IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

Civil Appeal No. ABU 0093 of 2005
(High Court Civil Action 625 of 1998S)

BETWEEN:

BHAWIS PRATAP
(f/n Ram Pratap)
t/a BHAWIS PRATAP DISTRIBUTION

Appellant

AND

CHRISTIAN MISSION FELLOWSHIP

Respondent

Coram: **Barker, JA**
Henry, JA
Scott, JA

Date of Hearing: **4 July 2006**

Counsel: **G.O'Driscoll for the Appellant**
I. Fa for the Respondent

Date of Judgment: **14 July 2006**

JUDGMENT OF THE COURT

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[1] On 16 October 1998 the Plaintiff commenced proceedings seeking $268,068.10 which he claimed was the balance owed to him by the Defendant to which, under an oral agreement, he had

arranged to have wristwatches supplied for the purposes of fundraising.

[2] In April 1999 the Plaintiff was ordered to provide further and better particulars of the number and value of the wristwatches supplied. In October 1999 the Plaintiff's solicitors gave the Defendant further information including a sample invoice and accounts "acknowledging value up to $1,115,024.00". Receipt of this additional information was acknowledged by the Defendant in the same month.

[3] On 29 October 1999 a Defence and Counterclaim was filed. In paragraph 4 (iii) of the Defence it is pleaded that the Defendant:

> "... never had any dealings with the Plaintiff and were not aware of his existence."

Such dealings as the Defendant had in respect of the supply of wristwatches were said to have been with one Jay Dutt Lal.

[4] In paragraphs 9 and 10 of the Defence and Counterclaim the Defendant counterclaimed $274,096.00 against Jay Dutt Lal. It is not clear to us that it is permissible to counterclaim against a party other than the Plaintiff.

[5] In January 1999 the Plaintiff sought a form of mareva injunction against the Defendant to prevent it disposing of funds required to satisfy the Plaintiff's claim. Among the documents filed by the Defendant is a letter from I. Naiveli and Co., chartered

accountants, dated 30 March 1999, who had audited the Defendant's accounts at its request. In paragraph (a) (ii) the accountants refer to "money paid to Jai Dutt Lal/Bhawis Pratap" for the Defendant's project account. In paragraph (iv) the accountants wrote:

> "Due to the lack of evidence we were not able to confirm whether Bhawis Pratap Distributors have received all the funds paid to them."

It is not immediately apparent to us how these references to the Plaintiff can be reconciled with paragraph 4 (iii) of the Statement of Defence.

[6] In September 2000 the Plaintiff filed his list of documents. The list contains invoices, bundles of copies of cheques, records of watches supplied, a progress report, customs entries and a number of other documents consistent with the wide distribution and sale of wristwatches for fundraising purposes.

[7] In January 2001 the Defendant filed its own list of documents which included a record of sales achieved of "Quemeex watches in the Northern, Western and Central division" as well as other records of sale of wristwatches during the period November 1998 to February 1999.

[8] Between January 2001 and March 2005 no further steps were taken by either side to advance the litigation, however on 15

March 2005 the Plaintiff's solicitors sent the Defendant's solicitors draft "minutes of a pre-trial conference".

[9] We pause here to observe (not for the first time) that the practice of exchanging so called "minutes of a pre-trial conference" when no conference had in fact taken place and therefore no minutes had actually been taken is not compliance with the mandatory requirements of RHC O 34 rule 2. It is a practice which should be discontinued.

[10] On 16 March 2005 the Plaintiff also filed a Notice of Intention to Proceed pursuant to RHC O 3 r 5.

[11] On 29 March 2005 the Defendant's solicitors advised the Plaintiff's solicitors that it would be opposing any attempt to revive the action and that it would be applying to the Court to strike out the proceedings for want of prosecution.

[12] In May 2005 the Plaintiff filed a summons to dispense with a pre-trial conference altogether.

[13] On 31 August 2005 the Defendant filed a summons to have the Plaintiff's claim struck out on the grounds that:

> "(i) it is scandalous, frivolous and vexatious; and
> (ii) it is otherwise an abuse of the court process."

