Solicitor General

Scan + Upload + File 10/12/20.

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY CV 55 of 2018

BETWEEN:

DIANE WARNER Plaintiff

-and-

[1] YANJIAN TONGA LIMITED
[2] STONE COMPANY LTD
[3] YALU GE Defendants

Plaintiff's application to strike out defence and enter judgment

RULING

BEFORE:	LORD CHIEF JUSTICE WHITTEN QC
Counsel:	Mr S. Fonua for the Plaintiff
	Mrs F. Vaihu for the First Defendant
	Mr S. Taione for the Second Defendant
	No appearance for the Third Defendant
Date of hearing:	27 November 2020
Date of judgment:	27 November 2020
Date of issue of written decision:	9 December 2020

The application

1. This is an application by the plaintiff filed 22 October 2020 to strike out the first defendant's (who I will simply refer to as 'the defendant' for present purposes) defence and to enter judgment against it in accordance with the pleaded claim in the plaintiff's Statement of Claim. The plaintiff relies upon Order 18 rule 6 of the Supreme Court Rules which provides:

> Notwithstanding the provisions of rule 4(3), if any party fails to comply with the requirements of this order the court may order that the defaulting party to so comply within a specified period, and in default may order that the claim be dismissed or the defence struck out, and that judgment be entered accordingly.

10 DEC 2020

2. For completeness, Rule 4 sub-rule 3 provides that in the event of a party having to make application for an order for discovery under this rule because of the other party's failure to adequately comply with the provisions of rules 1 or 3, the court may order the defaulting party to pay the costs of application for discovery, in any event, in a fixed amount or on such other basis as the court deems appropriate. That rule does not apply here.

3. At the conclusion of submissions on this hearing, I delivered a ruling ex tempore. This transcript of the reasons for that ruling has been edited as to form only, not substance.

Background

4. This proceeding commenced in 2018. It has had a chequered history.

5. On 22 June 2020, I delivered a ruling on an application by the plaintiff for further discovery by the defendant. That ruling culminated in identification of categories of documents which the defendant was required to discover 17 July 2020. Inspection of those further discovered documents was to be completed by 31 July 2020. It should be apparent that that ruling followed a number of previous and unsuccessful attempts by the defendant to provide discovery to the satisfaction of the plaintiff.[1] That led to the plaintiff bringing that application which was determined earlier this year.

6. After that decision, the defendant filed a further verified list of documents on or about 6 August 2020. During a directions hearing on 7 August 2020, Mr. Edwards SC, who then appeared for the defendant, advised the court that there were still further documents to be discovered and that an effort would be made to make contact with the defendant's employees in China to obtain those documents. The defendant applied for more time to do so. The court extended the date from the 7th to the 28th of August 2020 and set the matter down again for hearing on 11 September 2020. That hearing was brought forward for administrative reasons to 10 September 2020.

[1] Initial discovery 20 December 2019; Plaintiff's application 20 April 2020, heard 22 May 2020, determined 22 June 2020.

7. On that occasion, the court directed that any application by the plaintiff pursuant to Order 18 rule 6 was required to be filed by 4 September 2020. The plaintiff did not make an application under that rule at that time. According to Mr. Fonua, the plaintiff considered it appropriate to allow the defendant more time to obtain all the documents which were discoverable, and which met the categories set out in the June ruling.

8. On 10 September 2020, the court directed that if the plaintiff required further information from the defendant in relation to discovery, she should file a memorandum requesting that information by 24 September 2020. The plaintiff did so. The defendant's response to that request was directed to be filed by 8 October 2020. The defendant did not comply with that direction. The court also directed that if the plaintiff was not satisfied with the defendant's response, any application pursuant to Order 18 rule 6 was to be filed by 22 October 2020.

Plaintiff's case

9. On that day, the plaintiff filed the current application. The orders sought pursuant to the said rule are:

   (a) that the defendant's defence be struck out; and

   (b) judgment be entered against the first defendant for the sum of $3,380,335 plus interest; alternatively, judgment in the sum of $2,278,087 (presumably also plus interest).

10. Those two figures represent the two alternative claims pleaded by the plaintiff in this proceeding on the bases that the defendant is a related company to Yan Jian Group Co Limited, a liquidated company here in the Kingdom; alternatively, that a loan agreement between Yan Jian Group and the defendant here for $2,278,087 was cancelled thereby representing a transaction at undervalue which pursuant to the *Companies Act* permits the plaintiff here to pursue that sum from the defendant.

