IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 598 of 2005

BETWEEN : **WESTERN WRECKERS LIMITED** a limited liability company duly incorporated in Fiji under the Companies Act and having its registered office at Navutu Industrial Subdivision, Navutu, Lautoka, in Fiji

FIRST PLAINTIFF

AND : **DIAMOND AQUA (FIJI) LIMITED** a limited liability company duly incorporated in Fiji under the Companies Act and having its registered office at 164 Ratu Mara Road, Samabula, Suva, in Fiji.

SECOND PLAINTIFF

AND : **ALBI'S MUFFLER HOUSE (FIJI) LIMITED** a limited liability company duly incorporated in Fiji under the Companies Act and having its registered office at Suva, in Fiji.

THIRD PLAINTIFF

AND : **MOHAMMED JAMAL** of Nadi, in Fiji, Businessman.

FIRST DEFENDANT

AND : **VEENA KIRAN** of Nadi, in Fiji, Businesswoman.

SECOND DEFENDANT

AND : **MOHAMMED ALTAAF** of Nadi, in Fiji, Businessman.

THIRD DEFENDANT

AND : **CRYSTAL CLEAR MINERAL WATER (FIJI) LIMITED** a limited liability company duly incorporated in Fiji under the Companies Act and having its registered office at Waqadra Industrial Subdivision, Namaka, Nadi, in Fiji.

FOURTH DEFENDANT

AND : **FREZCO BEVERAGES LIMITED** a limited liability company duly incorporated in Fiji under the Companies Act and having its registered office at Waqadra Industrial Subdivision, Namaka, Nadi, in Fiji.

FIFTH DEFENDANT

BEFORE : **Master Thushara Rajasinghe**

COUNSEL : **Mr. S. Chandra** for the Plaintiff
Ms. N. Choo for the Defendant

Date of Hearing : 16th June, 2014
Date of Ruling : 26th September, 2014

RULING

A. INTRODUCTION

1. This Summons was filed by the Defendants pursuant to Order 25 rule 9 of the High Court rules seeking an order to strike out the Plaintiff's claim against the Defendants on the ground of want of prosecution.

2. Upon being served with this Notice, the Plaintiffs and the Defendants appeared in court on the 1st of April 2014. The Plaintiffs and the Defendants were given directions to file their respective affidavits which they have filed accordingly. Subsequently, this Summons was set down for hearing on 16th of June 2014, where the counsel for the Plaintiff and the Defendants made their respective oral submissions. The learned counsel for the Plaintiff tendered his written submission at the end of the hearing. Having considered the respective affidavits and submissions of the parties, I now proceed to pronounce my ruling as follows.

B. BACKGROUND,

3. The Plaintiffs have instituted this action by way of a writ of summons on the 16th of December 2005. The Defendants then have filed their statement of defence and counter

claim, which was followed by the reply statement of the Plaintiff and defence to the counter claim. Subsequently matter has moved through the discoveries and inspections of document to the pre –trial conference. The Plaintiffs have filed the minutes of pre-trail conference on 26th of July 2011. Since then, this action has been laying in abeyance without taking any steps to take the matter to its conclusion until the Defendants filed this Summons to strike out pursuant to Order 25 r 9.

The Plaintiff's case,

4. The Plaintiff filed an affidavit of Mr. Mohammed Hanif in response to this Summons. Mr. Hanif deposed in his affidavit that the Plaintiffs have no intention to delay the proceedings and was always wanted to take this matter to trial. He further stated that the matter has already completed all pre-trial procedures and only required to file Order 34 summons to set the matter to hearing. The reasons for the delay to take such steps since the filing of the minutes of pre-trial conference were that the Defendants' previous solicitor and the Plaintiffs had been engaged in a negotiation to settle this dispute and also had to discover voluminous of documents. Mr. Hanif tendered some correspondence exchanged between the parties as annexure to his affidavit.

Defendant's case,

5. Before, I discuss the contentions deposed by the Defendants in their affidavits; I am compelled to determine the acceptability of the affidavit of Mr. Mohammed Altaff filed in support of this Summons. The acceptability of the affidavit in fact has no effect to the validity of this Summons as Order 25 r 9 does not require an affidavit in support to invoke the court jurisdiction under this rule. However, the facts deposed in the affidavit are materially relevant to determine the issues raised by this summons; hence I first proceed to consider the acceptability of Mr. Mohammed Altaff's affidavit as evidence.

6. This affidavit is appeared to be sworn by the deponent on 29th of January 2013 at Nadi before a commissioner for oaths, whose name was not stated, neither his official stamp. However, he has deposed some facts and incidents in the affidavit which had took place on 19th of June 2013, 29th of October 2013, 15th of November 2013, and 5th of December

2013 respectively. Accordingly, it appears that the deponent has given evidence in this affidavit regarding some facts and incidents which had actually occurred after the affidavit was sworn and signed by the Deponent. The Defendants did not make any application for leave to use this defective affidavit pursuant to Order 41 r 4. Even though, if such leave was sought, I am of the opinion that this defectiveness does not fall within the scope of Order 42 r 1 as it only allows for irregularity of the form of affidavits. Hence, the evidence given by the deponent in this affidavit could not be considered as credible valid evidence.

