IN THE HIGH COURT
OF SOLOMON ISLANDS

Civil Case Number: 476 of 2006

Civil Jurisdiction

BETWEEN: **ROBSON T DJOKOVIC**

Claimant

AND: **SOLOMON STAR LIMITED**

1st Defendant

AND: **OFANI EREMAE**

2nd Defendant

REASONS FOR DECISON

Date: 26 September 2008

1. If it is not cutting down someone else's trees, it is being unwilling to pay off the overdraft. If not that, it is ordering someone out of the country or worse, kidnapping them and pretending that you are taking them to court (via the airport). Still, a judge must not complain for at least here no judge has, as yet, been called upon to hear an appeal against a fine for an unlicensed dog.

2. Today is in no small part caused by a dog, although whether the dog was licensed or not is not the question. Today, or more correctly on the 11th August 2008, the plaintiff in today's action was bitten by a dog, and bedridden for days thereafter, as certified by his medical practitioner.

3. That injury, not photographed or the subject of any criminal charges against either the dog or its owner, resulted in the plaintiff in these proceedings being unable to attend the hearing of his claim for defamation against an author and the Solomon Star newspaper.

4. Again, more correctly, it meant that the plaintiff did not really want to come to court and so, properly, he went to his legal representative to see what his lawyer had to say about his client's predicament.

5. Not quite so properly, his legal representative advised that his client need not attend court the very next day for a hearing scheduled to last at least one whole day in a very busy civil jurisdiction where days are preciously guarded by the judges of the court as being valuable commodities. We here have only five

working days when we can sit in one week, and not every week of the year can judges sit in their courts, as we maintain the legal fiction of the 'court vacation'.

6. Not quite so correctly, his legal practitioner advised his client not to attend because he himself had no intention of attending the hearing. The news that his client was not too keen on attending in his present circumstances must have been received as manna from heaven to the legal practitioner intent on missing the hearing himself.

7. A letter was hastily dispatched to the Registrar of the High Court and, no doubt excited at the prospect, the legal practitioner ordered that all his cases for the entire week be moved to somewhere more convenient to him. Not to let his professional colleagues at the bar down, he copied this same letter to them. After all, it was unlikely that any other legal practitioner would mind having his court diary altered, but just in case anyone did think fleetingly of voicing a murmur of protest, he had copied his edict to the world.

8. Copied, as he says in his sworn statement, and was 'verily told' by his process server clerk that the copies were placed in the High Court Registry pigeon holes. Surprisingly, or maybe not, there is no indication, apart from the badly placed adverb, that the legal practitioner believes this to be true.

9. That a letter from a legal practitioner requesting adjournments of his cases for his own personal reason can so quickly turn into some form of court order is probably not unique to this jurisdiction. Responses to such letters vary from outrage to pure joy. An overworked legal practitioner on the other side, himself not prepared for a day in court tomorrow when he might be shamed into admitting his lack of preparation, hides his delight and simply asks for costs, privately celebrating the fact that with no appointments booked he can surreptitiously surrender himself to the delights of one of the local registered charitable premises. There are two such premises for local practitioners, one surrounded by greens and the other at the edge of the great blue.

10. The ardent, prepared, not so athletic practitioner may be less impressed. He is ready, this adjournment cannot take place without a fight. But with whom shall he engage his legal wit? There shall be no-one there with which to spar.

11. As for the judges, as ever hard pressed, judgments forever to be written, files to peruse, lists to oversee, law reports to be opened, perhaps even read, some may say, ah well, perhaps it is a good thing. Another may say I wonder what the opposition thinks of this, whilst a third may say this is simply not good enough.

12. So the legal practitioner, in writing such a letter, puts himself in the hands of – well not the gods – others. He runs the risk that his request will be favoured, thereby freeing him from his burdens for the day, or not, but either way will seek to recover some fees out of whatever might happen next.