11. The grounds for the application are as follows:

(a) that the defendant has failed to discover all relevant documents in the proceeding;

(b) the defendant failed to answer interrogatories (ordered at the time of the June 2020 ruling) fully and failed to discover documents relating to transfers of funds from ANZ bank account number 1613358 to the defendant's ANZ bank account number 1826650;

(c) the court had warned the defendant that a failure to discover all relevant documents could result in its defence being struck out and judgment be entered against it;

(d) the defendant failed to discover documents in respect of the goods supplied by the liquidated company (Yan Jian Group Co Limited) to the defendant in 2014;

(e) the defendant failed to discover the documents given to its accountant to prepare its financial statements for the years 2014 through to and including 2019;

(f) the defendant has tried to dissipate its assets including a lease to a company known as Stone Company Limited (which has subsequently been joined to this proceeding as the second defendant) to defeat recovery on any judgment that may be entered in favour of the plaintiff herein;

(g) the defendant failed to discover documents relating to the loan of $500,020 to an overseas company known as Yan Jian Cambodia Co Limited;

(h) it is in the interests of justice that the defence be struck out and judgment entered against the defendant; and

(i) on the grounds appearing in the affidavit of the plaintiff, Dianne Warner, filed in support of the application.

12. Ms Warner's affidavit, sworn 22 October 2020, contained exhibits which run to 175 pages. The main resource or reference in her affidavit is a table comprising:

(a) the categories of documents which were ordered to be discovered by the June ruling;

(b) the documents which have been discovered by the defendant, if any, in respect of each category; and

(c) Ms. Warner's comments in relation to the defendant's efforts or otherwise to discover each category of documents and whether further documents should exist.

13. The exhibits to the affidavit include documents, some which have already been discovered by the defendant, and others which have not, but which have been obtained by Ms Warner through other enquiries including provision of documents by the ANZ bank.

14. During his submissions, Mr. Fonua took the court through each of the categories and the various exhibited documents in order to demonstrate that the defendant had failed to comply with the June ruling and more broadly its discovery obligations in the proceeding.

15. A number of the categories were accepted by Mr. Fonua to have been complied with by the defendant insofar as it had either discovered documents which met the category and in respect of which there was no other evidence which indicated that further documents are/or should be, or should have been, in the possession, custody of control of the defendant. Those categories are:

(a) the formation or incorporation of the defendant, its shareholding and the appointment of its directors;

(b) the formation of the caretaker or relationship agreement dated 22 December 2012;

(c) the formation of the loan agreement dated 20 August 2013;

(d) the defendant's use or occupation of any land ever leased, occupied or used by Yan Jian Group Co Limited;

(e) any plant, machinery, equipment, including office equipment, and tools provided to or for the use of the defendant by Yan Jian Group Co Limited.

16. Mr. Fonua submitted that the defendant had failed to comply with the order for discovery of the balance of the categories. They are addressed below.

Defendant's case

17. The Defendant relied on an affidavit by Mrs Ebrahim, the majority shareholder and a director of the defendant (and a legal practitioner), sworn 13 November 2020. Mrs Ebrahim deposed to having "tried her very best" to produce all the documents required and that she had gathered what she could from Yalu Ge (manager of the Defendant) and the company accountant (JKC Accountants). She addressed topics involving the company's formation and bank account and sought to explain their background as she had in previous affidavits in this proceeding.

18. Suffice to say that Mrs Ebrahim's affidavit depicted a person who has very little, if any, actual firsthand knowledge of the inner-workings of the Defendant company or its day to day operations.

19. Between paragraphs 12 and 23, Mrs Ebrahim referred to previous related proceedings including the genesis proceeding of *Luani v Nuku*. She endeavoured to explain how she had not been able to identify any further documents other than those which been provided to her by Yalu Ge between August and October 2020. She deposed to the fact that while she had filed a statement apparently by Mr Ge on 7 October 2020, Mr. Ge had not provided any sworn affidavits despite previous orders for the same in respect of answers to interrogatories and in respect of these discovery matters because, according to Mr. Ge:

> *"The Tonga border is closed for force majeure of COVID-19 reason and he is lockdown in China. China is a Republic Country and the judiciary system only allows government affidavit to do at notary republic. They do not provide notarization for personal document."*

20. I was not provided with any submissions or authorities to determine whether that assertion as to any difficulties in obtaining a sworn affidavit from Mr. Ge is correct

or not. But, in any event, and despite Mr Fonua's objections as to the admissibility of the statements attributed to Mr Ge, I have taken the statements that he has apparently provided, particularly, his unsworn answers to interrogatories, at face value for the purposes of this application in order to give the defendant every reasonable opportunity to explain itself.

