IN THE HIGH COURT OF REPUBLIC OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 30 OF 2012

BETWEEN : **PETER ALLAN LOWING** of 1404 Hilton Hotel, Denarau Island, Fiji

Plaintiff

AND : **QBE INSURANCE (FIJI) LTD** of QBE Centre, Victoria Parade, Suva

Defendant

Messrs Lowing and Associates Barristers & Solicitors for the Plaintiff

Messrs Munro Leys Solicitors for the Defendant

Date of Hearing: 19 September 2013

Date of Decision: 17 October 2013

DECISION

Introduction

Pursuant to O.25 r.9 of the High Court Rules 1988 (HCR), on 8 July 2013 the High Court Registry at Lautoka issued a notice, *ex mero motu*, requiring the Plaintiff to attend court on

10 July 2013 to show cause as to why the matter should not be struck out for want on prosecution or an abuse of the process of the Court.

On 10 July 2013 Mr.Vakacakau counsel for the Plaintiff appeared in court on behalf of the Plaintiff and obtained time to file and serve Affidavit in Response. Accordingly the Plaintiff was granted 14 days to file Affidavit in Response. An Affidavit of Ms Salote Tabuadua Seru, a Solicitor employed by Messrs Lowing Associates, Solicitors for the Plaintiff filed on 31 July 2013 stating, inter alia, that pleadings in these proceedings have not closed and the last document filed was the Statement of Defence which was filed on 10 July 2012.

Background

On 12 June 2012 the Plaintiff filed Writ of Summons and Statement of Claim, claiming from the Defendant a sum of $100,000.00 or alternatively damages, interest and cost on indemnity basis.

The Statement of Claim filed herein sets out the background facts of the claim. It states inter alia that:

1. By a placement slip issued by the plaintiffs broker and a policy of marine insurance number FJ110000588pls dated about the 12 May 2011 on the terms set out therein (The Policy) the defendant agreed to insure the vessel valued at $100,000.00 against the perils set out in the policy including, but not limited to, perils of the seas, for a period of 12 months beginning on 12 May 2011.

2. On or about the 30 March 2012 whilst insured under the policy, the vessel encountered a storm of exceptional violence and sank on or adjacent to its mooring adjacent to Denarau Island (the incident). Fiji and specifically Denarau Island was subjected to extraordinary rain and wind at the time the vessel sunk.

3. On or about 3 April 2012 the Plaintiff reported the sinking to the defendant and a written claim under the policy was made on or about 15 April 2012.

4. Accordingly the Plaintiff suffered loss and damages of 100% of the agreed value of the vessel namely $100.000 less the deductible of $1,000.00 together with associated costs due to the happening of the incident.

5. As a result of the matters set out above the defendant is liable to indemnify the Plaintiff for the insured total loss of the vessel namely $100,000.00 less any deductible of $1,000.00.

The Writ herein has been filed on 12 June 2012. The Defendant filed Acknowledgement of Service on 26 June 2012. Subsequently the Defendant filed Statement of Defence on 10 July 2012. Afterwards, the Plaintiff filed an Amended Statement of Claim on 6 August 2012. This was the last pleading in the matter. As stated in the Affidavit of Solate the last pleading in the matter was not the Statement of Defence but the Amended Statement of Claim filed on 6 August 2012 was the last pleading in the matter. Thereafter the matter had been hibernating without any action being taken by the Plaintiff until the Court issued show cause notice under O. 25 r.9 of the HCR on 8 July 2013 upon the plaintiff.

On 31 July 2013 the plaintiff filed an Affidavit in Opposition (the **Affidavit of Salote)** and the Defendant filed an Affidavit in Rely on 20 August 2013 (the **Affidavit of JoneTuqiri**). The matter was argued on 19 September 2013.

Plaintiff's submission

In the Affidavit in Response the Plaintiff stated that correspondences pertaining to the substantive matter between the Defendant's Solicitors and the Plaintiff were on going even after the Statement of Defence so that on 7 August 2013 the Plaintiff represented to the Defendant that it (sic) had sold the vessel. By email on 7 August 2012, the Defendant's Solicitors advised the Plaintiff that they would not file an amended defence until an Amended Statement of Claim was filed.

