

SUEMALO (FOGASAVAII ATIOO) v WESTERN SAMOA
TRUST ESTATES CORPORATION (No.1)

Supreme Court Apia
Phillips CJ
2 November 1983

PRACTICE AND PROCEDURE - non-compliance with order for discovery
"within the time specified" - affidavits in contentious matters
to be sworn before an outside solicitor.

HELD: The Defendants motion to dismiss the action for
non-compliance with Order for Discovery was not
made out. The principles applicable were set out
by the Court.

CASES CITED:

- Patrick v Attorney-General [1957] NZLR 228
- Laming v Wellington City Corp p1933] GLR 749
- Hana v Auckland City Corp [1945] NZLR 622, 632
- Rossage v Rossage ([1960] 1AER 600 CA
- re J (an infant) [1960] 1AER 603
- Sievwright v Holloway [1936] GLR591 cited Sims p.154;
- Bourke v Davies [1889] 44 Ch. D.110, at 126 Kay J.
- Duke of Northumberland v Todd [1878] 7 Ch. D.777.
- Compagnie Financiers du Pacifique v Peruvian Guano Co.
[1882] 11 Q.B.D.55 at 63
- Haigh v Haigh [1886] 31 Ch.D. 478
- Seal v Kingston [1908] 2 KB 579
- Rockwell v Barrus [1968] 2 A.E.R. 98
- Gouch v NZ Financial Times Co. [1932] NZLR 1685

LEGISLATION:

- Western Samoa Supreme Court (Civil Procedure) Rules 1980;
Rs 86, 93, 115
- Oaths Affidavits and Declarations Act 1963; Ss 13, 14
- New Zealand Code of Civil Procedure: Rules 17, 27, 185, 187,
583, 584, 585, 586 and 588E

A S Epati for Plaintiff
R Drake for Defendant

This is a Motion for an Order that the Action herein be dismissed upon the grounds that the Plaintiff has failed to comply with a certain Order for discovery of documents within the time specified therein and upon the grounds appearing by the affidavit of Mrs Ruby Drake, Counsel and solicitor for the Defendant, filed in these proceedings.

The Action referred to is brought by a widow Suemalo Fogasavai Atioo as Plaintiff on behalf of herself and her children against Western Samoa Trust Estates Corporation alleging that her late husband met his death as a passenger in a bus which came into collision on the 13th day of July 1979 on the Main West Coast Road with a truck belonging to the Corporation and driven negligently, it is alleged, by its driver in the course of his employment and that she and her children were dependent upon his income as a Methodist pastor for a Methodist congregation in the village of Fusi, Safata.

The action was commenced by the filing of a Statement of Claim dated and filed in the Supreme Court at Apia under Number S.136/81 on the 13th Day of May 1981. Solicitor on the record and Counsel for the Plaintiff signing the Statement of Claim is Mr A.S. Epati whose address is given as Apia, Western Samoa. The Ordinary Summons of the same date signed and sealed by a Deputy Registrar of the Court and summoning the Defendant Corporation to appear in the Supreme Court at Apia on the 8th day of June 1981 was served on the Corporation on the 26th May 1981, as appears on an affidavit of Service on the Court file.

It would be logical to deal first with what is by way of documentation contained on the Court file S.136/81 with notations of the then Chief Justice of adjournments granted. Then proceed to consider the matter in dispute and referred to in the affidavit of Mrs Drake sworn and filed with her motion and the affidavit of Mr Epati in reply to the Motion to strike out the action. The back of the statement of Claim is noted by the then Chief Justice as follows:

Set down for 8.6.81

Statement of defence within 14 days of todays date

Adjourned to 22.6.81

Adjourned to 29.6.81

Adjourned to 27.7.81 for mention

Statement of defence to be filed before that date.

R.J.B. St.John, CJ
19.6.81

The next document appearing on the file is a Statement of Defence for the Defendant Corporation dated the 17 July 1981 and filed in the Supreme Court on 27.7.81. This Statement of Defence signed by the Solicitor for the Defendant and filed by John Beaumont Samuel whose address for service, at the foot of the last page of the Statement, is at the offices of Mrs Ruby Drake of Drake & Co., Solicitors, P O Box 757, Apia, Western Samoa. At the foot of the backing cover sheet wherein the name and address of the Solicitors appears who prepared the document and act as solicitors for their client therein appears the legend "Mahony Samuel Becker & Stapleton, Solicitors, Auckland, New Zealand, by their agents Drake & Co., Solicitors, Apia. On its backing cover is a notation "filed on 27/7/81".

The next notation on the Statement of Claim is:

Adjourned to 24.8.81; then

Adjourned sine die. Liberty to either party to restore on 7 days notice.