21. However, that latitude was exhausted by the final chapter in Mrs. Ebrahim's affidavit commencing at paragraph 27 where she deposed that:

(a) leaving the company through resignation or deregistration was and is not possible for her due to a an outstanding consumption tax report and tax debt owing in order to get a tax clearance;

(b) she was promised a 'shareholder payment' around February 2020, which did not happen;

(c) in March 2020, she tried to deregister the company but the Ministry of Labour referred her to the tax department where she found out that the Defendant's consumption tax report was incomplete, which must be completed before any further action can be taken to deregister the company;

(d) she tried to resign from her shareholder and director position, but the procedure did not allow her to do so because she has to transfer her shares to the remaining shareholder and to do that she has to obtain a company tax clearance. She said she has to wait until the "*Financial Income Tax for 2019 to be submitted which we have not submit it due to no money to cover the tax payment*";

(e) Yan Jian Tonga Limited ("YTL") presently owes to the Government of Tonga TOP$77,580 in tax for 2019;

(f) she has demanded that YTL 'pay' her shares which were valued in 2018 by an accountant by the name of Mr. Fifita Tangi Junior at TOP$500,000, but that 'they' have not paid her that sum or any part thereof;

(g) YTL told her 'they' will pay her in February 2020 "but no payment came and financially they cannot afford that now and they never will";

(h) Mr. Ge has confirmed to her that YTL owes:

(i) Andrew Vaipulu, the quarry landowner, $71,900.00;

(ii) Ministry of Lands and Revenue, $77,580.00;

(iii) 'CCECC for hiring the machineries', $1.7 million; and

(iv) her $500,000 for her shares in the company.

(i) YTL has a bank balance of only $1,500 or so and no money to pay for the above debts;

(j) she visited the (YTL quarry) site in July 2020 and on 9 November 2020, and could confirm that quarrying at YTL land has stopped, although she does not know when it stopped; and

(k) it was her wish for the hearing of the present application to be adjourned until the border is re-opened so that Mr Ge could assist 'them' with any further information 'they' may still need.

22. Mrs Vaihu did not press that wish.

Consideration

23. I turn now to consider whether on the evidence before the court on this application, the Defendant has failed to comply with the orders for discovery of the remaining categories of documents. To do that, I will consider whether there are reasonable bases for expecting that the remaining categories of documents either exist and are or should be in the Defendant's possession, power or control; or if not, whether such documents could be expected to have existed at some point in time; and if so, what if any explanation the Defendant has provided in that regard.

Has the Defendant failed to comply with the June 2020 orders?

24. Category (f) is 'any materials or goods supplied by Jan Jian Group Co-Limited to the defendant, including the materials referred to in the caretaker agreement and the loan agreements and all communications, orders, invoices, shipping and delivery records and payments (or other arrangements for payment) for such material or goods'. Ms. Warner deposed to, and exhibited, documents dated 2014 comprising customs import entry forms which showed that Yan Jian Group sent goods to the defendant. Further, she referred to fact that Mr. Yalu Ge, the defendant's manager, in his unsworn answers on behalf of the defendant to interrogatories previously ordered in the proceeding, stated that the defendant had paid Yan Jian Group for goods supplied and received. However, in answer to questions about any documents evidencing those goods supplied, and payments made, Mr Ge stated "but I don't have the details or list". There is no other evidence in this application to explain why any of those documents or any others of that kind have not been discovered by the defendants. The only explanation provided by Mrs Vaihu, on instructions from Mrs. Ebrahim, was that the defendant had discovered all documents in its possession. The same response applies to each of the categories which I will continue to canvas. There has been no evidence whatsoever from the defendant to identify any documents meeting the descriptions ordered which have been in its possession at some point in time, but which no longer are, or any reasons for that or explanation as to where those documents may now be. That is part of any litigant's obligation of discovery in civil proceedings. Therefore, I am satisfied that the documents in category (f) as evidenced by the customs entry forms exhibited by Ms Warner lead to a train of enquiry which clearly suggests that other documents of that kind and documents meeting the description in category (f) either do exist or at one time did exist and that the defendant has failed to comply with the order requiring discovery of that category of documents.

25. Category (g) is 'any cash payments or advances by Yan Jian Group Co Limited to the defendant whether pursuant to the loan agreement or otherwise'. No documents of that category have been discovered by the defendant. Ms Warner deposed that although no relevant documents have been discovered, Mr. Yalu Ge stated in his unsworn answers to interrogatories that there were three main

transfers made. In respect of those transfers, Mr. Fonua earlier served a request on Mr. Edwards for the defendant to make discovery of documents evidencing those payments. The request was never responded to. I am satisfied that the documents of the kind referred to in category (g) ought to have been discovered or otherwise explained if they are no longer in the defendant's possession. I therefore find that the defendant has failed to comply with the orders in respect of that category.