[14] The Defendant filed an affidavit in support of the strike out application. In paragraph 8 it stated that the further and better

particulars ordered by the High Court in April 1999 had not been supplied. In paragraph 12 it was stated that the Statement of Claim disclosed no reasonable cause of action and that it was scandalous, frivolous and vexatious. The Deponent also averred that the Defendant's constitutional right to have the matter disposed of within a reasonable time had been breached. In paragraph 14 it was averred that "the Defendant's witnesses to the case are no longer available as many have now left Fiji and therefore cannot be present in the course of the proceedings". None of the witnesses who had left Fiji was named and no reason was given why they were unable to return, or have their evidence taken on commission.

[15] In his affidavit in answer the Plaintiff first referred to the fact that the further and better particulars, as ordered, had actually been supplied in July 1999. The Plaintiff disagreed with the Defendant's suggestion that it would be unable properly to defend the action. The Plaintiff stated that:

> "the issues relating to my claim are documented and records would be available to the Defendant's bankers".

The Plaintiff explained that the delay in the prosecution of his claim was a result of financial weakness and the downturn in business which followed the events of May 2000.

[16] On 20 September 2005 the High Court heard the application to strike out. Apparently, no notes of the submissions by Counsel were taken and the entire record of the hearing is as follows:

> "Before the Hon. Mr. Justice Coventry
> Tuesday 20th day of September 2005 at 9.00 a.m.
> Mr. O'Driscoll for the Plaintiff
> Mr. Fa for the Defendant
>
> Action is struck out (claim and counterclaim by consent)
> Reasons
> Inordinate delay of Plaintiffs in failing to pursue the action 10/1/01 – 16/03/05.
> Action was commenced nearly seven years. Personal memories are involved and contact lost with witness. Prejudice to the Defendants.
> Also failure of Plaintiff to give F & BPs of claim from Scott J's order of 13/7/99.
> Costs assessed at $500 to be paid by Plaintiff to Defendants."

[17] Five grounds of appeal were filed. The fifth ground (which was filed as a supplementary ground of appeal) was that the Judge failed to give any reasons for his decision to dismiss the action. This ground and the written submissions filed by the Appellant in February 2006 were drafted on the assumption that the ground was factually correct. Following, however, on a further inspection of the High Court file the Reasons set out in paragraph [16] above were located and accordingly this ground of appeal, as

drafted, cannot succeed. Whether *adequate* reasons were delivered is, however, another matter.

[18] As has been seen, the Defendant's application had two limbs. Each of these gives rise to distinct considerations which must be dealt with individually. Although the judgment did not specifically state that the first limb of the application had been rejected it seems clear to us that this was in fact the case. In view of the pleadings and the documents discovered it is plain that the action was not scandalous, frivolous or vexatious. The only remaining question therefore is whether the judge was right to dismiss the action as being an abuse of the Court's process.

[19] We think it appropriate to begin our consideration of this question by reminding ourselves that while the High Court undoubtedly has the power to dismiss or permanently stay proceedings before it which it finds to be an abuse of its process (see e.g. the often quoted passage from Metropolitan Bank Limited v. Pooley (1885) 10 App. Cas 210 at 220, 221) it is a power which must be exercised with considerable caution.

[20] In Dey v. Victorian Railways Commissioners (1949) 78 CLR 62, 91 Dixon J said:

> "A case must be very clear indeed to justify the summary intervention of the court ... once it appears that there is a real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court

to dismiss the action as frivolous and vexatious and an abuse of process".

[21] More recently, in Agar v. Hyde (2000) 201 CLR 552 at 575 the High Court of Australia observed that:

> "It is of course well accepted that a court ... should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes."

[22] We also note Section 29 (2) of the Constitution:

> "Every party to a civil dispute has the right to have the matter determined by a court of law ..."

