetoali had done all that was required of him (see documents marked *"SM3", "SM4", "SM5", "SM6", "SM7"*, and *"SM8"* annexed to the affidavit of Samuel Manetoali filed 19th July 2002). He had written not one letter, but six letters in an attempt to get those responsible to respond, but to no avail.

There are time limits to be taken into account which apply to court proceedings. Where there is non-compliance or delays, satisfactory explanation ought to be given. It is not the case where those involved in giving instructions were not aware of the time limits and requirements imposed by law. The court cannot condone delays where there has been basically inaction on the part of those responsible for giving

instructions to the Defendant. According to the affidavit evidence of Mr. Manetoali he was only handed the relevant documents on or about 9th May 2002 and after he had personally called in to the Office of the Permanent Secretary of the Ministry of Finance. Even if no one was available to give instructions to learned Counsel, those documents could easily have been given to him for his perusal well before that date and as soon as the request for instructions had been made. Respectfully, no satisfactory explanation has been provided for the failure and delay to comply.

Further, I note there is no viable or credible defence on the merits whether in final or draft form before me. There is simply no affidavit material in support of the application for leave to extend time to file defence, nothing on the merits of a viable defence.

I am not satisfied accordingly that I can even consider exercising my discretion to grant an extension of time to file defence in this application.

The only realistic condition on which this can be done is as submitted by learned Counsel Moti, if the Defendant pays into court the sum due within 7 days (see *Quality Motel Limited v. Attorney General unreported HCSI CC No. 308 of 2001*, February 12, 2002).

Leave to enter judgment

I have carefully considered the Statement of Claim of the Plaintiff filed 4th April 2002. The Claim speaks for itself. It is thorough, clear and concise and has pleaded all that is necessary and material to enable the Defendant to file defence. That has not been done. I have covered this aspect in the first part of the judgment. There is little else that can be done other than to grant leave to enter judgment if the Defendant fails to put up the sum claimed within 7 days.

ORDERS OF THE COURT

1. **Dismiss the Defendant's Amended Notice of Motion with costs.**

2. **Unless the Defendant pays the sum of SBD3,498,671.89 into Court within 7 days, the Plaintiff shall be at liberty to enter final judgment against the Defendant for the amounts set out in the Plaintiff's Statement of Claim together with interest at the applicable rate claimed therein and costs.**

3. **If the above the sum is paid:**

   (a) **the Defendant may defend the action;**
   (b) **the Defendant shall have 7 days in which to serve its Defence.**

4. **The Plaintiff's costs of and incidental to this application be taxed and paid by the Defendant.**

THE COURT