26. Category (h) is 'the cancellation agreement dated 28 April 2017, including all communications with Yan Jian Group Co Limited leading to and after the execution of the said agreement'. To this category, according to the plaintiff, the defendant has discovered one document described as a written explanation from Liu Jian Sheng (an original shareholder of the defendant) dated 22 September 2017 and the unsworn answers to interrogatories by Yalu Ge. In the first document, Mr. Jian Sheng wrote to Yalu Ge on 22 September 2017,[2] relevantly:

> *"I am writing to make acknowledge [sic] the following situation. I negotiated the loan agreement with Yan Jian Group Co Limited in the first place and the loan was not put in place but Yan Jian Tonga Limited received substantial benefits through contracts where it did the work and it got paid monies. This was assistance through the Yan Jian Group Co Limited. You will also see in the agreement dated 22 September 2012 that there were a lot of services and expenses covered by the Yan Jian Tonga Limited. When I returned to China I also did the negotiations from there and we agreed by contra that Yan Jian Tonga Limited did not owe any money to Yan Jian Group Co Limited. It was agreed then to cancel the abovementioned loan agreement and this was drawn up and signed again by Sisi Vaipulu [now Mrs. Ebrahim] on behalf of Yan Jian Tonga Limited. I informed Sisi that the company did not owe money to Yan Jian Group Co Limited".*

27. Clearly, that document identifies communications and negotiations between the two companies which, it is reasonable to expect, would have been the subject of further documentation. No explanation has been given by the defendant once again as to whether that assumption is sound or not; or whether any such documents have existed in the past and if so, what has happened to them. I therefore find that the defendant has failed to comply with its obligations and the court order for discovery in respect of the documents in category (h).

---

[2] Page 141 of the Warner affidavit.

28. Category (i) calls for documents relating to payments by Yan Jian Group Co Limited to the defendant of $80,000 per annum from 23 December 2013 to the date of the cancellation agreement making a total of $267,000 as referred to in paragraph 5 of the cancellation agreement. There is no issue that the cancellation agreement which has been referred to in the various previous rulings in this proceeding does provide, as I have just outlined, in paragraph 5 for an arrangement whereby the defendant was to be paid $80,000 per annum for three and a third years. In respect of that category, the defendant has not discovered any documents. Clearly, in my view, some documentation surrounding that statement in the cancellation agreement existed at one point in time. It is impossible to accept that an arrangement of that sort involving various works being undertaken by Yan Jian Tonga Limited for Yan Jian Group at significant payment would not have been the subject of some documentation. I therefore find that the defendant has failed to comply with the order in respect of category (i).

29. Category (j) is 'ANZ bank account 1613358 and 1613369 including all communications passing between the defendant and Yan Jian Group Co Limited and/or the ANZ bank in respect of those accounts.' No documents have been discovered by the defendant in respect of that category. Ms Warner deposed that the ANZ discovered bank statements for both accounts in previous proceedings. They showed that on 12 May 2015, there was a transfer of $100,000 from the 'CTT account' 1613358 to the defendant's account 1826650. The bank statement in question was exhibited to Ms Warner's affidavit.[3] The name on the account is 'Chinese Technical Project of Tongatapu trunk road embassy of the People Republic of China'. Mr. Fonua sought to explain the relationship between what may be referred to as the "Chinese Technical Team" (CTT) and Yan Jian Group as the main contractor for the works being performed by the CTT at the time, by reference to previous decisions in the principal case (LA29 of 2015) which gave rise to this proceeding and that Yan Jian Group was, for all intents and purposes the CTT. There was some evidence that Yalu Ge was the authorized signatory of the CTT account.[4] That may all be so but given that the only document is the

[3] Page 140.

[4] See his unsworn answers to interrogatories at pages 135 and 137 of the Warner affidavit.

single bank statement in the name of CTT, I am not satisfied that there has been non-compliance in this regard.

30. Category (k) is documents relating to the initial employment of Jian Sheng Liu Runzhi Li, Dong Liu, Li Yang, Zhan Min, Zhao Hui and Ge Yalu. No documents have been discovered. Ms Warner made no comment about that in her affidavit. The enquiry, as with all of these categories, must be whether there is any evidence which either directly establishes or at least provides a basis for an inference that documents fitting this category exist or existed at one point in time. I am not satisfied, on the material before me, that the defendant has failed to comply with the order in respect of this category.

31. Category (l) is the defendant's financial statements for the years 2017 to 2019 and all information provided to JKC Accountants for the preparation of its financial statements for the years 2014 to 2019 in relation to the loan from a related party (which is alleged to be Yan Jian Group Co Limited), any other loans or advances, materials and inventory, leasehold property, plant and equipment and wages and salaries. The defendant discovered its financial statements from 2017 through to 2018 but no documents whatsoever containing any information to the accountant for the preparation of the financial statements specified. It is beyond issue that the earlier financial statements for the defendant included a liability in the form of a loan to a related party for the amount claimed in the alternative cause of action in this proceeding of $2,278,087. By the time of the financial statements for the year ending 30 June 2017, that loan entry had been removed. There was no explanation given in any of the notes to the accounts for the removal of the loan amount. More importantly, the category under consideration was directed at documents and other information provided by the defendant to the accountant. The fact that it has not provided any such documents or any explanation for not doing so or that no such documents have ever existed, beggars belief. There has been no attempt by the defendant to explain how those financial statements could possibly have been created without the defendant providing the accountants with documents and other information relevant to the task. I therefore find that the defendant has failed to comply with the order for discovery in respect of category (l).

