IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

High Court Civil Appeal No. HBM 20/2014
[Civil Action No. 12 of 2013]

BETWEEN : **FIJI DEVELOPMENT BANK** a body corporate duly constituted under the Fiji Development Bank Act (Cap 214) and having its principal office at 360 Victoria Parade, Suva in Fiji.

Applicant

AND : **PENIJAMINI RURU NASALO** & **TULIA TINAI ANNESLEY KOROI** both of 54 Musuniwai Street, Lautoka, Civil Servant and Businesswoman respectively.

Respondents

Appearances : Ms. Vasiti for Applicant
Respondents in Person

Date of Hearing : 04 December 2014

RULING

BACKGROUND

1. I have before me now an application to enlarge time to appeal a decision of the Magistrates Court.
2. The Respondents, Mr. Penijamini Nasalo and Mrs. Tulia Koroi, had borrowed monies from the Fiji Development Bank (**"FDB"**) to purchase a 4x4 utility twin cab. The loan term was five years and the primary security was a bill of sale over the vehicle. When the respondents started defaulting about a year into the loan term, FDB started writing letters to the Respondents to get their account in order. Eventually, in September 2008, FDB engaged a bailiff to repossess the vehicle plus other items which were secured under the Bill of Sale. In due course, these were sold through tender and the proceeds credited against the Respondent's loan account. However, this was not enough to clear the account entirely.

MAGISTRATES COURT CIVIL ACTION 455/2010

3. On 27 September 2010, FDB filed at the Magistrates Court in Lautoka a Writ of Summons and Statement of Claim *vide* Magistrates Court Civil Action 455/2010 to recover the balance outstanding.
4. There is no need for me to get into the details of the nature of the facility and the amount owing. Suffice to say that all this is common ground between the parties.

5. The Respondents did file a statement of defence at the Magistrates Court on 27 January 2011. Whilst admitting to everything pleaded in the statement of claim, the respondents however raise two grounds of defence:
   (i) that FDB at no time whatsoever advised the Respondents to seek independent financial and legal advice.
   (ii) the vehicle was not sold at a reasonable market value price nor a proper tender processs was followed.

STRIKING OUT OF 455/2010

6. On 03 February 2011, which was the fourth call-over date, FDB's claim was struck out when no one appeared in Court for FDB. Notably, FDB had appeared on all earlier call over dates[1]. On these occasions, time was extended to the Respondents to file their Statement of Defence.
7. The reason why no one appeared for FDB on 03 February 2011 is explained in the Affidavit of affidavit of Hemant Kumar Mahadeo sworn on 26 August 2014 and filed on 29 August 2014. Mahadeo says it was due to a miscommunication with FDB's solicitors' Lautoka agents. I have no reason to doubt his explanation.

APPLICATION TO REINSTATE 455/2010 & APPEAL OF DECISION TO DISMISS REINSTATEMENT APPLICATION

8. In any event, on 07 March 2011, just a little over a month after the action was struck out, FDB's solicitors would file an application in the Magistrates Court to reinstate the claim. On 21 November 2011, the Magistrates Court handed down a ruling which dismissed FDB's reinstatement application.
9. Seven days after the above decision, FDB's solicitors filed a Notice of Intention to Appeal and Grounds of Appeal.

FILING OF FRESH CLAIM @ MAGISTRATES COURT – 12 /2013

10. On 01 March 2013, FDB's solicitors decided to also file a fresh action at the Magistrates Court against the same defendants/respondents on the same grounds as their now-dismissed earlier action (455/2010), and for which it (FDB) had filed appeal papers.

[1] i.e. on 08 December 2010; 19 January 2011 and 27 January 2011.

11. After they filed the fresh claim, the matter was called and adjourned on four occasions on 20 May 2013, 01 July 2013, 31 July 2013, and 07 August 2013 to allow the defendants/respondents to file their statement of defence. When the case was called on 07 August 2013, the defendants/respondents raised a preliminary objection in court that the fresh action was an abuse of process because the appeal was also on foot simultaneously.

DISCONTINUANCE OF APPEAL

12. It would appear that because of the said preliminary objection, FDB's solicitors then took the step to discontinue the appeal. This they did by filing a Notice of Discontinuance on 13 August 2013 at the High Court.

