IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 72 of 2014

BETWEEN : REBECCA LIN JIANG AND YOU YOU WENG both of Sydney, Australia, Personal Assistant and Computer Engineer respectively.

PLAINTIFF

AND : KULU BAY RESORT LIMITED a limited liability company duly incorporated having its registered office at Unit 2, Level 2, Velop House, 370 Victoria Parade, Suva.

DEFENDANT

BEFORE: Acting Master Vishwa Datt Sharma

COUNSEL: Mr. Udit with Ms. Low - for the Plaintiff
Ms. Nancy Choo - for the Defendant

Date of Hearing: 23rd April, 2015
Date of Ruling : 25th September, 2015

RULING

(A) INTRODUCTION

1 The Defendant in the within action filed a '**Summons**' on 06th November, 2014 to **Strike Out the Plaintiff's Writ of Summons and the Statement of Claim** pursuant to *Order 25, r 9 of the High Court Rules 1988 and to the Inherent Jurisdiction of this Honourable court.*

2 The 'Summons' sought for the following orders-

(a) **The Plaintiff to show cause as to why the within action ought not to be struck out for want of prosecution;**

(b) **Such further or other orders as to the court seems fit; and**

(c) **The cost of this action be paid by the Plaintiffs on full indemnity basis.**

3 The Summons was filed together with an affidavit in support of the Defendant Counsel's Senior Law Clerk Lemeki Sevutia.

4 Subsequently, the Plaintiff's filed an affidavit in Response deposed by David Clark who was engaged as a Solicitor for the Plaintiff's in Australia.

5 Hereinafter, the Defendant's filed a further affidavit in response to David Clark's affidavit.

6 Written submissions were filed and served by both parties to this proceedings and the application was heard on 23rd April, 2015.

(B) BACKGROUND

Writ of Summons and Statement of Claim

7 The Plaintiffs are a married couple from Sydney, Australia who instituted this proceedings against the Defendant:

8 The Plaintiffs state that the Defendant is the owner, occupier and operator of a Resort ordinarily advertised, promoted and known as Kulu Bay Resort on Beqa Island.

9 The Plaintiffs alleged that on or about 20th January, 2012 the Plaintiffs made reservations with the Defendant to spend their vacation from the 4th to 11th February, 2012 at the Resort for a considerable sum which was paid in advance.

10 The Plaintiffs checked in at the Resort on 04th February, 2012 and were assigned the furthest Room (Bure 6) from the reception area for the duration of their stay.

11 On or about 06th February, 2012, after their dinner, both Plaintiffs retired to Bure 6 and secured the exit and entry points from inside.

12 Before going off to sleep, an intruder broke into Bure 6 wielding a cane knife demanding money from them. The Plaintiffs succumbed to the demand by giving a handbag to him.

13 The intruder took the bag but he forcefully dragged the First named Plaintiff with him when the second Plaintiff intervened to protect his wife from being harmed. The intruder attacked him with the cane knife severing his left arm above the wrist.

14 The intruder then dragged the firs Plaintiff 300 meters into the nearby bush, ripped off her clothes and sexually molested her. At this time, she was assisted and brought to the reception area when the second Plaintiff with his injured arm still bleeding profusely wrapped in a piece of cloth. The severed arm was later found in Bure 6.

15 The Plaintiffs have had to helplessly wait on Beqa Island for a considerable period of time before being transported to Vitilevu to receive urgent medical attention.

16 The Plaintiffs alleged breach of duty of care under the *Occupiers Liability Act Cap 33, Negligence* and hence claims for;

(i) Special Damages;
(ii) General Damages;
(iii) Loss of earnings;
(iv) Interest; and
(v) Costs.

Statement of Defence

17 In their Defence, the Defendant joins issues with the Plaintiffs upon their claim insofar as the same consists of **admissions** and **save for any admissions** contained herein.

