IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 67 of 2012

BETWEEN: **DOMINION INSURANCE LIMITED** a limited liability company incorporated in Fiji having its registered office at 231 Waimanu Road, Suva.

PLAINTIFF

AND: **PACIFIC BUILDING SOLUTIONS** a limited liability company having its registered office at 9 Nukuwatu Street, Lami, Suva.

DEFENDANT

COUNSEL: Diven Prasad Lawyers for the Plaintiff
O'Driscoll & Co. for the Defendant

BEFORE: Acting Master S. F. Bull

RULING: 31 August2015

RULING

Introduction

1. This is the Defendant's application to strike out the Plaintiff's statement of claim dated 9 July 2008 on the ground that it discloses no reasonable cause of action, as well as on the ground of abuse of process for delay. The application is made under Order 18 rule 18 (1) (a), and Order 25 rule 9 of the High Court Rules (the HCR).

2. The Plaintiff was given time to file a response to the application and not only failed to do so, but also failed to return to Court, resulting in this application having to be heard undefended.

Background

3. These proceedings were instituted by a writ and statement of claim filed by the Plaintiff on 6 March 2012. On 14 May 2012, the Defendant filed a statement of defence, denying the allegations in the claim, and pleading that the claim disclosed no reasonable cause of action.

4. Thereafter, neither party did anything to progress the matter in Court, necessitating the Court issuing a notice of its own motion on 29 October 2013, for the parties to show cause, pursuant to Order 25 Rule 9, as to why the matter ought not to be struck out for want of prosecution.

5. Both parties were ordered to file affidavits and only the Defendant did so within the given time. The Plaintiff's application for extension of time to file an affidavit showing cause was refused by the Court. In a ruling delivered on 31 March 2014, the Court chose to treat the notice under Order 29 Rule 5 as a summons for directions and ordered the Plaintiff to file a reply to the defence within 14 days thereafter or risk the writ being struck out.

6. The reply was filed on 14 April 2014, and subsequently, a summons for directions was filed on 30 May 2014. On 1 July 2014, the Master granted order in terms of the summons for directions. Thereafter, the matter once more stalled, until 11 December 2014 when the Defendant filed this application to strike out the claim for failing to disclose a reasonable cause of action.

The application to strike

7. Mr. O'Driscoll for the Defendant submitted that the claim discloses no cause of action. The claim refers to a cyclone in 2009, and that damage was caused to some platform by a barge which the Plaintiff says was owned by the Defendant. There is no allegation in the claim as to how the Defendant was at fault. There is no allegation of negligence or any act of the Defendant that led to the damage and therefore, the claim discloses no cause of action.

The law

8. Order 18 rule 18 (1) (a) of the HCR provides:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that it discloses no reasonable cause of action or defence, as the case may be.

9. O. 18 r. 18 (2) precludes the use of evidence in an application under O. 18 r. 18 (1) (a), and confines the Court's examination to the allegations in the pleadings alone. (See also *Razak v Fiji Sugar Corporation Ltd* [2005] FJHC 720; HBC208.1998L (23 February 2005) at [8]; *Republic of Peru v Peruvian Guano Company* (1887) 36 Ch. D 489 at p. 498.

10. The law on striking out in this jurisdiction is settled and requires that the Court's summary power to strike out pleadings be sparingly used, and then only in "plain and obvious cases" where the cause of action is "plainly unsustainable" (*Razak*, (supra), citing Drummond-Jackson

at p.1101b; *A-G of the Duchy of Lancaster v London and NW Railway Company* [1892] 3 Ch. 274 at p.277.

The statement of claim

11. The starting point for an application to strike out under O. 18 r. 18 (1) (a) is the statement of claim. The Plaintiff is an insurance company (the Company) and is the insurer of Petroleum & Gas (Fiji) Ltd t/a Blue Gas (the insured). The Defendant is a company incorporated in Fiji and carrying out building, construction and consultancy work.

12. It is pleaded that on or about 15 December 2009 when Tropical Cyclone Mick struck Fiji, a barge owned by the Defendant had damaged the Company's off shore floating pipeline platform at Vuda Point in Lautoka. The net assessed loss caused by the damage was $41,641 after deduction of the policy excess of $20,000. In 2010, the Plaintiff paid $41,641 to the insured for repairs and restoration of the damaged pipeline platform, and then issued a demand notice on the Defendant to recover the amount the Plaintiff had paid to the insured, as well as the policy excess. The Defendant failed to recompense the loss and the Plaintiff instituted these proceedings by way of writ issued on 6 March 2012.

