IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 458 of 1993

BETWEEN : RESOLUTION TRUST CORPORATION a Receiver for American Federal Savings Loan Association of Colorado and American Savings of Colorado

1st PLAINTIFF

: THE CADLE COMPANY of 100 North Center Street, Newton Falls, Ohio, United States

2nd PLAINTIFF

AND : LEINANI K. BORTLES & LARRY LYNEL BORTLES both of Qeleya Street, Lami

1st DEFENDANT

: A. MITCHELL GAY of 108 Denver Trail, Azlea, Texas, United States, Radiologist, for 'Fiji Marina Partners'

2nd DEFENDANT

: ALAN C. BEALL of Honolulu, Hawaii, Real Estate Developer and Consultant, for 'Fiji Pacific Partners'

3rd DEFENDANT

BEFORE : **Master Thushara Rajasinghe**

COUNSEL : **Mr. W. Clerk** for the Plaintiff

Ms. S. Shameem with D. Gandhi for the 1st Defendant

Mr. Nagin for the 2nd and 3rd Defendant

Date of Hearing: 19th of September, 2014,

Date of Ruling : 22nd of May 2015

RULING

1. The Plaintiff files this Summons dated 29th of August 2013 seeking following orders inter alia;

   i. The counter claim filed by the second and third defendants be dismissed for want of prosecution,

   ii. The counter claim filed by the second and third defendants be summarily dismissed on the ground that it discloses no reasonable cause of action or otherwise is frivolous, vexatious and an abuse of the process of the court.

2. The summons is being supported by the affidavit of Denise Harkless. The Plaintiff states that this application is made pursuant to Order 18 rule 18 (1) of the High Court rules and the inherent jurisdiction of this court.

3. Having being served with this Summons, the second name first defendant filed an affidavit in opposition of this Summons. Neither the second

defendant nor the third defendant filed any affidavit in opposition. Subsequently the matter was set down for hearing on 19th of September 2014. In the meantime, the Plaintiff sought leave of the court to file several supplementary affidavits which was allowed. The learned counsel for the Plaintiff, and the Defendants made their respective oral arguments and submissions during the course of the hearing. All the parties were then directed to file their respective written submissions, which they filed as per the directions. Having considered the summons, respective affidavits and the submissions of the parties, I now proceed to pronounce my ruling as follows.

Background

4. The Plaintiff instituted this action by way of a writ of summons dated 25th of August 1993 against the first Defendants seeking following orders inter alia;

   i. *Damages in the amount of US $ 2,878,910.65 and interest at the rate of 7.02% per annum from 4th May 1991 and late charge in the amount of US $742,002.39 and cost, and*

   ii. *Damages in the amount of US $954,375.00 and $ 18,213.00 representing cost and attorney's fees and interest at the rate of 3.41% from 26th of August 1992; and,*

   iii. *An order that the Defendants and each of them:*

      (a) *be restrained and an Injunction be granted restraining them and each of them until further order whether by themselves their servants or agents or otherwise howsoever from transferring, dealing with, charging, mortgaging, assigning, disposing of (otherwise than to the Plaintiff or with prior written*

consent of the Plaintiff's solicitors) or removing from the jurisdiction any of their or each of their property or monies or asset including property held by third party entities over which the Defendants or each of them have ownership and or control within the jurisdiction of this Honorable Court including but not limited to the property being described as Certificate of Title 6684 and Native Lease 8720; and

(b) *forthwith disclose and within fourteen days after the service of this order upon them make and serve on the Plaintiff's Solicitors and Affidavit disclosing the full value of all of their and each of their assets within the jurisdiction of this Court identifying with full particularity the nature and whereabouts of all such assets and whether the same be held in their own name, jointly or by one or more, by one or the other or by nominees or companies or otherwise held on their or on each of their behalf and without prejudice to the generality of the foregoing specifying:*

a. *the identity of all bank, financial institution or other accounts held in their name or names; or jointly ,or by nominees or otherwise on or for their or each of their behalf, and the balance of each of such accounts and the name and address off the branch at which it is held;*
b. *any and all other assets money or goods owned by them or each of them and the whereabouts of the same and the names and address of all persons who have or may have the possession custody or control of such assets moneys goods at the date of service of this order; or*

iv. *Such further orders in aid of same as to this Honorable Court seems just;*

v. *An order that the Plaintiff may retain Caveats on the title of the properties of the Defendants and each of them including properties held by entities over which the Defendants and each of them have sole ownership and or control*