18 In the above circumstances, I will not reiterate the entire **Statement of Defence** but will highlight only the **relevance** as to what has been **admitted** or **denied**, although the entire Defence will be taken into consideration while arriving at a **decision**.

19 The Defendant admits that it owes a duty of care to its guests to ensure that they have a safe and enjoyable stay at the Resort and in this respect it is under a duty to take all reasonable measures to provide such safety measures as are deemed necessary which it did in this case.

20 The Defendant categorically denies that it breached its duty of care to its guests and further responds to the negligence allegations at paragraph 11 (c) – (j).

21 The Defendant denies that it was negligent or that it breached its duty of care under the *Occupiers Liability Act Cap 33* and says that it did provide a safe secure premises for accommodation and hereafter, sets out its denial and furnishes its explanations at paragraph 13 (a) – (j).

22 The Defendant also denies that it is liable to pay the Plaintiffs for the alleged damages, alleged monetary loss and for the alleged pain and suffering. Says it is improper for the Plaintiffs to seek relief in Australian currency when the Jurisdiction of the claim is Fiji and denies the claim for interest.

23 The Defendant seeks the dismissal of the Plaintiffs Statement of Claim with costs.

(C) THE LAW

24 This application is made pursuant to *Order 25 Rule 9 of the High Court Rules 1988 and to the Inherent Jurisdiction of this Honourable Court,* which *inter-alia* states as follows:

> *"(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.'

25 The basic law on Order 25 Rule 9 has been crystallized in the leading authority of **Birkett vs James (1978 AC 297 (1977) 2 ALL ER** whereby the House of Lords held"

"The power should be exercised only where the court is satisfied wither (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 wither as between themselves and the plaintiff or between each other or between and a third party."

26 In the Case of **Abdul Kaddus Hussein vs Pacific Forum Line Civil Appeal No. ABU 0024 of 2000s (30th May 2003)**, the Court of Appeal readopted the principles expounded in Birkett vs James (supra).

27 The test in **"Birkett vs James" (supra)** has two limbs. The first limb is "intentional and contumelious **default**". The second limb is **"inexcusable or inordinate delay and prejudice."**

28 In **Pratap v Christian Mission Fellowship, (2006) FJCA 41**, The Court of Appeal discussed the principles expounded in **Brikett v James Fellowship"** - (supra) held "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.

29 While citing **Abdul Kadeer Kuddus Hussein v Pacific Forum (supra)** the court, readopted the principles expounded in **Birkett v James [1978] A.C. 297; [1977] 2 All ER 801.**

> *"(7) The question that arises for consideration is what constitutes" **intentional and contumelious default"** (First Limb). The term "**Contumely**" is defined as follows by the Court of Appeal in **Chandar Deo** v **Ramendra Sharma and Anor**, **Civil Appeal No, ABU 0041/2006,***
>
> 1. *Insolent reproach or abuse, insulting or contemptuous language or treatment; despite; scornful rudeness; now esp. such as dishonor or humiliate.*
>
> 2. *Disgrace; reproach."*

30 While the "**Summons**" may not seek for strike out on the **abuse of process,** the court can on its own inherent jurisdiction strike the matter out for abuse of process.

Lord "Woolf" in "**Grobit and Others v Doctor and Others**" **(1997) 01 WLR 640, 1997 (2) ALL ER, 417,** has discussed the **principles for striking out** for "**Abuse of process**" (The second ground in Order 25 Rule 9 (1)) as follows:

> *"The Court had power under its inherent jurisdiction to strike out or say actions on the grounds of abuse of process irrespective of whether the test for dismissal for **want of prosecution** was satisfied. Accordingly, since the commencement and continuation of proceedings with no intention of bringing them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to established **want of prosecution** by showing that there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant. It followed, on the facts that the deputy judge had been fully entitled to strike out the action. The appeal would therefore be dismissed."*

31 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:

"It may 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 judgment 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."

32 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 then may amount to "abuse of process" which justifies for **want of prosecution** without having to show prejudice.