No reason is stated by the learned Chief Justice in his notation for taking the file off its periodic adjournment and retiring the file from active mention to sine die. The reasons for the several adjournments will appear in the affidavits filed by both counsel. Rule 115 of Western Samoa Supreme Court Rules 1980 permits:

"parties to be represented in Court by a barrister or solicitor of the Supreme Court of Western Samoa, or by any person entitled by law to practice as a barrister or solicitor in Western Samoa, or with the leave of the Court, by any other agent ..."

Obviously leave of the Court was granted for Mano'o L. Mulitalo to appear for the Corporation.

The next document in chronological order on the file is an original of an Order dated 9th September 1981 signed by a Deputy Registrar and sealed with the Court seal, ordering:

"that the Plaintiff do within 7 days from the service of this Order upon her answer on affidavit stating what documents are or have been in her possession or power relating to the matters in question in these proceedings and return such affidavit for filing and deliver a copy thereof to the Defendant"

and asking for costs to be reserved. The backing cover sheet at the foot thereof recites Drake and Company, Solicitors, Apia.

The next document on file is an original dated 8th day of November 1982 signed by Mr Epati as solicitor for the Plaintiff, applying for a fixture for the hearing of this claim, asserting that the matter is in all respects ready for hearing but without giving the estimated duration of the hearing. This is addressed to the Registrar, Supreme Court, Apia.

Next on file is a letter dated 5th August 1983 addressed to the Registrar, Supreme Court, Apia as follows:

"Dear Sir

re Su'emalo Fogasavaii Atioo v WSTEC

I filed application to set the above matter down for Court on 8 November 1982 and have not heard from you since. Would you please now set this matter for mention on 15 August 1983. I am requesting Drake & Co. Solicitors for the Defendants by copy of this letter to indicate any preliminary matters outstanding before setting a fixture.

Yours faithfully

A'ea Semi Epati

cc Messrs Drake & Co."

This is receipted by the Registrar on 8th August 1983.

Next on file is an affidavit in Reply to Discovery sworn by the Plaintiff, before a Deputy Registrar of the Supreme Court on 2nd September 1983 and listing in the schedule thereof five items discovered as in her possession or power and "that any further documents that may become relevant may be submitted as they arise".

The Deputy Registrar of the Supreme Court then scheduled this action on the next mention day Monday the 19th September, 1983.

The next documents that appear on file are:

- (a) A letter dated 13.9.83 to the Action Registrar, Supreme Court, Apia advising "that we are the solicitors for the defendant corporation and would appreciate your noting your records accordingly". Signed by Mrs Ruby Drake with copy to Mr Epati.
- (b) The notice of Motion dated the 13th September 1983 referred to at the commencement of this ruling addressed to the Registrar and to the abovenamed Plaintiff.

- (c) Its supporting affidavit by Mrs Ruby Drake is dated 19th September 1983 and is sworn by her before Mr Murray Roy Drake, a solicitor for the Supreme Court of Western Samoa and her partner in their law firm.

The last document on file is an affidavit sworn on the 20th September 1983 by Mr Epati before Mr R. Barlow, a solicitor of the Supreme Court of Western Samoa and a partner in another law firm, the affidavit is in reply to Motion to strike out procedure, comprises 32 paragraphs on four foolscap pages.

Before dealing with the question of the motion to strike out for non compliance with Rule 93(a) of the Supreme Court (Civil Procedure Rules) 1980 (hereinafter referred to as the Western Samoa Rules) there are two issues of law raised in the affidavits filed.

The first is raised by Mr Epati and it may be briefly put as follows that the solicitors on the record for the Defendant had been the Auckland law firm named above by virtue of the Statement of Defence filed by Mr Samuel.

That thereafter (clauses 10, 11, 15, 16, 17, 20, 21 and 23 of his Affidavit) the Auckland law firm remained solicitors on the record until the letter of Mrs Drake dated 13th September 1983 advising that her firm were solicitors for the Defendant corporation; "that application of the Defendant is defective insofar as it is filed by the solicitors not on record as having any representative authority for the Defendant;" para. 30 of this affidavit.

There are no comparable Rules in the Western Samoa Rules to those of the New Zealand Code of Civil Procedure such as Rule 15 (Warrants to sue and defend signed by the actual parties nominating their solicitors and filed in Court) Rule 27 as to undertaking in writing filed by solicitor for Defendant to accept service; Rules 584 to 586 dealing with addresses for service and service by person or where acting by solicitor. Nor is there a similar Rule to Rule 588E where any party changing his solicitor during proceedings has to serve a notice in Supreme Court form and verify by affidavit on all other parties and the former solicitor. New Zealand Rules require pleadings to state addresses for service not more than 3 miles from the office of the Court where the pleadings must be filed (NZ Rules 17 and 583, 584). On all these matters the WS Rules are silent, other than the right of representation contained in Rule 115. Rule 585(NZ) Headed Service where personal service not required. In cases where personal service is not required, all judgments, orders, notices and other written communications required to be served on a party to any contentious proceeding other than the document commencing the proceeding shall be served as mentioned in the next two rules.

