

**Civil Action No. 68 of 2013 St Aubyn Limited And Young Women's Christian
Association of Fiji**

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Action No. 68 of 2013

Between: St Aubyn Limited

Plaintiff

And: Young Women's Christian Association of Fiji

Defendant

Appearances: Ms S. Devan for the plaintiff

Ms Prem Narayan for the defendant

Date of hearing: 1st November, 2013

JUDGMENT

1. I have before me two summons. The first is an application by the defendant in terms of Or 18,r (1) and 18(1) to strike out the plaintiff's writ of summons. The second is the plaintiff's application under Or 18,r1 and Or 2,r1(2) seeking an extension of time to file statement of claim.

2. *The plaintiff's summons*

- a. On 2nd July, 2013, the defendant filed summons to strike out the plaintiff's writ of summons for failure to file a statement of claim within 14 days of being served with the acknowledgment of service, on the ground that the plaintiff's endorsement of claim discloses no reasonable cause of action.
- b. In an affidavit in support of the summons, Taraivini Qicatabua, General Secretary of the Young Women's Christian Association (YWCA) states:
 - On 20th March, 2013, the YWCA was served with the writ of summons.
 - On 22nd March, 2013, an acknowledgment of service was filed by the YWCA.
 - Since 22 March 2013, the plaintiff has not filed a statement of claim.
 - At present, the YWCA does not know the nature of claim it has to answer.
 - The claim is frivolous and vexatious and amounts to an abuse of process.

3. *The defendant's reply and summons*

In an affidavit in reply filed on behalf of the defendant on 19th August,2013, Annmarie de Vos, company director of the plaintiff states that the delay in filing of its statement of claim was for the reason it was relying on :

- *a forensic financial report which was to be prepared by its auditors, Messrs Aliz Pacific Chartered Accountants and Business Advisors ...which addressed essentially the nature and extent of financial business loss suffered by the Plaintiff owing to the breaches of lease and mediation agreement by the Defendant”.*
- *the forensic report was delayed by the Plaintiff's auditors as the partner (Mr Zarin Ali) who was supervising the preparation of report suddenly fell ill and was evacuated to Australia for urgent medical treatment.*
- *The financial report was fully submitted to the Plaintiff on 16 July 2013 however due to some errors in the report, a request was made to amend the same which was received by the Plaintiff on 3rd August 2013.*

The plaintiff sought leave that the time to file statement of claim be extended in terms of its summons filed on 19th August,2013. The plaintiff states that the defendant is not prejudiced by the delay, as the defendant has failed to respond to the plaintiff's interim application.

4. These proceedings commenced with an ex parte notice of motion(subsequently made inter partes) filed by the plaintiff praying for the following orders:

- i. *That the Defendant by itself or by its servants or agents or otherwise however be restrained from levying or proceeding further with the levying and putting into force a distress upon the goods of the Plaintiff to recover the rents of the premises known as “YWCA building” until the further of the Court.*
- ii. *An Order that the rental in respect of the tenanted premises be abated until the renovation works to the YWCA building is complete.*
- iii. *Alternatively the Plaintiff be at liberty to apply further rental accrued to finance the renovation/repair works to the YWCA building.*

5. In an affidavit in support,Annmarie de Vos, company director of the plaintiff stated that;

- a) On 5th September,2004, the plaintiff entered into a lease agreement with the defendant to lease the YWCA building, for a term of 10 years commencing 6thJuly,2004, at a rental of \$25,000 per month. The plaintiff leased the building, in order to operate a hotel, restaurant and a bar from the premises.
- b) In terms of the Lease Agreement, the defendant as sub-lessor, was to maintain the roof, exterior drainage and electric systems of the demised premises.

- c) A dispute had arisen between the parties in respect of the state of non-repair of the building. This led to arbitration proceedings. A sum of \$195,226.52 being rent less a set off of \$58,622.46 on claims by the plaintiff was awarded to the defendant.
 - d) Subsequently, the plaintiff and defendant entered into a mediation agreement, in terms of which the defendant would commence repair/refurbishment works to the building and complete the works within 36 weeks from 4 July, 2012. The defendant agreed to reduce its rental claim, which would be increased after the works were complete.
 - e) The works were to be completed by 4th March, 2013. But the work continues to be delayed.
 - f) When the repairs were effected to the roof, heavy rain caused major leaks. As a result, the plaintiff had to close all rooms to guests on the fourth and fifth floor, part of the 3rd floor, the kitchen, restaurant and bar. The generator has not been working and power to the building has been disrupted.
 - g) Due to the state of the building, loss of business revenue and the works not being completed within time, the plaintiff resolved to suspend payment of rentals until such time the renovations works are completed. The plaintiff is willing to pay rental, provided the defendant gives a time frame for all works to be completed.
 - h) The plaintiff cannot be unfairly expected to pay rental, without being able to use the entire premises and operate its business.
 - i) The plaintiff's market reputation as hotelier has been tarnished and the situation will be worsened, if a distress for rent is levied.
 - j) The plaintiff seeks an order that the defendant be restrained from issuing a distress for rental and an Order to withhold or abate payment of rent until the completion of renovation works.
6. On 22nd March, 2013, Ms Prem Narayan, counsel for the defendant consented to the grant of the first interim relief sought by the plaintiff, namely, that the defendant be restrained from levying or proceeding further with the levying and putting into force a distress upon the goods of the plaintiff to recover the rents of the premises. The defendant was given 21 days, to file affidavit in opposition. On 3rd May, 2013, a final date was given to the defendant, to file affidavit in opposition on 24th May, 2013