(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 This case was commenced by a Writ of Summons on 11th March, 2014 and the Defendant filed its Statement of Defence on 25th March, 2014.

35 After 25th March, 2014, no action was taken by the Plaintiff nor any the Defendant in order to pursue this case any further until 06th November, 2014, when the Defendant's Solicitors filed a **Summons for Strike Out application** together with **an affidavit in support.**

36 The application filed in terms of the *Order 25 Rule 9* sought from the Plaintiff to show cause why this matter should not be struck out. This meant that since the last pleading was filed on 25th March, 2014, and until the *Order 25 Rule 9* application was filed, a little over a period of seven (7) 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.

37 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 25th March, 2014.

38 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; 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

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

40 In this case, after the Defendant filed its Defence on 25th March, 2014, the Plaintiff failed to file and serve any reply to the Defendant's Defence as required in terms of the Law. The case was commenced by a Writ of Summons where there is no requirement under the High Court Rules, 1988 for the High Court Registry to assign a returnable date. The Defendant upon being served with the Writ is required thereafter under the law to file and serve a Defence on the Plaintiff. Still no returnable date would be assigned since there is no requirement under the law as such, but certain time period is allocated as a requirement for the Plaintiff to file a Reply to Defence, and hereafter, the parties are required to pursue the claim and act in compliance

with the set down procedures and the High Court Rules, 1988 respectively until a time comes when the parties have fully complied with the pleadings and the case is ready for hearing either before a Master of the High Court or a Judge.
In fact, no action was taken by the Plaintiff after the service of the Defence was effected onto the Plaintiff.
For the above rational, the first arm of the test does not apply herein since this court did not make any directions nor it was not adhered to at any time.

Delay

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

Intentional

For these two elements to be satisfied, the 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 he has a genuine desire to pursue this claim. They have not filed this action for the sake of any revenge against the Resort. Both the Plaintiffs have been severely injured whilst they were staying at the Hotel as its paying guests.*
> *In light of the injuries sustained and the manner in which the Plaintiffs were treated as pleaded in the Statement of Claim, the Plaintiff did not file the action for the sake of filing and delaying it. They want some justice for the same and intentions are clear like any injured persons they want some relief as soon as possible. He relied on the submitted case authorities to support his stand.*

> *The Defendant submitted that the Plaintiffs instituted this action against the Defendant on 11th March, 2014 and the Defendant filed and served its Statement of Defence. The Plaintiffs within 7 days were to file and serve their Reply to the Statement of Defence and they failed to do so. The Plaintiffs have not taken any steps since the Defendant's filed their Statement of Defence to move the matter forward. This action has been lying in abeyance over six months until the Defendant by its Motion dated 06th November, 2014 sought to strike out the Plaintiffs claim pursuant to Order 25 Rule 9 of the High Court Rules*

for want of prosecution. The Defendant relied on the submitted case authorities also.

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.
Bearing in mind the arguments raised by both counsels for the Plaintiff and the Defendant both orally and by the written submissions, I find that the delay was not intentional.

42 The other requirement is the 'inordinate' delay.

Inordinate

This relates to the length of delay.
The Counsel for the Plaintiffs explained that the Plaintiffs engaged a solicitor in Australia to instruct Howards Lawyers. This process took some time to obtain instructions. The Plaintiffs did not have a good command of English and as such the solicitor in Australia has to engage an interpreter. Further delay was occasioned due to the non-availability of the information relating to the injuries sustained by both Plaintiffs from the Director of Public Prosecutions Office.
The Plaintiff submitted that the delay claimed by the Defendant in this matter is neither intentional nor inordinate. The time was spent in obtaining instructions, more so, in light of the issues raised in the Statement of Defence.

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.