Mr. Vakacakau submitted that the delay was not intentional and has reasonable excuse in that we were in the process of obtaining sufficient evidence to support our proposed application for summary judgment. However, the delay was not inordinate.

Defendant's submission

On the other hand Mr. Lee submitted that there has been one year delay since the pleadings in court and no cause shown for the delay. He further submitted that they advised the Plaintiff to amend their Statement of Claim but they haven't done so although agreed to. He argued that the Statement of Claim must be struck out pursuant to O.25 r.9 (HCR).

The Law

I am to consider this application in the light of the principles governing the dismissal of an action for want of prosecution**.**

O.25 r.9 (HCR) provides that:

Strike Out for want of prosecution (O.25, r.9))

*9. - (1) If **no step** has been taken in any cause or matter **for six months** then any party on application or the Court of its own motion may list the cause or matter for the parties **to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court.***

*2) Upon hearing the application the Court may either **dismiss** the cause [or] matter on such terms as may be just or **deal with the application as if it were a summons for directions.***(Emphasis added).

In **Grovit v Doctor and Others** (1997 1 WLR 640 at 641 H.L) it was held in a situation such as the present:

"That for the plaintiff to commence and to continue litigation which he had no intention to bring to a conclusion could amount to an abuse of process; and that, accordingly, once the court was satisfied that the reason for the delay was one which involved an abuse of process in maintaining proceedings when there was no intention of carrying the case to trial it was entitled to dismiss the action"

In the leading House of Lords decision on the principles governing dismissal for want of prosecution, namely **Birkett v James** [1978] AC 297 at 318, **Lord Diplock** declared;

> ***"The power should be exercised only where the court is satisfied either (1) 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 (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will 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."***

The following statement of **Lord Parker** in **Culbert v Stephen WestwellCo. Ltd** (1994) PIQR 55 concerning '**contumelious conduct'**:

> ***"There is however in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuseof the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a serious of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice.***
>
> ***In my judgment the way in which the action has been conducted does amount to an abuse of the process of the court and it would be a further abuse of the process if the action were allowed to proceed. In my judgment also, a fair trial is no longer possible."***

In this case, although there has been **inordinate** and inexcusable **delay**, this alone, to use the following words of **Lord Justice Nourse** in **Choraria (Girdharimal) v Sethia (Nirmal Kumar)** Supreme Court of Judicature Case No. 96/1704/B C.A. 15.1.98 are worth noting:

> ***"However great, does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse so that, if it is fair to do so, the action will be struck out or dismissed on that ground."***

It has been further stated by **Nourse J:**

"That is the principle on which the court must now act. Whether it is identified as being comprehended within the first limb of Birkett v James or as one having an independent existence appears to be a point of no importance. I have already said that it is clear that the relevant ground of decision in Culbert was based on the first limb of Birkett v James. In other words, it was there effectively held that the plaintiff's conduct had been intentional and contumelious.

In my view that conclusion was well justified on the facts of the case, which demonstrated not only the plaintiff's complete disregard of the rules but also his full awareness of the consequences. He had at the least, been reckless as to the consequences of his conduct and, on general principles, that was enough to establish that the defaults had been intentional and contumelious."

The Plaintiff's counsel appears to be heavily relying on the above case law.

The Fiji Court of Appeal in **Owen Clive Potter v Turtle Airways Limited** (CIV Appeal No. 49 of 1992 at p3&4) explained the meaning of '**inordinate**' and '**inexcusable**' delay in prosecuting the claim as follows:

"*(**Inordinate**).....means **so long that proper justice may not be able to be done** between the parties. When it is analyzed, it seems to mean that the delay has made it more likely than not that the hearing and\or the result will be so unfair vis a vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties".*

*...**Inexcusable** means that there is **some blame, some wrongful conduct**, some conduct deserving of opprobrium as well as passage of time. It simply allows the judge to put into the scales the Plaintiff's conduct or reasons for not proceeding, as well as the lapse of time and the **prejudice that would result to him from denying him opportunity from pursuing the action** or perhaps any action against the defendant"* (Emphasis added).