Rule 86 of the Western Samoa Rules which is the Rule empowering the issue of discovery "as of course" provides that :

- (1) In any action where a Statement of Defence ... has been filed, any party may issue as of course against any other party, without any application to the Court, an Order for discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the proceedings.
- (2) The order shall be in form 17 and shall be served by the applicant on the party against whom it is issued.
- (3) The affidavit of documents to be made by a party against whom an Order for discovery is issued shall be filed in Court and a copy thereof shall be served on the party issuing the Order within 10 days after service of the Order, or within such further time as the Court, on application, may order.

Even assuming the view, though I have not so found, that the Auckland Law firm remained solicitors on the record until at the latest 13th September 1983, it was perfectly competent for them to instruct their agents to issue out such an Order for discovery whether on an Order prepared in their offices or on instructions to their Western Samoan agents to do so and as long as the Order was properly intituled with the names of the parties there could be no mistake as to the intent of the party issuing the same or the party to whom it was intended, and Service upon the solicitor for the Plaintiff in the manner provided by Rule 586(NZ) would on analogy and in the absence of any specific provision on this point in our Rules, be ruled sufficient service.

Mr Epati acknowledges (para. 18 that there is on file a general order for discovery dated 9th September 1981 but deposes (para.19) that he has no recollection of being served personally so that in effect he does not know how it got there but even more importantly when it got there. One inference is it was served on his office address in his absence and placed on file by his staff.

And he attacks paragraph 4 of the Affidavit of Mrs Drake as being in his words "false insofar as it (she) stated that I was served with this same Order on the 4th September 1981 when the date of the document is 9th September 1981". To be perfectly correct Mrs Drake deposed that "in or about the 4th September 1981 Mr Epati was served". Two questions pose themselves from this part of the affidavit. Did Mrs Drake serve the Order upon Mr Epati because, in paragraphs 1 and 2 of her Affidavit she correctly follows the format laid down by the Oaths Affidavits and Declarations Act 1963 s.13(3) "in every affidavit the deponents statement shall be in the first person throughout the affidavit". She said in

paragraph 1 "I received" and in paragraph 2 "I filed". In paragraph 3 she deposed to what occurred in Court or what was said in Court while she was present and this is unobjectionable. But she does not then say I served Mr Epati but "Mr Epati was served", suggesting that someone else effected service and that this assertion is hearsay she not being present when the Order was served, but if so she does not state the grounds for her hearsay belief.

Section 13(5) of the Act provides that:

"affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except that affidavits for use on interlocutory motions may make statements as to the deponents belief, with the grounds thereof."

The equivalent provision in New Zealand is Rule 185 of the NZ Code. See Sim's Practice & Procedure 11th Ed. Vol.1 pps 153-154; Patrick v Attorney-General [1957] NZLR 228, Laming v Wellington City Corp [1933] GLR 749 cited in Notes at foot p.153 per Sir Michael Myers CJ; also in Hana v Auckland City Corp [1945] NZLR 622, 632. Rossage v Rossage [1960] 1AER 600 CA; In re J (an infant) [1960] 1AER 603; and Siewwright v Holloway [1936] GLR591 cited Sims p.154; Halsbury's Laws of England 3rd Ed. Vol.15 para.845.

And where, as in Rule 86 (WS), the party served has a time limit to file her affidavit of documents within 10 days after service of the Order..., it becomes important for the Court to know when the Plaintiffs obligation to act, began to run from. Was it the 4th or the 5th or the 6th or 7th that these 10 days began to run from? But as Counsel for the Plaintiff points out, the Order was not signed and sealed until the 9th of September 1981 - some 5 days after the purported service on or about the 4th.

Affidavits of service as distinguished from the general run of affidavits in support of interlocutory matters should be meticulous with regard to dates upon which service was effected and by whom - especially, as stated above when a time obligation begins to run from the date of service.

I find therefore that that portion of paragraph 4 beginning with the words "That in or about the 4th September 1981 Mr Epati was served in Order for discovery" is hearsay evidence given without grounds for the deponent's belief and in support of a Motion which though interlocutory in form seeks to determine the whole action by dismissing the same. It is therefore inadmissible and should be struck out for the reasons advanced above and in the Rossage case and in re J(an infant) cited above.