The Defendant Counsel submitted that it is apparent from the letter of 1st Plaintiff, Lin Jiang at annexure 'DC1' of the said affidavit dated 20th March, 2012 that she clearly understood and spoke the language. The fact that they reside and work in Sydney, Australia is proof enough of their proficiency in the English Language. Further, all correspondence being alluded to by the Deponent, Mr. Clark in his affidavit, alleging their attempt to gather information from the relevant authorities here in Fiji; are misleading as the dates on these correspondence evidentiate that these information were being obtained to assist the Plaintiffs to file a Writ of Summons against the Defendant as opposed to a Reply to Defence. There is no evidence before

court that the Plaintiffs took any measures after the Statement of Defence was filed to urgently file a Reply. They had all the material information and the Plaintiff quickly proceeded to file a Reply, once when a motion for strike out was filed by the Defendant. It is blatantly apparent from Mr. Clark's affidavit that they intended to mislead this court into believing that the Plaintiffs were in the midst of obtaining information to assist their Reply when this was clearly not the case. The Counsel referred to case authorities.

In the above circumstances I am of the finding that both the Plaintiff as well as the Defendant are to be blamed which contributed to the delay of over a period of seven months. The reason being that if the Plaintiff did not pursue or prosecuted his case any further, the Defendant could have moved the court further, forcing the Plaintiff to file and serve the respective consequent pleading. If the Plaintiff still failed then the Defendant should have taken the alternative steps provided for in the Rules, rather than wait for the expiration of six months. This was not done. Therefore, I find that the Plaintiffs have explained their delay accordingly which is acceptable to this court.

Even if the 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

43 It is trite law that the Defendant must establish that is prejudiced by the delay.

The Counsel for the Plaintiffs submitted that the incident is a recent one which took place in 2012. The Defendant in itself is claiming this to be a one- off incident. The statutory law does not treat the delay as prejudicial. Section 4 of the Limitations Act provides for all the personal injury claims to be filed into court within 3 years. The Defendant has got notice of the Plaintiffs claim. The Defendant concedes that prejudice has not yet been caused. Lemeki deposes that…..'may potentially cause prejudice…' It is trite law that the Defendant must show actual prejudice. The Plaintiff further submitted, that they undertake to pursue this matter expeditiously through from here in after. The Reply to Defence is annexed to Davis Clark's affidavit. This is a personal; injury claim, Order 25 Rule 8 allows for automatic discovery.

The Defendant's Counsel in her written submissions raised that the issue of inordinate and inexcusable 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 Defendant. The Defendant is aware that the incident which gave rise to this action occurred in 2012. While the Plaintiffs are not barred from bringing this action after a period of two years, that in itself has been a considerable delay as most employees of the Defendant who were crucial witness to the incident and assisted in the aftermath are no longer employed with the Defendant. The prejudice of this action and or inaction of the Plaintiffs weigh gravely on the Defendant and any chance of a fair trial may not be accorded to the Defendant in light of the unjust delay by the Plaintiffs. A prospect of a fair trial is now less than likely in light of the delay.

I have examined the submissions of both Counsels as well as the case authorities on this issue of prejudice.
The argument submitted certainly alleviates any prejudice to the Defendant.

Interest of Justice

44 The Defendant submitted that it is unfair that the Defendant has to be punished for the laxity of the Plaintiffs whereby they institute an action which they have no interest to see through its conclusion. The Defendant is being put through unnecessary expensive litigation for a claim that is non-meritorious and vexatious to begin with and sought for a striking out accordingly.

The courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible, even if the Defendant satisfies the requirements in ***Birkett v James***. 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.*

45 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.'*

46 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.'*

47 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 therefore 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 Defendant has not suffered any real prejudice; and*

(v) *In the interest of justice, a fair trial is still possible.*

48 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.**

(d) **Each party to bear their own costs.**

Dated at Suva this **25th** **Day of** **September, 2015**

HIGH COURT OF FIJI

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VISHWA DATT SHARMA
Acting Master of High Court, Suva.

cc: *Howards Lawyers, Suva.*
R. Patel Lawyers, Suva.