7. *The determination*

At the hearing, Ms Narayan, counsel for the defendant moved that the plaintiff's writ of summons be dismissed, for failure to file statement of claim within 14 days after the defendant gave notice of intention to defend. Acknowledgement of service was filed on 22 March,2013.On 2 July,2013,the application to strike out the writ of summons was filed. Ms Narayan concluded that thereafter,the plaintiff filed summons on 19 August,2013,for extended time to file statement of claim.

Mr Sharma, counsel for the plaintiff, in reply conceded that statement of claim was not filed within 14 days of the acknowledgement of service. He contended that there was a legal issue to be determined before Court, in view of the plaintiff's application for interim relief, which was granted by consent of the defendant.

I would accept the argument of Mr Sharma. There is a valid issue between the parties, as evident from the affidavit in support of interim reliefs and the interlocutory relief granted by consent. I also note that the defendant has not filed affidavit in opposition to the interim reliefs sought.

The law on striking out is clear. I refer to the classic exposition of Lord Diplock in *Birkett v James*, (1977) 2 AER 801 at pg 805, where he stated that the power to strike out an action for want of prosecution 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) 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".(emphasis added)*

This passage was restated by the Fiji Court of Appeal in *Pratap v Christian Mission Fellowship*, (2006) FJCA 41.The judgment of the court also referred to *Dey v Victorian Railways Commissioners*,(1949)78 CLR 62,91 and *Agar v Hyde* (2000) 201 CLR 552 at 575. In the first case, Dixon J stated :

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. (emphasis added)

In *Agar v Hyde* (*supra*) 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."

I do find that the plaintiff had not taken steps to file statement of claim within the stipulated time, and got its act together only after the defendant filed an application to strike out. I am not satisfied with the alleged reasons given by the plaintiff, for its delay in filing statement of claim. I see no reason why another firm or partner of "Messrs Aliz Pacific Chartered Accountants and Business Advisors", could not have prepared a "forensic financial report", when Mr Zarin Ali fell ill. In support, a medical report has not been submitted. I also do not find credible the further delay said to have arisen, when the plaintiff sent back the report for amendment.

Be that as it may, in my view there has not been an inordinate or inexcusable delay on the part of the plaintiff to proceed with its action. And importantly, the defendant has not claimed that it would be prejudiced by the delay.

Pathik J in *Prasad v Estate of Ram Dei*, (2003) FJHC 261 stated that a defendant must give detailed reasons with particulars as to how he would be prejudiced. Pathik J relied on the case of *Owen Clive Potter v Turtle Airways Ltd*, (Civil Appeal no.49 of 1992) for the following definition of the words "inordinate" and "inexcusable" delay, in this context.

(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 his action or perhaps any action against the defendant

In *Lovie v. Medical Assurance Society Limited*, [1992] 2 NZLR 244, 248 as cited in *Pratap v Christian Mission Fellowship*, (*supra*) 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. (emphasis added)

The judgment of the court in *Pratap v Christian Mission Fellowship*, also referred to the case of *New India Assurance Co. Ltd. v Rajesh Kumar Singh* (ABU 0031/1996 – FCA B/V 99/946) and declared:

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 the principal consideration is whether, in view of the delay, a fair trial can still be held. (emphasis added)

In *Costellow v. Somerset County Council*, (1993) 1 All ER 952, the Court of Appeal gave guidance for courts confronted by a situation where the plaintiff having failed to take a step in the proceedings within the time frame required, at the same time applies for an extension of time in these words:

Two principles are to be considered. The first is that the rules of court and the associated rules of practice devised in the public interest to promote the expeditious dispatch of litigation must be observed. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. Neither principle is absolute, but the court's practice has been to treat the existence of such prejudice as a crucial and often decisive factor. (emphasis added)

In the light of the principles governing striking out, I decline the defendant's summons and grant the plaintiff leave to file and serve statement of claim.

8. *Orders*

- i) The application for striking out is declined.
- ii) The plaintiff's summons for extension of time to file statement of claim is allowed. The pleadings will now take their normal course.
- iii) The plaintiff shall pay the defendant's costs in a sum of \$ 750 summarily assessed within 21 days of this judgment.

19th September, 2014



A.L.B. Brito - Mutunayagam

A.L.B. Brito- Mutunayagam

Judge