being CT 6684 being Lot 1 on DP 1277 and Native Lease 8720 being Lot 5 Qeleya subdivision pending the final determination of the Plaintiff's claim; and

vi. *The costs of and incidental to this action on an Attorney/Client basis;*

vii. *Such further and other relief as this Honorable Court deems just.*

5. The Plaintiff's claim is founded on two Judgments delivered by the United State District Court for the District of Colorado against the First Defendants on 3rd of May 1991 and 25th of August 1992 respectively. The Plaintiff stated that the first Defendants have not honored the said judgment sum so far. The second and third defendants sought leave of the court to join as the defendants in this matter, which was allowed on 27th of January 1997. Subsequently, the second and the third defendants filed their statement of defense and the counter claim on 22nd of September 2006. The Plaintiff filed their defense to the counter claim on 27th of October 2006. In the meantime, the Plaintiff has obtained a Summary judgment against the first defendants on 31st of March 2009 on the following terms;

a. *Damages in the amount of US $2,878,910.65 and interest at the rate of 7.02% per annum from 4 May 1991 and late charges in the amount of US $742,002.39 and costs ; and*

b. *Damages in the amount of US $954,375.00 and $ 18,213.00 representing costs and Attorney's fees and interest at the rate of 3.41% from 26 August 1992; and*

c. *An order that the Plaintiff retain caveats on the title of the properties of the first Defendants and each of them have sole ownership and control being CT 6684 being Lot 1 on DP 1277 pending realization of the judgment debt; and*

d. The costs of and incidental to this action on an Attorney/client basis,

6. The second and third Defendants filed their affidavits verifying the list of documents and the minutes of the pre-trial conference on 27th of July 2007. Since then the counter claim has been in abeyance without any further steps been taken until the Plaintiff filed this Summons for strike out. According to this Summons, it appears that it constitutes two main grounds. The first ground is the want of prosecution and the second ground is that the counter claim discloses no reasonable cause of action or otherwise is frivolous, vexatious and an abuse of the process of the court.

7. Having considered the nature of this application, I first draw my attention to the first ground of the summons that is the want of prosecution.

The Law

8. The applicable principles of striking out an action on the ground of "want of prosecution" and "abuse of the process of the court" have been discussed in Birkett v James (1978) AC 297 at 318) (1977) 2 All E.R 801 where Lord Diplock found 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".

9. 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 been 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".

10. Lord Griffiths in **Department of Transport v Chris Smaller (Transport) Limited (1989) AC 1197)** has discussed the scope of the second limb enunciated in the celebrated passage of Lord Diplock in **Birkett v James (supra)**. Lord Griffiths held that the existence of mere inordinate and inexcusable delay is not enough to strike out an action. The court must satisfy that the inordinate and inexcusable delay has caused substantial risk for the conduct of fair trial and also has caused prejudice to the defendant. Lord Griffiths found that;

"what would be the purpose of striking out in such circumstances? If there can be a fair trial and the defendant has suffered no prejudice, it clearly cannot be to do justice between the parties before the court; as between the plaintiff and defendant such an order is manifestly an injustice to the plaintiff. The only possible purpose of such an order would be as a disciplinary measure which by punishing the plaintiff will have a beneficent effect upon the administration of justice by deterring others from similar delays. .....

To extend the principle purely to punish the plaintiff in the illusory hope of transforming the habits of other plaintiff solicitors would, in my view, be an unjustified way of attacking a very intractable problem".

11. The principles enunciated in **Brikett** and **Chris Smaller (Transport) Limited** have approved and applied in **Pratap v Christian Mission Fellowship (ABU 0093 of 2005),** where the Fiji Court of Appeal held that ;

"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 demonstrate (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 principle 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)".

12. Lord Griffiths in **Department of Transport**(supra) has discussed the scope of "prejudice", where his Lordship found that prejudice should not be limited

to the prejudice caused in the conduct of the litigation. Lord Griffiths held that;

"these authorities clearly establish that prejudice may be of varying kinds and it is not confined to prejudice affecting the actual conduct of the trail. It would be foolish to attempt to define or categorize the type of prejudice..."

13. I now turn to this instant application before me. It should be noted that the snail speed of the proceedings over nearly two decades, with so many interlocutory applications with clusters of affidavits and submissions has made the task of understanding the chronological background of this action a burdensome exercise.