13. The prayer is worded as follows:

> Wherefore the plaintiff claims from the Defendant
>
> i. Sum of FJD$41,641.00;
> ii. Policy excess $20,000.00;
> iii. Interest;
> iv. Costs; and

v. Such other relief as the Court deems just and equitable in the circumstances.

Analysis

14. Order 18 Rule 5 HCR sets out the formal requirements of pleadings. Order 18 Rule 6 (1) then requires, subject to rules 9, 10 and 11, that:

> ...every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved... (Underlining mine)

15. Facts that need not be pleaded are those which are presumed by law to be true, or for which the onus of proof lies with the other party. (Order 18 Rule 6 (3)).

16. In *Dart v Norwich Union Life Australia Limited* [2002] FCAFC 34; [2002] FCA 168 (1 March 2002) (per Beaumont, Finn, Sundberg JJ), the Court stated that the purposes of pleadings included defining

> ...the issues in a proceeding so that the parties may know in advance the case they have to meet: *Dare v Pulham* [1982] HCA 70; (1982) 148 CLR 658 at 664. A necessary precondition of this is that the pleading must disclose a reasonable cause of action against the party against whom that particular cause of action is brought and it must state all the material facts which are necessary to establish that cause of action as also the relief sought. A "reasonable cause of action" for this purpose means one with some chance of success

if regard is had only to the allegations in the pleadings relied upon by the applicant: *National Mutual Property Services (Australia) Pty Ltd v Citibank Savings Ltd* [1995] FCA 1628; (1995) 132 ALR 514 at 529.

17. Halsbury's Laws of England, 4th Edition (Re-issue) Vol. 37 at p. 24 defines 'cause of action' as:

> ...simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.[1] The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the claimant to succeed, and every fact which the defendant would have a right to traverse[2]. 'Cause of action' has also been taken to mean the particular act on the part of the defendant which gives the claimant his cause of complaint[3], or the subject matter or grievance founding the claim, not merely the technical cause of action[4].

18. 'Cause of action' has also been defined as

> ...any facts or series of facts which are complete in themselves to found a claim or relief. (Obi Okoye, *Essays on Civil Proceedings,* page 224 Art 110, cited in

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1 *Letang v Cooper* [1965] 1 QB 232 at 242, [1964] 2 All ER 929 at 934, CA, per Diplock J.

2 *Cooke v Gill* (1873) LR 8 CP 107 at 116, per Brett J. Lord Esher MR later defined the words as comprising every fact, though not every piece of evidence, which it would be necessary for the plaintiff...to prove, if traversed, to support his right to the judgment of the court: *Read v Brown* (1888) 22 QBD 128 at 131, CA...

3 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 457, [1971] 1 All ER 694, PC, applying *Jackson v Spittal* (1870) LR 5 CP 542

4 *O'Keefe v Walsh* [1903] 2 JR 681 at 718

19. A scrutiny of the impugned claim shows facts which allege only that the Defendant's barge had damaged a pipeline platform belonging to a company insured with the Plaintiff, a damage for which the Plaintiff had had to pay in accordance with the terms of the insured's insurance policy. Apart from this, the basis of the claim is not pleaded – whether the Defendant had been in a special relationship with the Plaintiff as to give rise to a duty of care, whether or how, if at all, that duty was breached by the Defendant, resulting in harm to the Plaintiff.

20. In *Shane v Allen* 2010 NSSC 484, the Court dealt with a motion to strike out the plaintiff's negligence claims against a bank, for failing to disclose a reasonable cause of action. The pleadings did not say that there was a special relationship between the plaintiffs and the defendants, or that there were exceptional circumstances pointing to the existence of a duty of care by the defendants to the plaintiff. The Court held that absent a special relationship between the parties, or the existence of exceptional circumstances, there could not be a duty of care, and that without a duty of care, no actionable cause in negligence existed.

