In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Action No. 551 of 2006

Between : Michael Low and Roslyn Low

Plaintiff

And : NBF Asset Management Bank

Defendant

Appearances : Mr G. O'Driscoll for the plaintiff

Mr K. Jamnadas for the defendant

Date of hearing : 10th February,2014

Judgment

1. By summons filed on 11th February,2013, the defendant filed summons to strike out the action of the plaintiffs for want of prosecution and abuse of the process of Court.

2. The affidavit in support of Trevor Seeto, Manager Legal of the defendant bank states as follows:
   (a) These proceedings concern a mortgage "*over 20 years old and the Defendant's key witnesses..are no longer in its employ and cannot be located*".The defendant's loss of witnesses is "*substantially*" due to the excessive delay in these proceedings.
   (b) The plaintiff has not complied with the order of 8 May,2012, to file their list of documents nor their affidavit verifying the list.

3. The first plaintiff, in his affidavit in answer, states that the delay of 9 months to comply with the summons for directions arose, as he had to comply "*intricate and voluminous*" records .

4. Trevor Seeto, Manager Legal of the defendant bank in his affidavit in reply states that summons for directions was filed by the defendant's solicitors, since the plaintiff did not take steps since 29 June,2011, to bring this case to a conclusion.

5. ***Course of proceedings***

13th December,2006	The plaintiff filed these proceedings.
28th June,2011	The Master granted the plaintiff leave to proceed with the action, consequent to an application for stay of proceedings by the defendant.
12th March,2012	The defendant filed summons for directions.
08th May,2012	The Court granted order in terms of the summons
11th February, 2013	The defendant filed summons to strike out the action

6. ***The determination***

a. In support of the summons for striking out, counsel for the defendant, Mr Jamnadas contended that there has been inordinate delay on the part of the plaintiffs to continue with this action. The plaintiffs have taken no step in these proceedings for a period of 9 months between 8th May,2012, and 11th February, 2013.

b. The plaintiffs' explanation is that they had to comply "*intricate and voluminous*" records.

c. Lord Diplock in ***Birkett v James,***(1977)2 AER 801 at pg 805, stated that the power to strike out an action for want of prosecution 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".*(emphasis added)

d. This classic exposition of Lord Diplock was restated by the Fiji Court of Appeal in ***Pratap v Christian Mission Fellowship,***(2006) FJCA 41.

e. The issues to be determined are twofold: whether (1)there has been inordinate and inexcusable delay on the part of the plaintiffs, and (2)serious prejudice has been caused to the defendant by the delay.

f. Mr Jamnadas, in his written submissions, has referred to the cases of ***Kendall-Jones v Carpenters Fiji Ltd,***(2003)FJHC119 and ***Harakh v Fiji Public Service Association,***(2000) 1 FLR 78.The periods of delay in those two cases are not comparable to the case before me.

g. In the first case, Pathik J found a lapse of 4 years to be an inordinate and inexcusable delay. The reason given by the plaintiff was that the solicitors did not do their duty.

h. In ***Harakh v Fiji Public Service Association,*** Gates J (as he then was) found a 3 year delay to be inordinate.The delay was left unexplained.

i. In both cases, the principles laid down by Lord Diplock in ***Birkett v James,***(*supra*) were applied.

j. The words "*inordinate*" and "*inexcusable*"have been explained in ***Owen Clive Potter v Turtle Airways Limited,***(Civil Appeal No. 49 of 1992 at page 3) as follows:

> *(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 at page 4, their Lordships stated:

> *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 pursuing his action or perhaps any action against the defendant.*

k. In the present case, there has been a delay of 9 months. In my view, this period does not constitute "*inordinate and inexcusable delay*".

l. The next matter to be considered is the question of prejudice. The defendant's concern is that its "*key witnesses who were privy to the negotiation and discussions concerning the mortgage are no longer in its employ and cannot be located*",and the mortgage is 20 years old.

m. I turn to the statement of claim.The claim relates to a third party mortgage granted by the plaintiff to the defendant. The plaintiffs sought an injunction restraining the defendant from advertising, accepting a tender or disposing of CT no. 19038: an order

for the defendant to supply a detailed statement of their account: and, that their liability be limited to a specific amount.

n. Meanwhile, the defendant has filed Civil Action no.415 of 2006 against the plaintiffs for vacant possession of the land in CT no.19038.

o. In my view, it is unlikely that the oral testimony of officials of 20 year vintage would be required to testify on documents and matters in the course of banking business.

p. In contrast, in the case of ***Harakh v Fiji Public Service Association,***(*supra*)the oral evidence drawn from the witnesses recollections was found to be likely to be more significant than letters and insurance documents.

q. One of the reliefs the plaintiffs seek is a declaration that the defendant owed the plaintiffs, a duty of care to explain the terms and effects of a third party mortgage. In its reply to statement of defence filed on 2nd November,2007,the defendant has stated that the terms and effect of the third party mortgage were explained to the plaintiffs by the "*witnessing Solicitor*".

r. In the result, I do not find to have been established a risk of prejudice to the defendant.

s. Ordinarily, a striking out summons is not an appropriate occasion for a court to decide on matters of proof. As the FCA declared in ***National MBF Finance (Fiji) Limited v Nemani Buli***, (unreported Civil Appeal No. 57 of 1998):

> *If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading* ***and will certainly not do so on a contention that the facts cannot be proved*** *unless the situation is so strong that judicial noticecan be taken of the falsity of a factual contention.* ***It follows that an application of this kind must be determined on the pleading as they appear before the court.***(emphasis added)

t. It is settled law, as stated in ***Nagle v Fieldon,***(1966) 1 All ER 689 that a Court will have recourse to the summary remedy of striking out a case only in plain and obvious cases.

u. In ***AG v Shiu Prasad Halka***,(1972) 18 FLR 210 MarsackJA at page 215 noted:

> *it is definitely established that the jurisdiction to strike out proceedings under Order 18Rule (18) should be very sparingly exercised and only in exceptional cases.* ***It***

> ***should not be so exercised where legal questions of importance and difficulty are raised.***(emphasis added)

v. I would refer to the passages reproduced by the FCA in ***Pratap v Christian Mission Fellowship,***(*supra*):

> *In Dey v Victorian Railways Commissioner[(1949) 78 CLR 62, 91 Dixon J said:*
>
> > *A case must be very clear indeed to justify the summary intervention of the court..**once it appears that there is a real question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.***(emphasis added)
>
> *More recently, in Agar v Hyde (2000) 201 CLR 552 at 575 the High Court of Australia observed that:*
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> > *It is of course well accepted that **a court ... should not decide the issues raised in those proceedings in a summary way except in the clearest of cases.***
> >
> > ***Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes"*** (emphasis added)

w. In my judgment, the plaintiffs have placed before Court, issues which have to be determined at a trial. These issues cannot be decided in a summary way.

x. I also cite a passage from ***Lovie v Medical Assurance Society Limited,***(1992) 2 NZLR 244, 248 as reproduced in ***Pratap v Christian Mission Fellowship,***(*supra*) 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**.*(emphasis added)

7. ***Orders***

(a) The defendant's summons to strike out the action of the plaintiffs is declined with costs in the cause.

(b) The matter to be called before the Master on17th February, 2015.

10th February, 2015

A.L.B. Brito-Mutunayagam

Judge