32. Category (m) relates to the transfer of $500,020 from the defendant's ANZ bank account 182650 to Yan Jian Cambodia Limited on 18 August 2016. The defendant has not discovered any documents relevant to that category. Ms Warner notes from the unsworn answers to interrogatories by Yalu Ge[5] that there was a loan and that he stated that it is to be repaid. At 6.3 of his answers, when asked for any documentary records in relation to the loan, Mr Ge answered: "I forgot how this operated". Ms Warner requested the defendant to provide copies of the required application to the Reserve Bank for permission to send those funds out of the Kingdom. The request has not been answered. There is no other indication in those unsworn answers to interrogatories or any other affidavit or submission filed behalf of the defendant in this application to explain why such documents have not been discovered. Again, in my view, it is impossible to accept that a loan of that size between what appears at least by name to be a related entity within the Yan Jian group was not documented in some way. Whether it might be through simple email communications, or a formal agreement, or records of the actual transfer of funds, which should have been the subject of Reserve Bank clearance in Tonga, it is more than reasonable to expect that the transaction would have been documented in some way. Accordingly, I find that the defendant has failed to comply with the order in respect of category (m).

33. Category (n) is 'instructions, advice, invoices received and payments to Mrs. Petunia Tupou for legal services requested by and provided to Yan Jian Group Co Limited in proceedings LA 29 of 2015 and the appeal decided in *Nuku v Luani* [2017] TOCA 5. The defendant has not discovered any documents meeting that category. Ms Warner exhibited a number of documents[6] in which she says Yalu Ge admitted that he had communications with Liu Jian Sheng, Tonga Group Co and Mrs. Tupou, and that Mrs. Tupou received her instructions from Yalu Ge and that he paid her fees. Those documents include a single page of handwritten notes of a meeting between Ms Warner an Mrs Tupou dated 5 December (no year). They are the basis for her comment in that column of the table in the body of her affidavit to effect that Mrs Tupou was last paid by Yan Jian Group Co in

[5] Page 137 of her affidavit.
[6] Pages 173 and 174 of her affidavit.

cash. The name Yalu appears on the notes as well. The preceding document is an email exchange between Mr. Edwards and Yalu Ge on or about 6 August 2020. Mr. Edwards wrote:

> *"The court has ordered that Yan Jian Tonga Limited produce any documents in its possession concerning Mrs. Petunia Tupou's invoices for legal services provided to Yan Jian Group Co Limited and payment of those invoices in connection to the appeal.*
>
> *Did Petunia Tupou give you any accounts for Yan Jian Group Limited in connection with the appeal against Luani. Please explain.*
>
> *Who requested Petunia Tupou's services in connection with the appeal by Yan Jian Group Co Limited in land case 29/2015 Lord Nuku v Luani 17 of the appeal. Can you give me an answer please".*

34. To that, Yalu Ge responded:

> *"Hi Clive. Due to Yan Jian Tonga Limited was involved in the case of Yan Jian and Yan Jian Tonga Limited had some cooperation with YJ meaning Yan Jian Group Co Limited would appear. In order to clear everything and also make sure that truth of YJT is totally different from YJ is known by the court the people I had contacted Mr. Liu Jian Sheng and Yan Jian Group also had held YJ for a communication with Petunia but I had never had the authority to arrange Petunia's work for Yan Jian YJ had emailed Petunia by themselves to authorize Petunia to be on behalf of them. I didn't pay for YJ I don't have the invoice or whatsoever and Petunia Tupou did not give me any accounts for Yian Jian Group Co Limited in connection with the appeal against Luani."*

35. There is no other evidence before me to better explain the arrangements for the engagement of Mrs Tupou. However, based on what is before me, particularly Yalu Ge's email, I am not satisfied that there is sufficient grounds to find that the defendant has failed to comply with its discovery obligations or the order in respect of category (n).

36. That concludes the assessment of the various categories of documents the subject of the June 2020 ruling and the defendant's response in respect of the job.

Interpretation of Order 18 rule 6

37. One question which arose during Mr. Fonua's submissions was the interpretation of Order 18 rule 6.

38. On one view, it could be interpreted as resulting in an order by the court for a defaulting party to comply with discovery within a specified period, and to include in that order, the consequences of default, namely and relevantly here, that the defence would then be struck out and judgment entered accordingly. Such orders are known variously as "unless orders" or "self-executing orders" (or 'guillotine' orders to use the vernacular). The effect of those orders is to give the defaulting party one last opportunity to comply, within a certain time, failing which, here the defence will be struck out automatically and judgment will be entered. The reality, however, is that if in that circumstance the defendant (as here) did not accept that it was in default of the order, it would nevertheless bring the matter back to court to argue why the consequences of the order should not automatically operate. In other words, it would seek to demonstrate that either it had complied or that there was some good reason for its non-compliance which should absolve it from the automatic consequence embedded in the order.

