

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 203 of 2010

BETWEEN : TRANSGLOBAL SUPPLIES LLC of 234 - 235 Quartier
Industrial Dakhla, Morocco.

PLAINTIFF

AND : OMEGA CORPS (FIJI) LTD of Suite 5, Level 2, Kwong Tiy
Plaza, 34 Marks Street, Suva.

1ST DEFENDANT

AND : HANSONS (FIJI) LIMITED of 8 Miles, Makoi, Nasinu.

2ND DEFENDANT

AND : RAM NAGEN Businessman c/- Suite 5, Level 2, Kwong Tiy
Plaza, 34 Marks Street, Suva.

3RD DEFENDANT

BEFORE: Acting Master Vishwa Datt Sharma

COUNSELS: Mr. Isireli Fa - for the Plaintiff
No appearance - for the 1st Defendant
Mr. Shelvin Singh - for the 2nd Defendant
No appearance - for the 3rd Defendant

Date of Hearing: 14th May, 2015

Date of Ruling : 3rd July, 2015

RULING

(A) INTRODUCTION

1. This court issued a Notice of its own motion pursuant to Order 25, r 9 of the High Court Rules 1988.
2. The Notice required the Plaintiff to show cause as to why the within action ought not to be struck out for want of prosecution or an abuse of process of this court since no steps have been taken by the Plaintiff in this cause for more than six (6) months.
3. The Plaintiff filed an affidavit of Jitoko Vunibola who works in his capacity as a Litigation Clerk for Fa & Company.
4. Subsequently, the Second Defendant filed an affidavit in Response of Suresh Kant, the Company Director.
5. First Defendant opted not to file any affidavit whilst the fourth Defendant failed to appear in court after service of the Notice.

(B) BACKGROUND

6. The Plaintiff, a body corporate with limited liability duly incorporated under the laws of Morocco, instituted this proceedings against the following three Defendants:
 - (a) 1st Defendant, which is a limited liability company duly incorporated under the laws of Fiji;
 - (b) 2nd Defendant, which is a limited liability company duly incorporated under the laws of Fiji; and
 - (c) 3rd Defendant, who is a businessman, employed by the 1st Defendant who at all material times acted as representative and or agent of the 1st and 2nd Defendants.
7. The Plaintiff alleged that the 1st - 3rd Defendants ordered from the Plaintiff 25 refrigerated containers of fish bait for the sum of USD \$560,000 and payment was to be by Letters of Credit to be provided by the 1st - 3rd Defendants.

8. The Plaintiff alleged that upon arrival of the 25 containers at the Port of Suva, the 1st - 3rd Defendants changed the terms of payment and thereafter have refused and neglected to pay the Plaintiff.
9. In their Defence, the 1st Defendant denied all allegations made against it by the Plaintiff.
10. The 2nd Defendant also denied all allegations made by the Plaintiff and further submitted that it had not contracted with the Plaintiff as alleged.
11. The 3rd Defendant admitted having dealt with the Plaintiff in respect to the shipment of the 25 containers of fish bait but denied any personal liability to the Plaintiff.
12. The Plaintiff instituted this action by way of a Writ of Summons on 06th July, 2010.
13. The Writ was served on all the three (3) Defendants and an affidavit of service was accordingly filed.
14. The acknowledgements of service as well as the Defences of all the three (3) Defendants were filed.
15. Reply to the Statement of Defences of all the three (3) Defendants were also filed by the Plaintiff.
16. The Plaintiff filed the Summons for Directions on 04th July, 2011.
17. The Plaintiff also filed Amended reply(s) to the statement of Defences of all the three (3) Defendants.
18. Affidavit Verifying List of Documents was filed by the Plaintiff as well as the 2nd Defendant.
19. It was noted by the Court Registry that the matter was laid in abeyance since 28th June, 2013, and no further steps or cause of action was taken by the Plaintiff to pursue this case further until the final hearing and the determination of the case that prompted the Court Registry to issue a Notice pursuant to Order 25 Rule 9 of the High Court Rules 1988.
20. Notice of Intention to proceed was filed by the Plaintiff on 20th February, 2015 only after the court issued a Notice pursuant to Order 25 Rule 9 on 09th February, 2015.

(C) THE LAW

21. This application is made pursuant to *Order 25 Rule 9 of the High Court Rules 1988*, which *inter-alia* states as follows:

"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.'

22. Abovementioned rule was introduced on 13th September 2005. After the introduction of this rule the Court of Appeal has had the opportunity to review the law on want of prosecution in Fiji both before and after the coming in to effect of the same.
23. Prior to the introduction of Rule 9, the Court of Appeal in *Abdul Kadeer Kuddus Hussein v. Pacific Forum Lime Civil Appeal No. ABU 0024 of 2000s* (30th May 2003) in readopting 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 amount 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."

(Emphasis added)

24. Basically the Court of Appeal affirmed the principle enunciated in *Brikett v. James (1978) AC 297 (1977) 2 ALL ER* where the House of Lords held as follows:-

"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 pre-emptory 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 (in the present case Defendant's lawyers); (b) that such delay would give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or is such as it 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 then and a third party."*

25. After the introduction of Order 25 rule 9, *Birkett v. James* was revisited by the court of Appeal. This largely arose due to the case management system introduced by the Court to agitate those cases which were lying idle in the registry for many years some ranging over 20 years. This High Court had tended to strike-out the actions based on delay alone.

26. The first case which went on appeal and decided by the Court was *Bhawis Pratap v Christian Mission Fellowship Civil Appeal No. ABU 0093 of 2005* (14 July 2006). His Lordship Mr. Justice Coventry struck out the action on a number of grounds one of which was delay of 7 years since the action was filed. On appeal, after reviewing the law on want of prosecution the Court of Appeal affirmed that the applicable law in this country is still as was pronounced in *Brikett v. James*. At para. 23 of judgment the Court unreservedly stated:-

"[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 Lime Civil Appeal No. ABU 0024 of 2000 - FCA B/V 03/382 the court, in readopting the principles expounded in Birkett v. James [1978] AC 297; [1977] 2 All ER 801"

(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)

27. Again the Court of Appeal was invited to consider the position of Order 25 rule 9 in the *Trade Air Engineering (West) Ltd v. Taga Civil Appeal No. ABU 0062 of 2006*

(9 March 2007) (per Gordon P, Barker and Scott JJA. In considering the appeal the Court categorically formulated the following question:-

"[4] - The central question raised by this appeal is whether the Court's powers under O 25 r 9 should be exercised in substantial conformity with the powers it already possessed prior to the making of the new rule or whether an additional jurisdiction, exercisable on fresh principles, has been conferred on the Court."

(Emphasis added)

28. In Observing the new feature of Order 25 rule 9 their Lordships stated:-

"[15] - A notable feature of the new Order 25 rule 9 is that it confers on the court the power to act on its own motion. Within our present High Court Rules such a power is only rarely conferred. One example is O 34 r 2 (6), another is O 52 r 4. In a number of overseas jurisdictions much wider case management powers have been given to the High Court and most of these powers are exercisable upon the court's own motion. Such developments have however not yet reached Fiji."

(Emphasis added)

29. Their Lordships then conclusively and unanimously held that:-

"[16] - In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority."

(Emphasis added)

30. The issue then is whether delay alone is sufficient for the Court to strike-out an action for want of prosecution. The Court of Appeal in *New India Assurance Company Limited v. Rajesh Kumar Singh Civil Appeal Number ABU 0031/1996* 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.*

31. The Court of Appeal in *Bhawis Pratap v Christian Mission Fellowship (supra)* discussed and distinguished the new rules which applied in England after the introduction of the new Civil Procedure Rules after 2000 inter-alia as follows:-

"[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 L.J wrote that:

"30 the power to strike out a statement of claim is contained in CPR r3.4. On 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 Arbutnot 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 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 r 1.1 or 3.4 and therefore the approach exemplified in Securum has not yet become part of our civil procedure.

32. Thus the developments which have been taken in England after the introduction of the new rules do not apply in this instant to Fiji without the introduction of new rules. As such the principle in *Birkett v James* applies on all fours. This was also confirmed by the Court of Appeal again in 2008; *Avinash Singh v Rakesh Singh, Nirmala Devi & Sarojini Kumar Civil Appeal No: ABU 44/06 (8 July 2008).*

(D) ANALYSIS and DETERMINATION

33. I have perused the court file in terms of the documents filed as required by the set down procedures and the High Court Rules 1988 accordingly.
34. I reiterate the abovementioned paragraphs 12- 18 inclusive which inform this court the steps taken and the documents filed by the Plaintiff and the Defendants in these proceedings.
35. This case was commenced on 06th July, 2010 and the final steps taken and or the pleadings filed by the Plaintiff were the Plaintiff's Affidavit Verifying List of Documents on 16th July, 2012.
36. After the Plaintiff filed his Affidavit Verifying List of Documents, then the 2nd Defendant filed his Affidavit Verifying List of Documents on 28th June, 2013. This pleading was filed some 11 months after the Plaintiff had filed his Affidavit Verifying List of Documents.
37. That upon the filing of the affidavit verifying list of documents, parties were suppose to carry out the inspection of documents within 14 days of the service of such lists and deal with the further consequent cause of action in terms of the orders made on the Summons For Directions (SFD).
38. After 28th June, 2013, no action was taken by the Plaintiff nor any of the Defendants in order to pursue this case any further until this court on 09th February, 2015 issued the notice in terms of the Order 25 Rule 9 application asking the Plaintiff to show cause why this matter should not be struck out. This meant that since the last pleading was filed on 28th June, 2013, until this court issued the Order 25 Rule 9 Notice that some 11 months had elapsed. In fact the Law requires that the parties to the proceedings must ensure that the pleadings in terms of the Law must be filed and served on the parties to proceedings to complete the pleadings and allow the case to be heard and determined either before the Master or a Judge of the High Court accordingly.
39. The onus is on the Plaintiff to provide a cogent and credible explanation for not taking any steps to advance the litigation in this case after the 28th June, 2013.
40. This court is therefore required to deliberate on the following issues in terms of the impending Order 25 Rule 9 application to arrive at a determination whether to

dismiss the cause or deal with the application as if it were a summons for directions accordingly:

- (i) *that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount 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, (In this case the Plaintiff's lawyers); and*
- (iii) *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."*

Default is contumelious

41. "Contumelious" in the context of want of prosecution refers to disobedience of any orders or directions of this court.

In this case, this court on 21st June, 2012 made orders on the Summons for Directions as follows:

- That the Plaintiff's and the Defendant's affidavit verifying list of documents to be filed;
- Inspection of documents to be carried out; and
- PTC to be conducted in 14 days thereafter.

Upon the perusal of the court file it reveals that the inspection of documents and PTC directions were not adhered to. In fact the orders on the summons for directions were not disobeyed rather not complied with by all the parties to this proceeding, including the Plaintiff and the 2nd Defendant.

For the above rational, the first arm of the test does not apply herein.

Delay

42. The test for delay is both '*intentional*' and '*inordinate*'.

Intentional

For these two elements to be satisfied, the 2nd Defendant must establish that the delay was intentional on the part of the Plaintiff. In other words the Plaintiff has filed an action with having no intention to proceed with the same.

The Plaintiff submitted that all the pleadings have been filed except the PTC and Order 34 summons and the same can take the normal cause. He added it is 2nd Defendant's counsel that is delaying the matter. Further he submitted that Order 25 Rule 9 application is specifically for the case management to ensure case keeps moving. He said he was faced with some difficulties together with the case load and the counsel who was in carriage of his case resigned from his firm and hence there was some natural delay in this case and that the Defendant is using this uncertainty as have this case struck out. He pointed out to paragraphs 9 and 10 of the 2nd Defendant's affidavit filed on 25th March, 2015 dealing with the 2nd Defendant's defence that the email from the Bank approving the letters of credit which the Plaintiff relies upon is a forgery. This was already raised in the security for costs application and struck out. He also pointed out delay in filing the Defendant's documents.

*The Defendant submitted that the lawyer left in November 2012 and the delay has not been explained. He referred to paragraph 8 of his affidavit' that a lawyer leaving the firm is not sufficient cause to justify why the case should not be struck out'. The Plaintiff did not take any steps after 16th July, 2012. He relied on case of *Birkett v James*.*

The Plaintiff relies on his Statement of claim filed and seeks for a day in court to allow justice to be done in this case. As earlier discussed at paragraph 7 and 8 hereinabove, and the arguments raised by both counsels for the Plaintiff and the Defendant, I find that the delay was not intentional.

43. The other requirement is the 'inordinate' delay.

Inordinate

This relates to the length of delay. Reference is made to 2nd Defendants affidavit in opposition filed on 25th March, 2015 which sets out the chronology of the pleadings filed and the same has been cross checked with the court record. No doubt the action was commenced on 06th July, 2010. The 2nd Defendant filed the acknowledgement of service on 14th July, 2010 and the defence on 03 August, 2010. Whereas the reply to

defence was filed by the Plaintiff on 14th July, 2011, some 11 months thereafter together with the Summons for Directions. Amended reply to defence was filed on 29th February, 2012, again 7 months later and a second summons for direction on 29th May, 2012. Plaintiff's affidavit verifying list of documents was filed on 16th July, 2012 and the 2nd Defendant's list of documents was filed on 27th June, 2013, some 11 months later. The chronology of the pleadings shows that both the Plaintiff as well as the 2nd Defendant somewhat delayed filing of pleadings, greater delay being on the part of the Plaintiff. I note from the file records that the 2nd Defendant was represented by Parshotam Lawyers and the matter was handled by Mr. Shelvin Singh. He now has his own firm and filed a notice of change of solicitors on 07th April, 2014. If he encountered any delay on the part of the Plaintiff then he should have filed and proceeded with an appropriate application to have the case struck out but only acted once the court issued and served the Order 25 Rule 9 application.

In the above circumstances I am of the finding that both the Plaintiff as well as the 2nd Defendant contributed to the delay in filing of their respective pleadings which has caused this matter to remain pending in the court. The Plaintiff has explained his delay accordingly which is acceptable to this court.

Even if the 2nd Defendant succeeded in establishing inordinate and inexcusable delay, these factors would not, on their own, be sufficient to warrant the striking out of this action.

Prejudice

44. It is trite law that the 2nd Defendant must establish that is prejudiced by the delay.
45. The Defendant in his affidavit in opposition has stated that he suffered prejudice due to the delays by the Plaintiff; the writers of the alleged emails from the Colonial Bank (now BSP) have left the Bank and may not be found to confirm the fact that the emails are a forgery which the Plaintiff intends to rely upon. So far some 5 years has only lapsed from the time of the commencement of the proceedings and the

2nd Defendant has not substantiated any evidence to this effect, rather seems to be only anticipating that the writers of the emails may not be found now. The matter is still before this court and the status of the matter in terms of pleadings is almost to the conclusion and the court can give tight timelines for the parties to comply with the same bearing in mind the nature of the substantive issue.

This certainly alleviates any prejudice to the 2nd Defendant.

Interest of Justice

46. Even if the 2nd Defendant satisfies the requirements in *Birkett v James*, the courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible. The Court of Appeal in *Chandar Deo v Ramendra Sharma and anor*: Civil Appeal No. ABU 0041 of (23 March 2007) (Unrep) stated as follows:-

[15] A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the Birkett v. James principles namely: 'In view of the delays which have occurred, is a fair trial now possible?' (Also case of Department of Transport v, Chris Smaller (Transport Limited [1989] AC 1197 refers.

47. In *Lovie v Medical Assurance Society Limited* [1992] 2 NZLR 244 at 248. Eichelbaum CJ reviewed the authorities and concluded:

'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 defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [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.'

48. Even the courts are reluctant to strike- out any matter summarily which has certain merits in it on the grounds of abuse of process. In *Dey v. Victorian Railway Commissioners* (1949) 78 CLR 62, at 91 Dixon J said:-

'26. This principle was restated by the Court of Appeal of Fiji in *Pratap v Kristian Mission Fellowship* [2006] FJCA 41. Also refer to; *New India Assurance Co Ltd v Singh* [1999] FJCA 69.

The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include; Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210; *Dey v. Victorian Railway Commissioners* (1949) HCA 1; (1949) 78 CLR 62; *Birkett v James* [1978] AC 297; *Lovie v Medical Assurance Society Limited* [1992] 2 NZLR 244; *Agar v Hyde* (2000) 201 CLR 552. Indeed the passage from *Abdul Kadeer Kuddus Hussein v Pacific Forum Line* reflects closely *Birkett v James* (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'

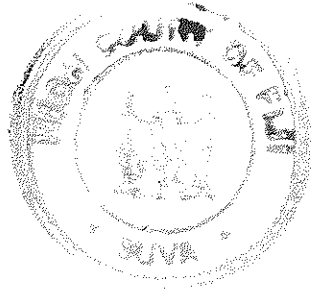
49. I have carefully perused the substantive application, the pleadings filed so far, the written and oral submissions coupled with the applicable laws and the case authorities and find as follows:-

- (i) *The delay is neither inordinate nor intentional;*
- (ii) *Explanation has been provided by the Plaintiff for the delay as such the Plaintiff has overcome the factor of not inexcusable;*
- (iii) *The default is not contumelious and the Plaintiff has not disobeyed any orders of this court;*
- (iv) *The 2nd Defendant has not suffered any real prejudice; and*
- (v) *In the interest of justice, a fair trial is still possible.*

50. For the aforesaid rational, I make the following orders:-

- (a) Application seeking dismissal of the substantive action is hereby dismissed;
- (b) This case to take its normal cause;
- (c) Further directions in terms of the compliance of consequent pleadings to be made accordingly on 07th July, 2015 at 9.00 am.
- (d) Each party to bear their own costs.

Dated at Suva this 3rd Day of July, 2015



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VISHWA DATT SHARMA
Acting Master of High Court, Suva.

cc: *Mr. Isireli Fa of Fa & Company, Suva.*
Mr. Shelvin Singh of Shelvin Singh Lawyers, Suva.