DISMISSAL OF 12/2013 AS ABUSE OF PROCESS

13. It is important to note that after having discontinued the appeal, FDB's solicitors then informed the Learned Magistrate in Court on the very next day (14 August 2013). The Learned Magistrate however would proceed with dealing with the preliminary objection that the claim at the Magistrates Court was an abuse of process on account of the appeal.
14. The matter (12/2013) was in fact called again on 28 August 2013, 02 October 2013, 13 November 2013 and on 15 January 2014. On these occasions, the Court was managing the parties' compliance with the timetable on submissions on the preliminary point.
15. Eventually, on 05 February 2014, the Learned Magistrate would dismiss the Magistrates Court claim.
16. In her Ruling, the Learned Magistrate began by noting the preliminary objection that *"this matter be dismissed inlimine without going to the merits of the case on the basis that the filing of this action is (sic) amount to abuse of process by the plaintiff"*.
17. The Magistrate then noted the facts on which the defendant was relying, which is basically the background as I have stated above including the fact that the defendant/respondent

> ...had filed a notice of discontinuance for the Civil Action 455/2010 in the High Court after the preliminary objection by the Defendant on 07th August 2013 before this court contending the same argument".

18. The Learned Magistrate then observed:

> ...At this point the defendant claimed that the plaintiff by their own action had taken steps to file two wits (sic) regarding same action in the Magistrates Court without that being bringing (sic) to the notice of court in the case 12/2013. According to the defendant since the plaintiff were not succeeded (sic) in the action 455/2010, the plaintiff by abusing the process has proceeded to file writ 12/2013 even before the preferred appeal filed by them regarding the dismissal of action in the case no. 455/2010 is dealt by the High Court. And also withdrawal of that appeal was done only after the defendant raised the preliminary objection in this court on 07.08.13.
> Therefore defendant' stated that the legitimate procedure would have been by the plaintiff was that the plaintiff should have waited till the appeal and if the appeal decided upon on their favour only they would have sought for the reliefs (sic) on the substantive issues once the matter is resent to the Magistrates Court by the High Court.

19. The Learned Magistrate then took note of the arguments raised by FDB's counsel in opposition to the preliminary objections. The gist of FBB's solicitors argument is that its action is not statute barred and because the earlier proceeding was struck out on account of their failure to attend court on one occasion rather than on the merits, there is nothing to estopp FDB from filing a second writ and statement of claim based on exactly the same cause of action and against the very same defendants.

20. The Learned Magistrate then devoted some sixteen or seventeen paragraphs to review some case law (**Kumar v Habib Bank Ltd** [2011] FJHC 200; HBC248.2009 (1 April 2011); **Sheetal Investments Ltd v Australia and New Zealand Banking Group Ltd** [2011] FJHC 271; HBC227.2010 (13 May 2011); **Castro v Murray** (1875) 10 Ex. 213; **Dowling** (75) (1915) 20 CLR).

21. The Learned Magistrate then concluded:

> Thus it is evident that the process by the Applicant by filing this case before this court until determination of the original case based on the same transaction is amount to abuse of process. And has been attempted using this court as an instrument to abuse by filing this case whilst appeal in the original case is rest in the High Court by the plaintiff and secondly withdrawing that appeal after the Preliminary objection by the defendant dated 07.08.2013 is process outside the lawful cause.
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> Accordingly this court order the action filed number 12/2013 to be dismissed on the aforesaid grounds.

22. The view taken by the Learned Magistrate is that the claim was an abuse of process because at the time the second Magistrate Court claim was filed, the appeal was still pending before the High Court.

APPLICATION BEFORE ME

23. Before me is a Notice of Motion dated 29 August 2014 seeking enlargement of time to file appeal of the decision of the Learned Magistrate dated 05 February 2014. By that decision, the Learned Magistrate had dismissed the Magistrates Court claim of the FDB on the ground that it was an abuse of process. The summons seeks the following:

    (i) That the Applicant be granted leave to appeal out of time the decision of the Learned Magistrate dated 05 February 2014.
    (ii) That cost of this application be in cause (sic) and
    (iii) Such other or further order as this Honourable Court deem (sic) just.

24. The application is supported by an affidavit of Hemant Kumar Mahadeo sworn on 26 August 2014 and filed on 29 August 2014. The Respondents have filed an affidavit of Penijamini Ruru Nasalo sworn on 02 December 2014[2].