14. The defendants forcefully and vehemently submitted that the delay was caused by the lacklustre attitude of the plaintiff of taking their action to the conclusion. They alleged that it was the onus of the Plaintiff to take steps to enter the action to trial and take it to the conclusion, which they have failed since the filing ofthe minutes of the pre-trial conference on 24th of July 2007.

15. The Plaintiff urged in their submissions, that it is the onus of the Defendants to take appropriate steps to take the counter claim to the conclusion. It appears from the statement of claim of the Plaintiff, that they have no claim against the second and third defendants. Mr. Mitchell Gay and Mr. Allen Beall sought permission to intervene into this action as defendants, claiming that they have beneficial interest in the Fiji Marina Partners and the Fiji Pacific Partners respectively. It appears from the affidavits of Mr. Gay and Mr. Beall, that they have interest in this action due to their limited partnership interest in Fiji Marina Partners and the Fiji Pacific Partners. They claim that Fiji

Marina Partners have an equitable ownership in CT 6684 and Fiji Pacific Partners have an equitable ownership in the eleven lots of lands mentioned in the paragraph 7 of the counter claim.

16. The counter claim of the defendants is considered as a separate action and the party who makes the counter claim is considered as the plaintiff for that claim. Accordingly, the second and third defendants are considered as the plaintiffs for this counter claim against the Plaintiff. As I have mentioned above, the Plaintiff has obtained a summary judgment against the first defendants on the 31st of March 2009, and have no other claim against the second and third defendants. Accordingly, the only claim remains in this proceedings is the counter claim of the second and third defendants.

17. Order 25 r 1 and 2 stipulate that the Plaintiff must take out summons for direction within one month after the pleadings are deemed to be closed. Moreover, Order 34 r 1 has stipulated that it is the onus of the Plaintiff to set down the action for trial before a judge. If the Plaintiff failed to take steps to set down the action for trial within the period fixed under Order 34 r 1, the defendant could either apply to the court to dismiss the action on the ground of want of prosecution or set down for trial pursuant to Order 34 r 2. In view of these rules, it appears that the onus is on the second and third defendants to take necessary steps to take their counter claim to a conclusion. They could not allege the Plaintiff for want of prosecution of their counter claim in this action.

18. In view of the affidavit of Denise Harkless, the second and third defendants have not taken any steps since the filing of their respective affidavits verifying the list of documents on or about 18th of October 2007. It appears from the court record, that the Howards Lawyers for the Plaintiff and Sherani & Co for

the second and third defendants have filed minutes of pre-trial conference on 24th of July 2007. Since then this counter claim has been in abeyance.

19. The learned counsel for the second and third defendants have forcefully and vigorously submitted that the protracted delay of taking this matter to the trial was due to the failure of the Plaintiff, which I find is misconceived. Apart from alleging the Plaintiff for the delay, the Defendants have not given any explanation for the delay of nearly seven years. In view of these reasons, it is my opinion that the delay is inordinate and inexcusable.

20. Having concluded that the delay is inordinate and inexcusable, I now draw my attention to consider whether such a delay has caused substantial risk for the conduct of a fair trial and/ or has caused prejudice to the Plaintiff.

21. In view of the summons to join non- parties as parties to action and the affidavit of the second defendant dated 18th of November 1994, it appears that the second defendant has claimed that his interestin this action derives from his limited partnership in the Fiji Marina Partners. He deposed in his affidavit that Fiji Marina Partners have an equitable ownership in CT 6684.

22. The third Defendant deposed in his affidavit dated 18th of January 1995 that his interest in this action stems from his limited partnership in Fiji Pacific Partners that have an equitable interest in the eleven lots of land mentioned in paragraph seven of the counter claim.

23. Having considered the reasons discussed in paragraph 21 and 22 above and the ruling of His Lordship Justice Fatiaki dated 27th of January 1997, it is my opinion that the second and third defendants have intervened into this action on the ground of their interests in the Fiji Marina Partners and Fiji Pacific

Partners as limited partners. The Fiji Marina Partners or Fiji Pacific Partners have not been included as parties to this action.

24. The counter claim of the second defendant is founded on the ground that the Plaintiff has wrongly lodged a caveat on CT 6684, where the Fiji Marina Partners are the beneficial owners.