[23] The correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution has been considered by this court on several occasions. Most recently, in Abdul Kadeer Kuddus Hussein v. Pacific Forum Line IABU 0024/2000 – FCA B/V 03/382) the court, readopted the principles expounded in Birkett v. James [1978] AC 297; [1977] 2 All ER 801 and explained that:

> "The power should be exercised only where the court is satisfied either (i) that the default has been

intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party."

[24] In New Zealand, the same approach was adopted in the leading case of Lovie v. Medical Assurance Society Limited [1992] 2 NZLR 244, 248 where Eichelbaum CJ explained that:

> "The applicant must show that the Plaintiff has been guilty of inordinate delay, that such delay is inexcusable and that it has seriously prejudiced the defendants. Although these considerations are not necessarily exclusive and at the end one must always stand back and have regards to the interests of justice. In this country, ever since NZ Industrial Gases Limited v. Andersons Limited [1970] NZLR 58 it has been accepted that if the application is to be successful the Applicant must commence by proving the three factors listed."

[25] In New India Assurance Co. Ltd. V. Rajesh Kumar Singh (ABU 0031/1996 – FCA B/V 99/946) this court emphasized that while inordinate and inexcusable delay might be established, these factors were not, on their own, sufficient to warrant the striking out of the action. What additionally had to be clearly demonstrated (and could not be presumed) was that the Defendant had been or would be materially prejudiced by the delay that had occurred. Although the categories of prejudice are not closed (see, for example, remarks by Lord Denning in Biss v. Lambeth Southwark and Lewisham Health Authority [1978] 2 All ER 125) the principal consideration is whether, in view of the delay, a fair trial can still be held (Department of Transport v. Chris Smaller (Transport) Ltd [1989] AC 1197).

[26] One, admittedly exceptional, example of a fair trial being held notwithstanding an extreme delay of 40 years (Wright v. Commonwealth [2005] VSC 200) was recently referred to by Kirby J in Batistatos v. Roads & Traffic Authority of New South Wales [2006] HCA 27.

[27] The most recent review of the whole topic by the New Zealand Court of Appeal is Bank of New Zealand v. Savril Contractors Ltd [2005] 2 NZLR 475. This case is of particular relevance since it considers developments which have taken place in England and Wales following the introduction of the new Civil Procedure Rules 1998. At paragraph [99] the Court stated:

> "It is clear that the principles in Birkett v. James apply in New Zealand. The subsequent English authorities

> will as a consequence be persuasive. We do note, however, that in New Zealand the overriding consideration in strike out application for delay has always been whether justice can be done despite the delay. In this regard, the concern has been to achieve justice between the parties and the administration of justice in a general sense has not figured in the decisions to the same extent as it does in the more recent English decisions of for example Arbuthnot [1998] 1 WLR 1426 and Securum [2001] Ch 291. New Zealand Courts have not been prepared to go as far as those decisions in placing the same significance on the assessment of the delay from the point of litigants generally and the courts. It was stressed by this court in Commerce Commission v. Giltrap City Limited (1998) 11 PRNZ 573, at 579 *that case management principles should not be allowed to undermine the delivery of justice to the parties*. There may be different considerations where an application is based on failure to comply with peremptory orders, commonly called "unless orders" but that is not the case here". (emphasis added)

[28] Securum Finance Limited v. Ashton (supra) is especially instructive since it explains why, following the introduction of the new Rules, the courts in England and Wales have been more ready to strike out actions on the ground of delay alone. At paragraphs 30 and 31 Chadwick LJ wrote that:

"30 the power to strike out a statement of claim is contained in CPR r3.4. In particular, rule 3.4 (2) (b) empowers the court to strike out a statement of case ... if it appears to the court that the statement of case is an abuse of the court's process. ... In exercising that power the court must seek to give effect to the overriding objective set out in CPR 1.1 : see rule 1.2 (a). The overriding objective of the procedural code embodied in the new rules is to enable the court "to deal with cases justly": see rule 1.1 (1). Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into accounts the need to allot resources to other cases".

"31 In the Arbuthnot Latham case this court pointed out in a passage which I have already set out that:-

> "In Birkett v. James the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance."