Having considered s.13 of the Oaths Affidavits and Declarations Act 1963, although this aspect was not raised by Mr Epati, I was driven to consider the effect of s.14 of the Act having regard to the very obvious fact that Mrs Drake swore her affidavit - an affidavit to be filed and used in a contentious matter and which would, if the Motion were granted simpliciter, result in the action for the Plaintiff being dismissed - before the other partner of her firm Mr Murray Roy Drake.

S.14(1) reads and its proviso:

"Each affidavit shall be sworn before any solicitor of the Supreme Court of Western Samoa, Notary Public, Registrar of Deputy Registrar of the Supreme Court or Magistrates' Court of Western Samoa, Postmaster, Collector of Customs, Medical Officer or other person authorized from time to time for that purpose by the Head of State by notice in the Gazette:

Provided that no affidavit shall be read or used in any contentious proceedings if it was sworn before a solicitor who, at the time it was sworn, was acting as the solicitor, or as clerk or agent, of the person on whose behalf or against whom it was intended to be read or used."

The equivalent provision in the NZ Code is Rule 187. Eng. R.S.C. Od.38 rr 16 & 17. Halsbury Laws of England 3rd Ed. Vol.15, title Evidence, para. 849 at p.470:

"No affidavit is sufficient if sworn before the party on whose behalf the affidavit is to be used, or before his solicitor or his solicitors agent, respondent, clerk or partner, or where the affidavit is sworn before one of the partners of the country firm of solicitors in a case where the name of the London solicitors appears alone on the record."

Bourke v Davies [1889] 44 Ch. D.110, at 126 Kay J. See also Duke of Northumberland v Todd [1878] 7 Ch. D.777. Sim's Practice & Procedure 11th Ed. Vol.1, p.155. Quite apart from the ruling on paragraph 4 of Mrs Drake's affidavit above recited, the affidavit, is by virtue of s.14(1) and its premise, a nullity and cannot be used in evidence in support of the Motion. The position is then that there is no sufficient proof of date of service nor, should this be material, the person who served the Order for Discovery referred to. The affidavit of Mr Epati does not cure this lack of proof. The grounds recited in the Motion "that the Plaintiff has failed to comply with the Order for Discovery within the time specified therein" is unsubstantiated by proof.

I note that prior to the filing of this Motion on 19th September 1983, the Plaintiff had on the 2nd September 1983 sworn before the Deputy Registrar of the Court an affidavit of documents in her possession or power and scheduled therein.

The Court has a duty to litigants to see that the processes available to them for discovery; production of documents and interrogations which, in the classic exposition of Brett L.J. often cited, in Compagnie Financiers du Pacifique v Peruvian Guano Co. [1882] 11 Q.B.D.55 at 63, "may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary" to be available freely and fully to them at all times.

By the same token the operation of Rule 93 of the WS Rules providing for non-compliance with Order made for discovery, possession of specified documents, production of documents is not imperative and an Order dismissing the action will not be made unless the Court is satisfied that the Plaintiff is endeavouring to avoid discovery, or where the defaulting party has acted with full knowledge and wilfully. The power will commonly only be exercised in the last resort: Sim's Practice and Procedure 11th Ed. Vol. 1 pp.137-138 and the cases therein cited also Halsburys Laws 3rd Ed. Vol.12 title Discovery paragraphs 33 and 34 especially Haigh v Haigh [1886] 31 Ch.D. 478; Seal v Kingston [1908] 2 KB 579. See also the warning issued by Megarry J in Rockwell v Barrus [1968] 2 A.E.R. 98:

"No doubt last minute disclosure is better than none at all; but the Plaintiffs were entitled to see the documents and consider their effect in advance of the hearing..."

In Gouch v NZ Financial Times Co. [1932] NZLR 1685 in motion for an Order to set aside Summonses for discovery and for interrogatories it was held delay on the part of the defendants' advisers the delay causing no special prejudice to the Plaintiff, the Orders were made for discovery etc. Mr Justice Reed allowed at p.1687, an often stated principle enunciated in Chancery by Bowen L.J. to guide him in these words:

"I think that it is a well established principle that the object of the Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other Division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy".

I have found that the Defendant has failed to substantiate for the reasons given above, that the order for discovery was not complied with "within the time specified" and that therefore the Motion filed by the Defendant must be dismissed. Because however, the principles upon which the Court should be guided in the question of the exercise of discretion in matters of non-compliance should, in the absence of authorities cited to me by Counsel, be set forth, I do so now. Costs in this interlocutory proceeding will be reserved for determination of the action by the Plaintiff.