25. Denise Harkless in his affidavit in support of this applicant has deposed that the second defendant is no longer a limited partner in the Fiji Marina Partners. The Second Defendant has died in 2009. He tendered the partner's share of income, deductions, credit for the Fiji Marina Partners for the years 2008 to 2011 as annexure to his affidavit in order to substantiate his claim. In view of those tax returns of partnership income, it appears that the second defendant or his estate or any other limited partners who tried to intervene in to this matter have any shares or interests in the Fiji Marina Partners.

26. One Karen Y Hurt, who claims that she inherited from her deceased brother Mitchell Gay, all of his interest as a limited partner in Fiji Marina Partners, filed an affidavit claiming that their limited partnership shares were conditionally exchanged for shares in a corporation, but those conditions were not fulfilled and the exchange has been reversed. However, the affidavit of said Karen Y Hurt has not been properly sworned, wherefore this document has no evidential value.

27. Apart from that one Robert C Hastings Jr. and Marilyn B Wykoff also field affidavits claiming that they are limited partners in Fiji Maria Partners and deposed that their limited partnership shares were conditionally exchanged for shares in a corporation, but those conditions were not fulfilled and the exchange has been reversed. However, they have not disclosed the name of

that particular corporation or any documentary evidence to substantiate such claim.

28. Having satisfied that the second defendant or his estate has no longer any interest in Fiji Marina Partners as limited partner, I find that the second defendant has no proper claim of beneficial ownership in CT 6684 as he had claimed in his counter claim. During the period of this protracted delay caused by the second defendant since 2007, his interest and shares in the Fiji Marina Partners has been transferred or ceased, which was not revealed to the parties in this action until the Plaintiff filed this application. Under such circumstances, it is my opinion that the continuation of the counter claim of the second defendant in its present status would undoubtedly cause prejudice to the Plaintiff.

29. I now turn to the issue of third defendant. His claim is founded on the ground that he is a limited partner of Fiji Pacific Partners, who are the beneficial owners of following properties;

i. Certificate of Title No 14932,
ii. Certificate of Title No 14 933,
iii. Certificate of Title No 14934,
iv. Certificate of Title No 15051,
v. Certificate of Title No 15052,
vi. Certificate of Title No 15056,
vii. Certificate of Title No 15066,
viii. Certificate of Title No 15067,
ix. Certificate of Title No 15068,
x. Certificate of Title No 15069,
xi. Certificate of Title No 15146,

30. Denise Harkless in his supplementary affidavit dated 7th of August 2014 deposed that the second name first defendant Larry LynelBortles has sold and transferred those abovementioned eleven lots of land in 2013 and 2014. Mr. Harkless tendered the copies of certificates of titles and the transfer of certificate of title in respect of those eleven lots as annexure to his supplementary affidavit in order to affirm his claim. Accordingly, it appears that those properties have first transferred from Pacific Hotel and Developments Limited to Larry LynelBortles as the nominee of Fiji Pacific Partners. Mr. Bortles has then transferred them to other parties. Wherefore, the Fiji Pacific Partners or the third defendant as he claimed in his counter claim now has no beneficial or equitable interest in those eleven lots of lands.

31. In view of these reasons discussed above, it appears that the third defendant and his Fiji Pacific Partners have disposed off the interest in those eleven lots of land during the period of this protracted delay in this instant action. Under such circumstances, it is my opinion that the continuation of the counter claim of the third defendant in its present status would undoubtedly cause prejudice to the Plaintiff.

32. Having considered the reasons set out above, in my conclusion I hold that the delay caused by the second and third defendants taking their counter claim to its conclusion is inordinate and inexcusable and such delay has caused a substantial risk that it is not possible to have a fair and proper trial of the issues in the action and also has caused serious prejudice to the Plaintiff. I accordingly make following orders that;

i. The counter claim filed by the second and third defendants dated 21st of September 2006 is hereby struck out on the grounds of want of prosecution and abuse of the court process,

ii. The Plaintiff is awarded cost in this action against the second and third Defendants on indemnity basis. If the parties fail to agree the cost on the indemnity basis, it is to be taxed.

Dated at Suva this 22nd Day of May 2015.

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R.D.R. Thushara Rajasinghe
Master of High Court, Suva

At Suva
22nd May 2015

Solicitors : Howards Lawyers,
Neil Shivam Lawyers
Sherani & Co.