39. The alternative interpretation involves a two-step approach. Firstly, the rule would provide for an order to be made requiring the defaulting party to comply within a specified period. Then, secondly, after the specified period or date for compliance, if the party was then in default of the order, a further application would be required for a separate order that the defence then be struck out and judgment entered.

40. Mr. Fonua acknowledged the possibility that the court, on this application, could determine it by making an 'unless order' thereby giving the defendant one last opportunity to comply. But, as I have stated, in that event, if there is a dispute between the parties as to whether the defendant has in fact complied or sufficiently complied, or whether there is some other extraneous reason why it has not, the court would still be required to hear argument and consider evidence on those matters and determine the question of compliance or non-compliance in any event before the final orders for striking out the defence could be made.

41. From a practical perspective, I consider that the proper interpretation and application of the rule depends on the history of the given matter. Where, as here, there have been numerous opportunities afforded to the defendant to comply with

its discovery obligations, there would be little utility in now making an 'unless order'.

42. Therefore, in this case, by reason of:

    (a) the previous orders of the court requiring the defendant to comply with specified discovery of the various categories canvased above and by a certain date;

    (b) the various extensions of those dates; and

    (c) the defendant's repeated failure to comply with those orders from at least June this year,

    subject to being satisfied that other considerations relevant to an application of this kind are in favour of granting it, the proper interpretation and application of Order 18 rule 6 would now permit an order for the defence to be struck out with judgment to be entered.

Other discretionary considerations

43. What then are the other considerations on applications such as this which involve the drastic step of curtailing and ending a party's defence of a substantial claim against it in long running civil litigation?

44. In that regard, neither counsel was able to assist. That is perhaps not entirely surprising because it would appear, from the dearth of published decisions on the point, that this is the first case in Tonga directly involving this particular rule.

45. In *Gateway Enterprise Ltd v Vaokakala Holdings Ltd* [2002] Tonga Law Reports 130, Chief Justice Ward was asked to consider a strike out application on the basis of non-compliance with a peremptory order. The proceeding involved a claim for partnership assets which included a bulldozer. The plaintiff filed an application for an interim order in relation to the bulldozer which it was claimed was being cannibalized by the defendant in order to restore one of its own bulldozers. The court saw the two machines and it was clear the claim by the plaintiff was true. However, the defendant claimed it needed one working

bulldozer and that it was better to repair one. The defendant also suggested that the application to stop using the bulldozer from which the parts were being taken was made simply to stop it operating the quarry. It was clear such an order would have that effect, so the court made a peremptory order with which the defendant had to strictly comply. It failed to do so. One of the officers of the defendant admitted hearing the terms of the order when it was made but said that he understood it to mean that he had to supply a two weekly report. The defendant argued that the failure was one of degree and that no real injustice had been caused to the other party by the delay. The plaintiff sought an order to strike out.

46. The court held that peremptory and 'unless' orders were made to exact compliance both in terms of time and action. The principle was that court orders must be obeyed and any party who disobeyed such an order would not be allowed to proceed. The degree and effect of the disobedience were matters that the court may consider but they would not be sufficient themselves to avoid the consequences of the failure to obey a peremptory order. Any such disobedience would generally be treated by the court as contumelious and the court should not be too ready to find excuses to mitigate the effect of enforcing the order.[7] Further, it would only be in rare cases that the court would be persuaded not to enforce a peremptory or unless order where the conduct of the party disobeying the order was contumelious or contumacious.

47. Chief Justice Ward referred to in *Re Jokai Tea Holdings Limited* (1992) 1 WLR 1196, where Browne Wilkinson V-C explained that:

> *"The rationale of such a penalty is that it is contumelious to flout the order of the court, if a party can explain convincingly that outside circumstances account for the failure to obey the peremptory order and that there was no deliberate flouting of the court's order, his conduct is not contumelious and therefore the consequences of contumely do not flow... In my judgment in cases in which the court has to decide what are the consequences of failure to comply with an unless order the relevant question is whether such is intentional or contumelious. The court should not be astute to find excuses for failure since obedience to orders of the court is the foundation on which the authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and the failure to obey was due to extraneous circumstances, such a failure to obey is not to be treated as*

[7] Citing *Tolley v Morris* [1979] 1 WLR 592.

contumelious and therefore does not entitle the litigant to rights which he would otherwise have enjoyed."