13. As an aside, have you ever taken the time to wonder how the choice of dispatch of communication takes place these days? There are so many ways to impart news and to request information. To some readers, the almost universal method of

communication is the ubiquitous 'e-mail'. I understand this to be some clever western invention that has overtaken the lives of people. They inhabit a 'virtual world' within which all information, verified or not, becomes their reality. Such was the case recently here, though not an example of a Solomon Islander. In that communication it was confidently asserted that the toilets in the High Court would be repaired 'by the end of this month'. Being the 30th day of that particular month of 31 days and observing the state of the present building works, any visual inspection would quickly give lie to the assertion, but the writer in his virtual reality said it was the case and probably believes to this day that it was, and is.

14. There exists in Solomon Islands a modified version of this modern e-mail facility. Modified in the sense that it is elevated to the status of an expensive toy, only to be enjoyed by the rich and further modified to the extent that it does not deliver everything that might have been sent, or at least not quite straight away. Anyway it probably says something about the legal profession that they all have access to it.

15. I find that correspondence can be broadly classified. If they want something, you get an e-mail. If it is their interests to get an answer quickly, you get an e-mail. If it is to explain why the flight was delayed and how they are still the best airline in the world, it is sent by ordinary mail and, if you are lucky and the airline is from overseas, it may be sent by airmail. If it is to explain why the bank did not follow your instructions through their human device interface, it will eventually be written, maybe it will be posted and maybe it will be delivered, but not within any limitation period known to man. But if it is for you to settle your overdraft, it will come by voice, text message, e-mail and carrier pigeon.

16. Does this explain why the otherwise efficient legal practitioner chose to commit himself to pen and ink and manual delivery to a third party facility to effect delivery of his edict? That way, there would be no chance to oppose, to express any contrary views. With decent luck, the Registrar displaying uncharacteristic charm and humanity might even tell the judge that the matter in his list was vacated to another day, thus permitting the judge to retain his sanity for a further period and letting the practitioner off the hook to fight (or miss) another day.

17. The careful reader will no doubt have observed that the reason why the legal practitioner sought an adjournment has not yet been mentioned. This is because I have considered the process by which the legal practitioner sought to obtain the adjournment, not the reasons behind the adjournment. That this process was adopted itself reduces the importance of the reason behind it, for it removes from consideration the validity of the request. Whether it be valid, as it may have been in this case, or not, as it may have been in other cases, loses significance.

18. Where time permits for a legal practitioner to write a letter and give instructions to deliver it, then time permits for the legal practitioner to pick up the telephone and speak to counsel on the other side, or to send an e-mail. That way, even if the other side does not agree to the proposal, there is the opportunity for decisions to be taken to minimize inconvenience and expense to others, to suggest alternative arrangements and, possibly, to come to an accommodation subject to the views of the judge at the hearing.

19. I am aware that this issue has troubled more than just this judge. Various methods have hitherto been tried to put a stop to it, clearly without demonstrable success. Quiet discussions have taken place with some counsel in chambers, stern words have been exchanged with some counsel in court, costs have been ordered, and probably other strategies of which I remain unaware. Yet the practice continues, and this judgment represents a further attempt to restrain lawyers from acting in this way. This, perhaps, may explain what some may see as less than relevant considerations being discussed within its text.

20. In this instance, the hand of fate may be said to have dealt a cruel blow to the aspirations of the hapless legal representative. A combination of an anxious opponent, mindful of the previous umpteen appearances of the same case in the civil court lists and a judge simply anxious that cases listed for such lengthy hearings actually take place as scheduled deal a hefty blow. No plaintiff, no case. Rule 12.25. Costs.

21. There was, of course, no explanation before the court as to the non attendance of the plaintiff. Since the letter had been written the adjournment was secure, if not cast in stone but a more modest piece of A4. The court made its order without knowing the fate of the injured plaintiff, or even the vicious dog. How can such an order be maintained?