In **Re Manlon Trading Ltd**[1995] 4 All ER 14, the Court of Appeal, Civil Division discussing the principle applicable to application to strike out proceedings for want of prosecution held:

***Held** – (1) The conventional approach to striking out for want of prosecution,which applied to all civil proceedings and required the court to inquire whether there had been **inordinate and inexcusable delay giving rise to a substantial risk that a fair trial would not be possible** or was such as was likely to cause or to have caused **serious prejudice to the defendant**, also applied to*

disqualification proceedings under the 1986 Act, but was modified by an additional consideration, namely the need to protect the public in whose interest the disqualification proceedings were brought. On that approach, if the court concluded that a fair trial was not possible owing to the delay, it should always strike out the proceedings. ***Where a fair trial was possible, the court should permit the case to proceed*** *unless there was evidence of serious prejudice caused to the director by the delay, both in launching the proceedings and thereafter, which outweighed the public interest in obtaining a disqualification order. In laying down a two-year period within which proceedings were to be brought, Parliament had clearly indicated that expedition was required and if the Official Receiver delayed in launching proceedings until the end of that period, greater diligence was required of him. It was not the case that the public interest in obtaining the protection of a disqualification order diminished with the passage of time and the judge had erred in so holding. It followed that the judge had erred both in his approach to disqualification proceedings and in his conclusion on adopting that approach (see p 21 d f to h, p 22 c j to p 23 g, p 26 c j to p 27 a g to p 28 b and p 29 d e j, post); Birkett v James[1977]2 All ER 801 applied; dictum of Vinelott J in Re Noble Trees Ltd[1993] BCLC 1185 at 1190 approved.*

(2) Given that any evidence of prejudice suffered by a director had to be set against the public interest in obtaining a disqualification order, a judge would rarely be justified in striking out on the sole ground of the prejudice inherent in the pendency of disqualification proceedings in the absence of evidence of other specific prejudice. On the judge's alternative approach, it was doubtful whether the inherent prejudice caused to A was sufficient to justify striking out in view of his earlier finding that a fair trial was possible and his rejection of the specific prejudice asserted by A. However, the substantial culpable delay on the part of the Official Receiver had clearly caused prejudice to A through its effect on the memories of the witnesses. It followed that such prejudice, together with the inherent prejudice on which the judge relied, amounted to prejudice which was sufficiently serious to outweigh the public interest in pursuing the disqualification proceedings and that the judge's conclusion that the proceedings should be struck out could therefore be supported on the facts. The appeal would accordingly be dismissed (see p 24 j to p 25 b e h j, p 26 b c, p 28 j and p 29 j ,post).

Decision of Evans-Lombe J [1995]1 All ER 988 affirmed on other grounds. (Emphasis added).

Determination

These proceedings had been initiated by the court by issuing notice on the Plaintiff to show cause as to why his claim should not be struck out for want of prosecution. The notice has been issued under HCR O.25 r.9 as the Plaintiff failed to take step in the matter for more than six month since the last pleading.

The writ herein was filed on 12 June 2012. The Defendant filed Statement of Defence on 10 July 2012 after filing Acknowledgement of Service of Writ of Summons on 26 June 2012. Thereafter the Plaintiff filed an Amended Statement of Claim on 26 August 2012. It is not clear whether the Amended Statement of Claim was served on the Defendant. The Amended Statement of Claim was the last pleading that was filed in the matter. After that the Plaintiff did not take any step that has necessitated the court to issue O.25 r. 9 Notice on 8 July 2013.

In Response to the notice the Plaintiff filed Affidavit of Salote, a Solicitor employed by Messrs Lowing & Associates, Solicitors for the Plaintiff. In Reply the Defendant filed Affidavit of Jone Tuqiri, Legal Executive of Munro Leys, solicitors for the Defendant.

As stated earlier, Plaintiff's claim arising from an insurance claim. The Plaintiff admits that the court records had been stagnant for more than six months. There has been almost one year delay between the last pleading (6 August 2012) and the show cause notice issued by the court on 8 July 2013. The Plaintiff filed the Affidavit in Response and stated the reasons why the matter should not be struck out for want of prosecution. In that Affidavit the Plaintiff (Affidavit of Salote) stated that an essential witness to the sinking of the boat was not in the country.