48. Some guidance may also be derived from decisions in other jurisdictions involving similar procedural rules.

49. In *Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264, the New South Wales Court of Appeal identified the following principles as applicable to an application of the instant kind which was also concerned with non-compliance with discovery orders:

    (a) The courts have inherent power to prevent misuse of their procedures in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people.[8]

    (b) The inherent power to deal with abuse of process exists to enable the court to protect itself from abuse of its process thereby safeguarding the administration of justice. That purpose may transcend the interest of any particular party to the litigation.[9]

    (c) It is not necessary that there be an element of contumelious disregard, oppressive conduct or moral delinquency before the power to intervene with respect to abuse of process can be exercised. It is the objective effect of continuation of the action which is decisive.[10]

    (d) The power to terminate or stay proceedings as an abuse of process does not exist simply to punish a party or its legal representatives who deliberately delay proceedings to the disadvantage of other parties. In the exceptional cases to which it applies, the power to stay exists to prevent the conduct or further conduct of proceedings that would be fundamentally

---

[8] *Walton v Gardener* (1993) 177 CLR 378 at 393.

[9] *Batistatos v Roads and Traffic Authority of New South Wales; Batistatos v Newcastle City Council* (2006) 226 CLR 256 at [12].

[10] *Batistatos* at [67] - [70], [137], [142].

unfair to another party because, for example, of serious delay in the commencement or continuation of the proceedings.[11]

(e) These principles must be considered against the background of the fundamental right of access to courts by citizens and that such access should not be denied other than in exceptional circumstances.[12]

(f) When considering the notion of a fair trial, it should be borne in mind that for a trial to be fair, it need not be perfect or ideal.[13]

50. The Court of Appeal referred to the decision in *Logicrose Limited v Southend United Football Company Limited*,[14] in which an allegation was made, but found not to have been established, that the principal witness for the plaintiff company failed to disclose and deliberately suppressed a crucial document in his possession or power. In the course his reasons, Millet JA considered the consequences of deliberate disobedience of a peremptory order for discovery in the following terms:

> *"Deliberate disobedience of a peremptory order for discovery is no doubt a contempt and if proved in accordance with the criminal standard of proof may, in theory at least, be visited with a fine or imprisonment. But to debar the offender from any further part in the proceeding and to give judgment against him accordingly is not an appropriate response by the court to contempt. It may however be an appropriate response to a failure to comply with the rules relating to discovery even in the absence of a specific order of the court and so in the absence of any contempt, not because the conduct is deserving of punishment, but because the failure has rendered it impossible to conduct a fair trial or would make any judgment in favor of the offender unsafe.*
>
> *In my view, a litigant is not to be deprived of his right to a proper trial as a penalty for his contempt or his defiance of the court but only if his conduct has amounted to an abuse of the process of the court which would render any further proceedings unsatisfactory and prevent the court from doing justice. Before the court takes that serious step, it needs to be satisfied that there is a real risk of this happening.*

---

[11] *Batistatos* (at [141]) per Kirby J.

[12] *Clark v State of New South Wales* (2006) 66 NSWLR 640 at [63], referring to *Dey v Victorian Railways Commissioners* [1949] HCA 1; (1949) 78 CLR 62 (at 91); *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125 (at 130); *Webster v Lampard* [1993] HCA 57; (1993) 177 CLR 598 (at 602); *Williams v Spautz* (at 519); *Batistatos* at [157]ff.

[13] *Clark* (at [64]) referring to *Holt v Wynter* [2000] NSWCA 143; (2000) 49 NSWLR 128 (at 142); *Batistatos* at [163]; *Commonwealth of Australia v Smith* [2005] NSWCA 478 (at [129]).

[14] [No 1] (1998) 132 SJ 1591, (1988) Times, 5 March 1988.

....

This might well be the case [i.e., exceptional circumstances requiring action by the court] if it was no longer possible to remedy the consequences of the document's suppression despite its production, perhaps because a material witness who could have dealt with the document had died in the meantime or where, despite the production of the document, there was reason to believe that other documents have been destroyed or remain concealed. But I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment of his conduct however deplorable unless there is a real risk that that conduct would render the further conduct of proceedings unsatisfactory. The court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice."

51. The Court of Appeal noted that the object of the rules of discovery is to secure the fair trial of the action in accordance with the due process of the court.[15] Accordingly, the question of what sanction, if any, should be imposed for non-compliance, whether deliberate or inadvertent, is to be tested against the question whether "a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice".[16]

Disposition

52. Having regard to those principles and the findings of fact at which I have arrived on this application, as well as:

    (a) Mrs Ebrahim's revelation about the parlous financial state of the company, which was a clear admission by a director of the company that it may have been trading insolvently and was reinforced by Mrs. Vaihu's submission that the company is no longer operating and no longer has an office open here in Tonga; and

---

[15] *Southern Cross Exploration NL v Fire and all Risks Insurance Co Limited* (1985) 2 NSW LR 340 at 356.