22. Perhaps it does not need to be maintained? Order 17 rule 17.55. Let's start over again.

23. The reader, uninterested in the facts of this case, may stop reading here. Any legal practitioner who writes a letter as in this case, and chooses to have it delivered in the way it was delivered here puts his professional reputation at risk. Like the advocate who asks that one fatal question without a good idea of what the answer will be and regrets it for the rest of his professional career, so the lawyer who behaves as if court lists can be manipulated for his own personal benefit at what ever cost and without risk, must appreciate that the risk is actually both grave and severe. For the risk is of exposure, exposure to the wrath of a disgruntled client, exposure to an order for wasted costs (ouch!), and at worst exposure to ridicule in a lengthy written judgment published on PacLII for contemporaries from college to see, not to mention the potential clients (ouch, ouch!!). It would be a shame to further burden the reader with the notion of professional ethics and responsibility so I shall refrain from any such mention.

24. At this hearing, counsel for the claimant admitted his fault in this matter, and in submissions referred to the notion that his failure should not prejudice the client. I support that contention. The fault of the lawyer should not be reflected in any order made against the client, it should be reflected as against the lawyer.

25. Yet in considering this application, counsel both agreed that the appropriate test for setting aside an order as this is dependent upon the applicant showing that there are reasonable prospects of success. Thus it is possible that the mistakes referred to above by the lawyer can be set aside and consideration be given to whether, regardless of the lawyer's failure, this claim has prospects of success, for

at the moment the claimant has not had his opportunity to give his story. It is not correct to say that the claimant had been denied an opportunity to be heard, it is that the opportunity for the claimant to be heard was lost through no fault of his own. The cost of securing a second opportunity is to demonstrate that there are prospects of success. That hurdle would not normally face a claimant so starkly were the circumstances not as they are here.

26. This claim is for defamation. Many facts are agreed. The local newspaper published a story containing what is said to be defamatory material. It was written by the second defendant. It said of the claimant . . . "who has Australian convictions for fraud, burglary and drug offences . . . "when describing his appearances for mention."

27. It is now conceded that the clamant has "Australian" convictions. It is not conceded that the claimant has the convictions as set out in the article. In the original statement of claim it was asserted that the claimant had not been charged or convicted, but now it is asserted that there are some convictions, not necessarily for the offences as described, and some instances where no convictions were recorded

28. The claimant submits that this claim raises important issue of law that need to be determined. In particular the claimant asserts that it is necessary to ascertain the effect of the law in the jurisdiction where the claimant appeared and was dealt with for his offences. In that jurisdiction there exists provision for convictions not to be recorded other than for the purposes of those proceedings and that thereafter outside of those particular proceedings, it is to be taken that there is no such conviction.

29. In argument, counsel for the defendant conceded that for the purposes of these proceedings, there is no argument that if no conviction was ordered to be recorded by the convicting court, then no conviction should be referred to in any article appearing in a newspaper such as this.

30. That important matter of law is therefore not an issue in this trial.

31. The second matter raised by counsel for the claimant is that the convictions of his client were not for the offences described and burglary and fraud. By admission, the claimant was convicted of breaking and entering a dwelling house with intent to steal. This, it is contended, is not burglary. Secondly that the claimant was convicted of dishonestly making off without paying as expected, and not fraud. Unfortunately, counsel for the claimant did not have with him or any memory of the relevant Criminal Code under which the claimant was charged convicted and sentenced.

32. I have considered the relevant sections of the relevant Criminal Code and have little hesitation in determining without requiring further submissions on the matter that this is not a ground that will have any success in pursuing this claim for defamation. These words are used in those parts of the criminal code where these particular offences are set out in detail. I agree that they represent what might be termed a shorthand way of setting out an offence, but I do not agree that they

represent anything other than a shorthand way of describing the substance of the offence.