21. Having examined the claim, I find that the allegations there pleaded do not contain all the material facts the Plaintiff needs to prove in order to support his right to the Court's judgment. (*Read*, supra); that the factual situation there given is incomplete to found a claim or relief (Obi, supra) and, being thus deficient, does not warrant the Court granting to the Plaintiff a remedy against the Defendant; (*Letang*, supra). Indeed, even if all the facts pleaded in the statement of claim

were proved, they would still be insufficient to prove the essential elements of a cause of action.

22. While under Order 18 Rule 18 (1) the Court has power to order an amendment of pleadings, the Plaintiff has neither made such an application nor appeared to oppose the Defendant's application to strike. In *Nigeria Airways Ltd. v F.A. Lapite,* SC 209/1988, the Court stated:

> ...an amendment of the pleadings could have saved the action of the appellant. However, the appellant did not address his mind to seek for leave to amend the pleadings before the learned Judge delivered her ruling. It is too late now to talk about an amendment.

23. I hold that the claim does not disclose a reasonable cause of action. There is nothing before the Court to move it to order an amendment. The Plaintiff had ample opportunity to oppose the application and /or alternatively, seek leave to amend the claim, and failed to do so.

On abuse of process for delay

24. The second limb of the Defendant's application is for the claim to be struck out on the ground of abuse of process, for delay, pursuant to Order 25 Rule 9 of the HCR. That rule 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.

25. Prior to the bringing of this application on 11 December 2014, the matter was last called on 1 July 2014 and orders made on the summons for directions. I consider the application under this Rule has been prematurely brought, it not having been made, as required, after six months of inactivity in the matter.

26. In *Jih Tsuan v Malarao* [2010] FJHC 30; HBC353.2003L (5 February 2010), Inoke J (as he then was) dealt with the Defendant's striking out application under the inherent jurisdiction of the Court, having found that Order 25 Rule 9 did not apply since the matter had "been called in court on several occasions, albeit with no effective further steps being taken to progress to trial..." I adopt the same course and accordingly deal with this part of the application under the inherent jurisdiction of the Court.

27. In discussing the relevant principles to striking out on the grounds of want of prosecution, the Court in *Pratap v Christian Mission Fellowship* [2006] FJCA 41; ABU0093J.2005 (14 July 2006)(per Barker JA, Henry JA, Scott JA) stated at [23] – [25]:

> [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 Line IABU 0024/2000 – FCA B/V 03/382) the court, readopted the principles expounded in Birkett v. James[1978] AC 297; [1977] 2 All ER 801 and explained that:
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> > "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 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, 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."

[24] In New Zealand, the same approach was adopted in the leading case of Lovie v. Medical Assurance Society Limited[1992] 2 NZLR 244, 248 where 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. In this country, ever since NZ Industrial Gases Limited v. Andersons Limited[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."

[25] 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 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 (see, for example, remarks by Lord Denning in Biss v. Lambeth Southwark and Lewisham Health Authority [1978] 2 All ER 125) the principal 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).

28. From the authorities above, it is clear that a party moving to strike on the ground of abuse of process for delay, will need to prove not only inordinate and inexcusable delay, but also that the delay has caused serious prejudice.

29. In *Singh v Raju* [2015] FJHC 228; HBC13.2014 (27 March 2015), the Court cited *Owen Clive Potter v Turtle Airways LTD*, Civil Appeal No, 49/1992 where the Court of Appeal stated:

(Inordinate)....means so long that proper justice may not be able to be done between the parties. When it is

> analysed, 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.

And later:

> 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 pursing his action or perhaps any action against the defendant.

30. Having read the Defendant's affidavit in support, and having heard counsel's oral submissions, I find nothing therein in support of inordinate and inexcusable delay, nor is there anything to say how such a delay has "seriously prejudiced" the Defendant. While I may have been moved to grant order in terms in light of the Plaintiff's failure to either file an affidavit resisting this application or to appear for the hearing, case authorities require that the Defendant satisfy the three grounds above. The failure of the Defendant so to do is, in my opinion, fatal to its application to strike on the ground of delay, which is accordingly refused.

31. **Orders:**

1. The Defendant's application to strike on the ground of the claim disclosing no reasonable cause of action is granted.

2. The application to strike founded on abuse of process for delay is refused.
3. The Plaintiff's writ of summons and statement of claim is struck out.
4. The Plaintiff is to pay the Defendant's costs summarily assessed at $1000, within 14 days.

S. F. Bull
Acting Master