ORDER XXXVII – MAGISTRATES COURT RULES

25. Order XXXVII Part 1 of the Magistrates Court Rules provides that an appellant must give notice of intention to appeal within 7 days after the decision was given and under Part III, file at the Magistrates Court his grounds of appeal within one month from the date of the decision:

    I. Notice of Intention to Appeal
    1. Every appellant shall within seven days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision

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[2] Mr. Nasalo deposes:

1. I am the First Named Respondent in this matter and that the Second Named Respondent is my wife.
2. I depose of this Affidavit on behalf of my wife and I am duly authorised by her to do so.
3. Everything in this Affidavit within my knowledge is true and everything not within my knowledge is true to the best of my belief.
4. We have read the Affidavit in Support (To Appeal Out of Time) (hereinafter referred to as "the Affidavit") of Hemant Kumar Mahadeo sworn on 26th August 2014 and filed on 29th August 2014 herein and we have understood it and oppose their application.

Background

5. I do confirm that on 3rd February 2011, the Appellant's matter, which was Lautoka Magistrate's Court Civil Action No. 455 of 2010, was struck out in the Magistrate's Court due to the Appellant's (Original Plaintiff) non-appearance.
6. On the 7th of March, 2011 the Appellant filed an Application to reinstate their matter that was struck out on the 3rd of February, 2011. This was first called on 27th April, 2011.
7. We thereafter filed out Affidavit in Opposition to the reinstatement on 6th September 2011 and this matter was adjourned to 21st September 2011.
8. We had attended Court on 21st September 2011 where the Ruling for Reinstatement was delivered and the Appellant's Application was dismissed.
9. The Appellant did not appear on 21st September 2011 and the miscommunication between the Appellant's Solicitor and its Agent is no fault of the Court.

The High Court Case

10. This Notice of Intention to Appeal and Grounds before this Honourable Court was filed on 28th November, 2011. That is more than 2 months after the Ruling of 21st September 2011 on the reinstatement application.
11. It was later discontinued by the Appellants for reasons known to them only. However, the Appellant's had, whilst their appeal papers were being processed by the High Court Registry, filed a fresh application in the Magistrate, which we had argued was an abuse of Court process.
12. This preliminary objection was raised by us and the matter adjourned to 5th February 2014 for ruling on this objection at 9.30am. At 9.30am, we together with the Appellant's Solicitors Agent appeared in Court where the matter was adjourned to 2.30pm for ruling.
13. When this matter was called again at 2.30pm, both parties were present and we were again informed that the matter would be adjourned to 3.30pm for Ruling on our preliminary objection.
14. At 3.30pm of 5th February 2014, we were in Court to uplift the Ruling as mentioned above and the Appellant were not present. Annexed here and marked "PRN1" is a copy of the Ruling made on 5th February, 2014.
15. We oppose what the Appellant's say at paragraphs 69 and 75 and say that we were advised in Court that Ruling would be ready and delivered in Court at 3.30pm on 5th February 2014. We were not advised to seek a next date in this matter as averred to by the Appellant.
16. The Appellants have shown through their Affidavit that they have failed to move their case and that they had abused the Court process.
17. By their admission, it took the Appellants approximately 5 months to get their copy of the Ruling. This is evidenced by their admission at paragraph 74 of their Affidavit.
18. The Appellant's then took another month to file their Notice of Motion to Appeal out of time.
19. The Appellant has again failed to show this Honourable Court why it took them so much time to, approximately 6 months to file their application.
20. This is the Appellant's case and the history of the case as averred to by the Appellant's show that they have failed to diligently execute their claim both in the Magistrates Court as well as the High Court.
21. Therefore, we seek and pray that the Appellants Notice of Motion be struck out with costs against the Respondent.

was given (hereinafter in this Order called "the court below") notice in writing of his intention to appeal :

Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced.

II. Security for Payment of Costs

2.- (1) Upon receiving notice of intention to appeal, the court below may in its discretion order the appellant to give security, to the satisfaction of the court if the parties differ, in such sum as the court shall direct, either by deposit, or by bond in Form 35 of Appendix A, for the payment of all such costs as may be awarded to any respondent by the appellate court.

(2) Where the security is by bond-

(a) the bond shall, unless the court otherwise directs, be given to the respondent;

(b) If the appellant is unrepresented, the bond shall be prepared by the court.

III. Grounds of Appeal

3.- (1) The appellant shall within one month from the date of the decision appealed from, including the day of such date, file in the court below the grounds of his appeal , and shall cause a copy of such grounds of appeal to be served on the respondent.

(2) At the time the appellant files the grounds of his appeal he shall deposit with the clerk of the court below such sum as the clerk shall consider sufficient to cover the fees prescribed in Appendix B for the preparation, certification and copying of the record.

THE LAW

26. Clearly, the applicant has failed to comply with Order XXV II of the Magistrates Court Rules. In any given case, once the rules are not complied with, it becomes a matter of discretion for the court whether or not to grant leave to appeal out of time. The onus falls heavily on an intended appellant to convince the court to grant leave.