[29] In Fiji there is as yet no equivalent of the English CPR rr 1.1 or 3.4. and therefore the approach exemplified in Securum has not yet become part of our civil procedure. Mr. Fa however suggested that Section 29 (3) of the 1997 Constitution had altered the position:-

"Every person charged with an offence and every person to a civil dispute has the right to have the case determined within a reasonable time."

[30] We have already referred to the right given to a party to a civil dispute by section 29 (2) of the Constitution. In our view, both sub-sections are primarily directed at the State's obligation to provide the citizen with reasonable access to courts and tribunals. Indeed, section 29 is entitled "Access to courts and tribunals". While not in any way underrating the expression of these rights in the Constitution, we do not think that they fundamentally alter the position which we have endeavoured to explain. As pointed out by the High Court of Australia in Batistatos (supra):

"The difficulty is in the expression "a legal right". The Plaintiff certainly has a "right" to institute a proceeding. But the Defendant also has "rights". One is to plead in defence an available limitation defence. Another distinct "right" is to seek the exercise of the power of the Court to stay its processes in certain circumstances. On its part, the court has an obligation owed to both sides to quell their controversy according to law."

[31] In our view, the circumstances in which the Defendant's right to seek to have the actions stayed or struck out on the ground of abuse of process are not established by inordinate delay alone.

[32] In the present case the judge found that the Plaintiff had been responsible for inordinate delay. He also found prejudice to the Defendant. Unfortunately, however, there was no finding that the delay (which was clearly inordinate) was in fact inexcusable. As has been noted, the Plaintiff offered indigence as a ground for failing to prosecute his action. And neither did the judge make any findings of fact relating to the consequences of the absence of witnesses or the limited usefulness of the documentary evidence as steps towards coming to a conclusion not only that the Defendant had suffered prejudice but that the prejudice was of such a nature and degree that a fair trial could no longer be held.

[33] In Bell – Booth v. Bell Both [1998] 2 NZLR 2, 6 the New Zealand Court of Appeal observed that:

> "Reasons for judgment are a fundamental attribute of the common law. The affinity of law and reason has been widely affirmed and a Judge's reasoning – his or her reasons for the decision – is a demonstration of that close assimilation. Arbitrariness or the appearance of arbitrariness is refuted and genuine cause for lasting grievance is averted. Litigants are assured that their case had been understood and carefully considered. If dissatisfied with the outcome, they are able to assess the wisdom and worth or exercising their rights of appeal. At the same time, public confidence in the legal system and the

legitimacy and dynamic of the common law is enhanced."

[34] In R v. Awatere [1982] 1 NZLR 644, 649 the New Zealand Court of Appeal also said:

> "Judges and Justices should always do their conscientious best to provide with their decisions reasons which can sensibly be regarded as adequate to the occasion. Indeed failure to follow the normal judicial practice might well jeopardise the decision on appeal. It could do so because a potential appellant might seem to be unduly prejudiced or it could do so by leaving it open for the appellate court to infer that there are in fact no adequate reasons to support it and so in either case act more readily than it would have done to order a re-hearing or to re-hear the case itself or to make an order that proper and adequate reasons are to be supplied or even to quash the verdict outright."

[35] In our view, the reasons given by the Judge in the present case full some way short of adequately explaining the conclusion reached. Such reasons as were given appear to suggest that the principles set out in Hussein were not followed. The reasons also seem to include an erroneous finding that an order of the High Court for the supply of further and better particulars had not been complied with.

[36] In all these circumstances we are satisfied that the decision to dismiss the action, thereby permanently depriving the Plaintiff of his opportunity to seek legal redress, cannot be upheld. The appeal must be allowed. The matter will be remitted to the High Court for directions to be given for the further and timely conduct of the proceedings.

RESULT

(1) Appeal allowed.

(2) Matter remitted to High Court for further directions.

(3) Appellant's costs assessed at $750.

R. J. Barker

Barker J.A.

FIJI COURT OF APPEAL

Henry J.A.

Scott J.A.

Solicitors:

Messrs A.K. Lawyers, Ba for the Appellant

Fa and Co., for the Respondent