The Plaintiff submitted that the action was not intentional so as to drag the matter or to show no interest in the carrying out of the proceedings.

In the Affidavit in Reply the Defendant stated that Phyllis Ann Williams (Plaintiff's eye witness) who travels on Passport No. 829348 was in Fiji until January 2013, returned to Fiji on 23 February 2013 and Departed Fiji again on 20 June 2013 (Travel history attached to the Affidavit marked "JT1").

Certain email correspondence had taken place between the Plaintiff and the Defendant. These emails were annexed to the Plaintiff's Affidavit marked "SC2". On 7 August 2012 the Plaintiff informed through email to the Defendant that he had sold the vessel for $35,000.00. The Defendant sent an email to the Plaintiff on 8 August 2012 wherein it stated that the sale of vessel will require further amendment of the Statement of Claim as the nature of the claim has to be changed fundamentally from one for total loss to one for partial loss. It was argued on behalf of the Defendant that the Plaintiff has failed to proceed with the matter by amending his Statement of Claim though agreed to.

Was the Plaintiff's default intentional and contumelious?

This is a question of fact and must be decided by the court depending on facts and circumstances of each case. In the present case the Plaintiff had been corresponding with the Defendant concerning Amendment of Claim. It is of note worthy that the Defendant had suggested that the Plaintiff need to amend the claim in view of the fact that the lost vessel was later found and sold by the Plaintiff. It is not the Defendant's duty to advise the Plaintiff how best he has to present his Statement of Claim in court. The Defendant's obligation was to defend the action instead of giving advice to the Plaintiff in respect of the amendment of the claim. They should have proceeded with the matter without waiting for the Plaintiff to amend his claim. In my opinion in this matter the Defendant also to be blamed for inaction occurred.

There has been no disobedience on the part of the Plaintiff to a peremptory order of the court.

Was there inexcusable and inordinate delay?

The Plaintiff submitted the delay caused was due to the fact that an essential eye witness was out of the country. He was waiting for the witness to interview before further amending the Statement of Claim. Moreover, the Plaintiff has been communicating with the Defendant via email.

As was held in Brickett v James (supra) the delay should have been inexcusable and inordinate.

The last document that was filed in this matter was Amended Statement of Claim on 6 August 2012. Thereafter the Plaintiff did not take any steps until O.25 r.9 show cause notice was issued by the court. The delay has been one year. The Plaintiff has explained why this delay was caused. I am satisfied with the explanation given by the Plaintiff for the delay. This delay, in my opinion, cannot amount to a culpable delay on the part of the Plaintiff or his lawyer.

Was there serious prejudice to the Defendant?

There is no evidence of prejudice suffered by the Defendant by the delay. A judge would rarely be justified in striking out on the sole ground of prejudice inherent in the pendency of the proceedings in the absence of other specific prejudice. Where a fair trial was possible, the court should permit the case to proceed unless there was evidence of serious prejudice caused to the Defendant by the delay.

Conclusion

For the foregoing reasons, on the authorities and on the facts and circumstances of this matter I permit the case to proceed as there was no prejudice caused to the Defendant and fair trial still possible. However, the court may deal the O.25 r.9 notice as it were a summons for directions pursuant to O.25 r.9 (2). This rule provides that:

> *2) Upon hearing the application the Court may either* ***dismiss*** *the cause [or] matter on such terms as may be just or* ***deal with the application as if it were a summons for directions.***

I therefore venture to deal the notice as it were a summons for directions. I accordingly make the following directions:

(i) The Plaintiff is granted permission to proceed with the matter;

(ii) The Plaintiff to file and serve Amended Statement of Claim within 14 days, if need be;

(iii) The Defendant to file and serve Amended Statement of Defence within 7 days thereafter, if need be;

(iv) Failure to comply with these directions will lead their respective pleadings to be struck out; and

(v) Cost of these proceedings shall be costs in the cause.

Mohamed Ajmeer

Acting Master

At Lautoka

17 October 2013