7. The Defendants in their affidavit in reply deposed that this incident took place some 14 years ago. The delay caused by the Plaintiffs has adversely affected their prospect of having a fair and just hearing. They further contended that the memories of their witnesses regarding the material facts of this dispute could have destructively affected by this delay.

C. THE LAW,

8. Order 25 rule 9 states that;

"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,

Upon hearing the application the court may either dismiss the cause or matter on such terms as maybe just or deal with the application as if it were a summons for directions.

9. It appears that according to Order 25 r 9, the court is allowed to strike out an action on the reasons of the failure to take steps for six months on two grounds. The first ground is for want of prosecution and the second is an abuse of the process of the court.

10. The applicable principles for strike out an action on the grounds of "want of prosecution" and "abuse of the process of the court" have expounded in **Birkett v James (1978) AC 297 at 318) (1977) 2 All E.R 801** where Lord Diplock held that

"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".

11. In view of this observation of Lord Diplock in **Birkett v James (supra)**, it appears to me that the judicial approach to exercise its discretionary power pursuant to order 25 r 9 has two pronged stages. The first stage is to consider whether the delay or default of the Plaintiff to take necessary steps for six months is either an intentional and contumelious default or an inordinate and inexcusable delay. The second stage is to consider whether such delay will give rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or to have caused serious prejudice to the Defendant.

12. The Fiji Court of Appeal in **Pratap v Christian Mission Fellowship (ABU 0093 of 2005)** has approved and adopted this celebrated passage of Lord Diplock in **Birkett v James (supra)** in to the legal domain of Fiji Islands in respect of application made pursuant to Order 25 r 9.

13. The scope of the definition of abuse of the process of the court and the intentional delay in respect of the application of this nature has further discussed and elaborated in **Grovit v Doctor and Others (1997) 1 WLR 640), (1997) 2 All E.R 417** where Lord Woolf held that;

"the court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an

abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if the justice so requires (which will frequently be the case) the court will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the Plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in ***Birkett v James***".

D. ANALYSIS,

14. The main reason given by the Plaintiffs for not taking any steps to take this matter to its conclusion and for the delay is the negotiation they had with the Defendants' previous solicitor for a settlement. Incidentally, this claim of settlement is categorically denied by the Defendants. They emphasized that such a process for a settlement never took place between the parties. Apart from stating the settlement discussion in the affidavit, the Plaintiffs have failed to provide any other credible evidence to substantiate their claim.

15. The other reason given by the Plaintiff is that the previous solicitor of the Defendants continually sought for further discoveries. Moreover, the Plaintiffs had to discover large numbers of documents which consumed much time. In fact, the annexure tendered by the Plaintiffs in their affidavit to substantiate this claim, actually give a contrasting view. All the correspondence between the previous solicitor of the Defendants and the Plaintiffs were relating to the period before the filing of minutes of pre-trial conference on 26th of July 2011. There is no specific or precise explanation from the Plaintiffs for their failure to take appropriate steps after the pre-trial conference was concluded in July 2011. Though the Plaintiffs claim that the matter is ready for trial and only need to fix a date for it, they have not taken any appropriate steps for that since July 2011. In the absence of any credible and substantial explanation from the Plaintiffs for such a delay, it certainly appears that the failure to take necessary steps nearly over a period of three years constitutes an intentional default by the Plaintiff. Moreover, such delay without any reasonable explanation undeniably falls with the meaning of inexcusable and inordinate delay.

16. I now turn to consider whether this intentional default and inexcusable and inordinate delay of the Plaintiff to take this action to its conclusion, would give rise to a substantial risk that it is not possible to have a fair trial or is likely to cause or to have caused serious prejudice to the Defendant.

17. The Defendants deposed in their affidavit in reply, that this delay has affected the confidence of their witnesses. They contended that this dispute between the parties has derived from incidents took place in late 1990s and early 2000s. The memories of their witnesses about the material facts could have faded away over the period of 14 years.

18. Irrespective of the Plaintiffs' claim that this action is now ready for the hearing, they have not taken any step to take the action to hearing since July 2011, that is almost over a period of three years. The Plaintiffs have not given any substantial explanation for the delay, which compel me to form a credible inference of the existence of substantial risk that it is not possible to have a fair trial, which certainly will cause serious prejudice to the Defendants.

19. Having concluded my opinion that the delay of the Plaintiff to take this action to its conclusion is an intentional default and amount to an inexcusable and inordinate delay which give rise to a substantial risk that it is not possible to have a fair trial and will cause serious prejudice to the Defendants, I make following orders that;

    i. This writ of summons and the Statement of claim filed by the Plaintiff in this action is hereby struck out on the grounds of an abuse of the process of court and want of prosecution pursuant to Order 25 rule 9 of the High Court Rules,

    ii. I award sum of $1,500 for cost assessed summarily for each of five Defendants.

Dated at **Suva** this **26th day** of **September, 2014**.

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R.D.R. Thushara Rajasinghe

Master of High Court, Suva