33. There then remains the question of fact as to whether convictions were recorded. This is in dispute with regards to the burglary charge and the drug related offences. The claimant has no evidence other than his own testimony to support that contention with regards to the burglary charge, relying as he did upon the notion that the offence of breaking and entering a dwelling house with intent is not burglary, and some, albeit currently inadmissible, paperwork to support the contention that no convictions were recorded as regards any drug related offences.

34. The paperwork to support that contention comprises two single piece of paper not exhibited through sworn statements but appearing in the trial book. Purporting to be signed by the clerk of the relevant magistrates' court on the second page of which, if one accepts that the same two loose pages were at one stage connected, that no convictions were recorded. Page one is dated at its bottom edge one date and the second page bears a different date, and there is no explanation as to why a following page was produced prior to its preceding page. It may well be that this can be explained, and it may well be that this evidence can be admitted in an eventual trial, but it cannot now and could not have been in August 2008 so admitted.

35. If the trial had taken place when it should have done in August, this material would not have been admitted as evidence. If the trial was today when this application is heard it is not evidence. Does this demonstrate prospects of possible success? It certainly cannot be described as demonstrating present prospects of success, and I am not sure if the test allows me to consider future prospects not yet existing.

36. Reference appears in the statement of claim to Australian Privacy laws, although counsel for the claimant made no reference to this head in his submissions on prospects of success. There is without doubt severe restriction on records held by any police force as to what purpose those records so held can be put. The suggestion has permeated into this record more than once that the claimant fears that the newspaper (or author) was told by some police authority of the convictions, and that this was wrong. It may or may not have happened and may or may not have been wrong, but there is no suggestion before me now that the details of properly recorded convictions in Australia cannot be reported and cannot be referred to in subsequent publications referring to the individual concerned. Whilst it is common cause that there exists in various jurisdictions restrictions on information to protect convicted persons, in this case that protection is afforded in the relevant jurisdiction by making an order that the conviction not be recorded. If not recorded it is conceded that it would be wrong to refer to it again, when recorded it must be taken that it can be referred to again, and the issue as to how the author of an alleged defamatory article came to know about the convictions will not go to liability in defamation but may go towards malice and therefore the question of quantum of damages.

37. Liability in damages for defamation is based on the truth, or substantial truth, of the written material. Considering the agreed and even disputed facts in the claim,

I fail to see how the claimant can demonstrate prospects of success in this matter. He has been convicted of fraud, he produces no evidence, other than his own testimony that he was not convicted of burglary, even though ample opportunity has been afforded him to do so as the matter was raised first in interrogatories, and in relation to the drug offences he still has not material in any admissible form to support his contention that no convictions were recorded against him. That material not being available for the trial date, and still not being available now, raises the question as to just how long these proceedings should be allowed to continue.

38. The claimant has not demonstrated any reasonable prospect of success, and I am not therefore inclined to exercise the discretion given by the Civil Procedure Rule to set aside the judgment against him given in his absence on 12 August 2008. Given the concession that the legal representative was responsible for the failure on that date, it is perhaps only fair that the question of who should pay the costs awarded on that occasion be addressed, and so I will hear from counsel on that issue.

39. Before concluding, for I have been troubled by this judgment, I turned back to consider whether in the circumstances reasonable prospects of success is the correct test. After all, the claimant failed to attend court because he was told not to. Yet, it seems to me that this is the correct test, because if there exists no reasonable prospects of success, there is no point in allowing the default judgment to be set aside. In this jurisdiction a defamation claim is heard and determined by judge alone, so there is no question of whether there exists material that a jury might find in favour the claimant, but what a judge hearing the matter will find based on the material, and I cannot myself find anything to suggest another judge could find for this claimant.

40. In the event the application for the default judgment of 12 August 2008 to be set aside is dismissed and the order for costs made at the same time shall remain in force. Costs of this application are awarded to the defendants against the claimant to be agreed or referred to the Registrar of the High Court for assessment.

JUDGE GOLDSBROUGH