[16] *Arrow Nominees Inc v Blackledge* [2000] EWCA Civ 200; (2000) All ER (D) 854; [2000] 2 BCLC 167 (at [54]) per Chadwick LJ (Roch LJ agreeing). The Victorian Court of Appeal cited Chadwick LJ's statement with approval in *British American Tobacco Australia Services Limited v Cowell* [2002] VSCA 197 (at [159]).

(b) the information provided in the application by the plaintiff for the joinder of Stone Company Limited and Yalu Ge as second and third defendants to this proceeding. In short, that application came about because the plaintiff and Mr. Fonua identified that the quarry which had been the main business of the defendant appears to have been, or is in the process of being, transferred to Stone Company Limited. The signage at the front of the quarry has been changed to say just that and the director of that company has provided affidavit evidence to the effect that the transaction is continuing but not yet been finalized and that because of the application to join his company to the proceeding he no longer wants anything to do with it.

53. From that evidence, it is quite clear, as I had commented on a previous occasion, that the defendant company here is in the throes of winding down its operations and, more critically, is seeking to dissipate its assets. An example of that is found in the affidavit in support on the recent application and orders made for a freezing order. That material included the defendant's bank statement from the middle of last year in which the defendant had transferred in the order of $750,000 to unidentified recipients. According to Mr Fonua, there has been a fairly constant stream of ongoing withdrawals from the company's account, and, most recently, a change of banks from ANZ to BSP, resulting, as Mrs. Ebrahim deposed, with the defendant having a balance at bank of only about $1,500.

54. On that basis, I am satisfied that it is more likely than not this company and those in actual control of it are endeavouring to dissipate its assets and wind it down with the intention, in part or in whole, of evading execution on any judgment which might otherwise result from this proceeding.

55. No other explanation has been proffered. With the very limited instructions she was provided, Mrs Vaihu was been unable to shed any further light on that analysis or to support a different view.

56. All in all, I consider that the defendant has had numerous opportunities to fulfil its discovery obligations in this proceeding. It has failed to do so. It has failed to disclose documents which, according to the available objective surrounding evidence, may reasonably be expected to be in existence or to have been in

existence, and in its possession at some point in time. It has also failed to explain why that would not be the case in respect of the categories I have found amount to non-compliance. It has not sought to provide any other explanation for its inability to properly discover those categories. I am not satisfied, even at face value, that the explanations purportedly given by Mr. Yalu Ge are satisfactory or that they in fact actually addressed or directly engaged with the questions which have been posed on this application.

57. On that basis, I am satisfied that, despite a number of extensions of time within which to comply, the defendant has demonstrated contumelious disregard for its discovery obligations under the Rules and the June 2020 orders.

58. There is no prospect in my view of the defendant improving its position on discovery. If the documents which I have found should be, or have been, in existence, at some point in time, have not been discovered by now, they never will be; nor will they ever be properly explained. That inference is particularly so given the obvious efforts by those in (real) control of the company to bring it to an end.

59. In those circumstances and having regard to the principles discussed in the *Palavi* decision above, I am satisfied that there are exceptional circumstances here which lead to the view that the defendant's conduct has amounted to an abuse of the court's processes in respect of discovery and would render any further proceedings or a trial unfair and unsatisfactory and may prevent the court from doing justice. Even though I am cognizant of the very serious step provided by Order 18 rule 6, I am satisfied that there is a very real risk of the consequences just outlined occurring if the matter is allowed to proceed.

60. Accordingly, pursuant to Order 18 rule 6, I find that the defendant is in contumelious default of orders requiring it to provide discovery and I order that its defence in the proceeding be struck out and judgment in favor of the plaintiff be ordered accordingly.

Result

61. The Plaintiff's application is granted.

62. Pursuant to Order 18 rule 6 of the Supreme Court Rules, the First Defendant's defence is struck out and judgment is entered accordingly.

63. Mr Fonua submitted that judgment should be entered for the higher claim. Mrs Vaihu made no compelling submission against that. Given the asserted financial state of the company, the difference is probably immaterial.

64. The First Defendant is to pay the Plaintiff the sum of TOP$3,380,335 or the unpaid balance thereof having regard to any other enforcement orders in respect of that sum.

65. Pursuant to Order 30 rule 2 of the Supreme Court Rules, the judgment debt shall carry interest at the rate of 10% per annum until the judgment is satisfied.

66. The First Defendant shall pay the Plaintiff's costs of the proceeding against it, save for any costs the subject of previous orders, to be taxed in default of agreement.

67. The freezing order (order no. 1) made on 27 August 2020 will continue pending any further order.

68. The orders made by Niu J on 2 October 2020 are extended to 4pm on 18 December 2020 or further order.

69. The matter is listed for directions on 18 December 2020 at 9 AM for the further conduct of the Plaintiff's claims against the Second and Third Defendants and to consider the further operation of the interlocutory injunctive orders made by Niu J on 2 October 2020.

NUKU'ALOFA
27 November 2020

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE