IN THE HIGH COURT OF FIJI
AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 177 OF 2010

BETWEEN : FIJI DEVELOPMENT BANK of 360 Victoria Parade, Suva in Fiji.

Plaintiff

AND : GARY KENNETH URWIN of Denarau Island, Nadi, Businessman.

Defendant

Mr. D. Sharma for the Plaintiff.
No appearance for the Defendant.

Date of Hearing : 13th November 2014

Date of Decision : 27th January 2015.

DECISION

(A). INTRODUCTION

1. The Court issued Notice of its own motion pursuant to Order 25, r 9 of the High Court Rues demanding the Plaintiff to show cause as to why the action ought not to be struck out for want of prosecution or an abuse of process of the Court.

2. Upon being served with Notice, the Plaintiff appeared in Court. Neither the defendant nor the Counsel appeared in Court on the Notice returnable date.

3. The Plaintiff filed an affidavit in show cause. The Defendant neither appeared nor filed any affidavit or submissions to oppose the Plaintiff's affidavit in show cause.

(B). BACKGROUND

(1) The Plaintiff instituted this action by way of Writ of Summons dated 13th September 2010.

(2) The Defendant filed and served the Statement of Defence on 26th April 2011.

(3) On 10th June 2011, the Plaintiff filed and served its reply to Statement of Defence.

(4) On 13th of September 2011, an Order for Summons for Directions was granted by the Court.

(5) On 10th November 2011, the case was transferred from the High Court of Lautoka to the High Court of Suva.

(6) On 24th November 2011, the Master of the High Court of Suva adjourned the matter to take its normal course.

(7) On 24th January 2012, the Plaintiff filed its affidavit verifying list of documents.

(8) On 12th March 2012, the Defendant filed his affidavit verifying list of Documents and Bundle of Documents.

(9) Thereafter, the action was again called before the Master on 29th November 2012.

(10) The status of the proceedings is for the parties to file Pre Trial Conference minutes.

(11) However, it never eventuated. No steps have been taken by the Plaintiff effective since 29th November 2012 to prosecute or advance proceedings to trial.

(12) The action has been laying in abeyance until the registry on 01st April 2014 issued Notice pursuant to Order 25, rule 9.

(C). THE LAW

(1) Order 25, rule 09 provides:

"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".

(2) Order 25, rule 09 expressly gives power to the court on its own motion to list any cause or matter, where no step has been taken for at least six (06) months.

(3) The Court is allowed to strike out an action on the failure of taking of steps for six (06) months on two grounds. The first ground is for want of prosecution and the second is an abuse of process of the Court.

(4) In the oft-cited case of **"Birkett v James" (1987), AC 297**, Lord **Diplock** succinctly stated the principles at page 318 as follows:

"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; (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 it 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."

(5) The test in **"Birkett v James"** (*supra*) has two limbs. The first limb is "abuse of process". The second limb is "an inordinate and inexcusable delay".

(6) The Fiji Court of Appeal in **"Pratap v Christian Mission" (ABU 0093 of 2005)** has applied the principles set out in **"Birkett v James"** (*supra*).

(7) Lord "Woolf" in **"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,** has discussed the concept of "Abuse of Process" as follows:

"This conduct on the part of the appellant constituted an abuse of process. 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 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 justice so requires (which will frequently be the case) the courts 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 [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".

(8) It seems that under **"Grovit and Others v Doctor and Others"** (*supra*) there is no need to show prejudice any more for it says that maintaining proceedings without a serious intention to progress them may amount to "abuse of process" which justifies for want of prosecution without having to show prejudice.

(D). ANALYSIS

(1) Between 29th November 2012 and 01st April 2014, no steps were taken by the Plaintiff to advance proceedings to trial.

(2) The status of the proceedings is for the Plaintiff to file Pre- trial Conference Minutes.

(3) The action has been laying in abeyance until the registry on 01st April 2014 issued Notice pursuant to Order 25, rule 9.

(4) The Plaintiff filed an affidavit to show cause.

(5) The Defendant neither appeared nor filed any affidavit in opposition or submissions.

(6) However, the onus is upon the Plaintiff to provide a cogent and credible explanation for not taking any steps to advance the litigation.

(7) The Plaintiff in its submissions to show cause explains the reasons for not taking any steps to advance proceedings to trial as follows;

" The Plaintiff's Solicitors attempted to contact Muaror & Company in order to agree to a Pre Trial Conference Date but were told that Messrs Muaror & Company had close down and were no longer operating.
The Defendant has made no effort to appoint another firm of Solicitors to act for him.
Muaror & Company have not made any application to withdraw acting for the Defendant either.
Subsequently when the Plaintiff tried to contact the Defendant directly it discovered that he had been convicted of an offence in New Zealand and had been sentenced to imprisonment. He was due to be released in April 2014. A copy of the relevant news article relating to his imprisonment has been provided to the Court.
The Plaintiff has not received any information whether the Defendant has been released from prison and his current address."

(8) Quite plainly, the Plaintiff has adopted a "Scatter gun" approach to justify its inactivity in the action for a period of over 16 months. The Plaintiff has adduced multiple reasons (Blaming the Defendant and his counsel) in the hope that one or more of the reasons might "hit home".

(9) I remain utterly unimpressed by the reasons for failure on the part of the Plaintiff to proceed with due diligence to prosecute the action under the rules of the High Court. I completely reject the "excuse" presented in the affidavit and submissions from counsel. I cannot regard the Plaintiff's submissions as of any weight.Needless to saythis is "sluggish litigation". The Plaintiff has adopted a "blame storming" approach to justify its flagrant disregard of the High Court Rules. The default of the Defendant does not in any way absolve the Plaintiff from its primary obligation to get on with the action. I am fortified in my view by the judgment in **"Zimmer Orthopaedic Ltd V Zimmer Manufacturing Co" (1968) 2 All ER 309**where Cross J said;
*"The essence of the matter, as I understand it, is this. **It is for the Plaintiff and his legal advisors to get on with the action and to see that***

it is brought to trial with reasonable dispatch. The Defendant is normally under no duty to stimulate him into action and the Plaintiff cannot complain that he gave him no warning before applying to have the action dismissed for want of prosecution." (Emphasis added).

(10) The Plaintiff could have moved the Court to strike out the Statement of Defence on the basis that the Defendant has failed to comply with the High Court Rules and seek to formally prove the case.

(11) From 29th November 2012 until 01st April 2014 that is for 16 months the Plaintiff had all the time to move the court to strike out the defence on the basis that the Defendant has failed to comply with the High Court Rules and seek to formally prove the case.

(12) The Plaintiff on its own volition chose not to follow the High Court Rules. The Plaintiff has adopted a "sitting on the hands" approach and allowed the proceedings to lay dormant. The Plaintiff by its conduct has clearly demonstrated that it has no regard to the primary policy of the High Court Rules.

(13) The Plaintiff's inactivity in the action for a period of over 16 months tantamount to an abuse of process. Moreover,the Plaintiff's commencement and continuation of proceedings with no intention of bringing it to a conclusion constituted an abuse of process.

(14) The Court of Appeal in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas &Anor, Civil Appeal No. ABU 0052/2006** affirmed the principle of **Grovit –v- Doctor** as ground for striking out a claim, in addition to, and independent of principle set out in **Brikett v James** (see paragraph 16 of the judgment). Their Lordships held:-

"Itmay be helpful to add a rider. During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in Grovit and Ors v Doctor [1997] 2 ALL ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in Birkett v James [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the Court. The relevance

of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court"

(15) I hold that the Plaintiff for the last 16 months had abused the process of the Court.In my view , this is a classic case of abuse of process of the court by a statutory institution

E. CONCLUSION

Having regard to the facts of this case, I apply the legal principles laid down in the case of **Grovit and Others v Doctor and others** (*Supra*). Accordingly, I concludethat the Plaintiff maintained the action in existence notwithstanding that it had no interest in having it heard.

This conduct on the part of the Plaintiff constituted an abuse of process.

The action is struck off.

Jude Nanayakkara
Acting Master of the High Court

At Suva

27/01/2015