27. In **Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund** [2010] FJCA 3; Miscellaneous Case 020 of 2009 (3 February 2010) the court the Fiji Court of Appeal stated:-

> "It is well settled law that once the rules are not followed it is the discretion of the court to grant leave to appeal out of time and that the onus rests upon the appellant to satisfy the court that in all circumstances the justice of the case requires that he be given an opportunity to appeal out of time against the judgment he wishes to appeal "

28. The above suggests that a party's right of appeal exists while time runs for the filing of the requisite appeal documents. Once time runs out, that right is extinguished. It then becomes a matter of judicial discretion whether or not to grant leave to appeal out of time. That discretion must still be exercised judicially.

29. The factors which a Court must take into account were set out by the Honourable Chief Justice in **McCaig v Manu** [2012] FJSC 18; CBV0002.2012 (27 August 2012). They are as follows:

(i) the reason for the failure to file within time
(ii) the length of the delay.
(iii) whether there is a ground of merit justifying the appellate court's consideration.
(iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
(v) if time is enlarged, will the Respondent be unfairly prejudiced?

COMMENTS

30. FDB filed its summons in this court on 29 August 2014. That was almost 07 months or so after the ruling of the Magistrate on 05 February 2014. To explain the delay, Mahadeo deposes as follows at paragraphs 80 to 82 of his affidavit:

> 80. **IN** summary the Applicant prays for an extension of time to appeal for the following reasons:
>
> a) despite the Court advising on 5 February 2014 that date will be assigned for delivery of Ruling no such date was allocated;
> b) despite writing to the Magistrates Court Registry on 24 February 2014 the Registry failed to update the Bank's solicitors on the status of the Ruling;
> c) it was only after the Bank's solicitors enquired with the Registry in July 2014 then they were informed that the Ruling has been delivered and placed in the city agents folder;
> d) however the Registry staff was unable to advise when the Ruling was placed in the folder and why the Bank's solicitors were not notified that the Ruling is ready;
> e) the Bank's solicitors then contacted the city agents who then contacted the Registry and uplifted a copy of the Ruling on 1 August 2014 and forwarded the same on that day to the Bank's solicitors. This is verified from the letter of the city agents that the Ruling was uplifted on 1 August 2014 from the Registry; and
> f) the Bank's solicitors were unable to file the necessary application in Court earlier as they were not aware of the Ruling of the Learned Magistrate striking out the Bank's claim against the Defendants.
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> 81. **DUE** to unfortunate circumstances beyond its control, the Bank was unable to file its Notice of Appeal within the time permitted under the Rules.

31. It appears from the above and from other parts of the affidavit not reproduced here that the FDB had first been told by the Magistrates Court Registry that ruling would be on notice and, accordingly, they were waiting in anticipation of a notice from the Registry.

32. The first Respondent however deposes as follows:

> 12. This preliminary objection was raised by us and the matter adjourned to 5th February 2014 for ruling on this objection at 9.30am. At 9.30am, we together with the Appellant's Solicitors Agent appeared in Court where the matter was adjourned to 2.30pm for ruling.
> 13. When this matter was called again at 2.30pm, both parties were present and we were again informed that the matter would be adjourned to 3.30pm for Ruling on our preliminary objection.
> 14. At 3.30pm of 5th February 2014, we were in Court to uplift the Ruling as mentioned above and the Appellant were not present. Annexed here and marked "PRN1" is a copy of the Ruling made on 5th February, 2014.
> 15. We oppose what the Appellant's say at paragraphs 69 and 75 and say that we were advised in Court that Ruling would be ready and delivered in Court at 3.30pm on 5th February 2014. We were not advised to seek a next date in this matter as averred to by the Appellant.
> 16. The Appellants have shown through their Affidavit that they have failed to move their case and that they had abused the Court process.
> 17. By their admission, it took the Appellants approximately 5 months to get their copy of the Ruling. This is evidenced by their admission at paragraph 74 of their Affidavit.
> 18. The Appellant's then took another month to file their Notice of Motion to Appeal out of time.
> 19. The Appellant has again failed to show this Honourable Court why it took them so much time to, approximately 6 months to file their application.

33. I am of the view that the delay was not substantial. But even a substantial delay may be tolerated if there is a ground of appeal that is strong enough that it will probably succeed and, provided, that the Respondent will not be unfairly prejudiced if time is enlarged.

34. On the latter part, I do not think that the Respondents will be unfairly prejudiced because not much of the substantive allegations against them are challenged.

35. On the former, I think there is a ground of appeal in this case against the ruling of the Learned Magistrate. Firstly, because the action was dismissed on account of FDB's non-appearance in Court on one occasion, it follows that the case was not decided on the merits. Therefore, there is nothing in law to estopp FDB from filing fresh proceedings in the Magistrates Court against the same defendants/respondents on the same facts and cause of action (see **Bibi v Narayan** [2014] FJHC 609; HBC187.2011 (5 August 2014); **Pople v Evans** [1969] 2 Ch 255, [1968] 2 All ER 743). Secondly, the Learned Magistrate's finding that FDB's Magistrates Court action (12/2013) was an abuse of process on account of the appeal that was already afoot did not account properly for the fact that FDB had already discontinued its appeal in order to pursue its Magistrates Court claim. In other words, whilst the Magistrate was aware that the Appeal had already been discontinued at the time she was calling for

submissions and certainly at the time she was writing her ruling, she failed to give proper weight to that fact. I discuss this below.

TO MAINTAIN TWO CONCURRENT PROCEEDINGS IS PRIMA FACIE A VEXATION & OPPRESSION AGAINST A DEFENDANT

36. In **Commonwealth of Australia v Cockatoo Dockyard Pty Ltd** [2003] NSWCA 192 (14 July 2003), the New South Wales Court of Appeal reviewed various case authorities in England and in Australia on the source of the courts power to restrain litigation on foot when a similar proceeding based on the same facts, cause of action, and parties is also afoot either in another country or even within Australia. Below, I discuss the principles I extract from the above to the extent that they are relevant in Fiji.
37. The starting point is that "a party who has properly invoked the jurisdiction of the court is *prima facie* entitled to have his case heard and determined by that court. In Fiji, section 15 (2) of the 2013 Constitution is relevant in this regard.
38. However, that right has to be balanced with the court's duty to prevent a defendant being improperly vexed or and/or oppressed by legal procedure. In that regard, the court will interfere and will not hesitate to strike out or dismiss a vexatious or oppressive proceeding to prevent the administration of justice being perverted for an unjust end[3].
39. Having said that, it is prima facie vexatious and oppressive to bring two concurrent actions when one will do[4].
40. Vexation may happen when a plaintiff brings an action *"under colour of asking for justice"* but is really *"harassing others"* i.e. where the judges see that the proceedings are *"so utterly absurd that the Judge sees it cannot possibly succeed, and that it is brought only for annoyance ..."* or where *"the plaintiff not intending to*

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[3] The NSWCA then said:

55 Bowen LJ (at 408) made it clear that the jurisdiction to stay proceedings should not be narrowly confined, saying:

> *... I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case. ... Where there is more than one suit being carried on in the Queen's Courts, it is obvious that .... [t]he remedy and the procedure are the same, and a double action on the part of the Plaintiff would lead to manifest injustice.*

[4] As the NSWCA observed:

In *McHenry v Lewis* (1883) 22 Ch 397, the first case relied upon by the Commonwealth, the Court considered when it might exercise its jurisdiction to stay an action brought in England on the ground that the applicant for the stay was a party to substantially the same proceedings brought in America although there were additional and important parties to the American proceedings. In considering the source of the power to restrain litigation on foot in two different countries the Court considered the general jurisdiction to stay proceedings.

54 Jessel MR (at 399) treated the Court's jurisdiction to consider granting a stay in such circumstances as "part of the general jurisdiction of the Court to prevent a defendant being improperly vexed by legal procedure." Insofar as local proceedings were concerned he said, albeit as dicta, (at 400):

> *In this country, where the two actions are by the same man in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is prima facie vexatious to bring two actions where one will do. ... This has been recognised ... for ages by the practice of the old Court of Chancery, which always put a Plaintiff to his election by an order of course if he was suing for the same cause of action both at Law and Equity.*

annoy or harass the defendant, but thinking he would get some fanciful advantage, sues him in two Courts at the same time and under the same jurisdiction..."[5]

41. Because the existence of two concurrent proceedings in two courts (in the one country or even in different countries) is *prima facie* vexatious and oppressive, generally, as a matter of course, the court will put the plaintiff to his election to stay one of the proceedings. However, that is not a hard and fast rule because the Court itself has powers to stay the proceeding before it if it considers it oppressive and vexatious to maintain it on account of the pendency of the other in another court or even before the same court[6].

42. The rationale is that the *prima facie* vexation and/or oppression, whilst it is undesirable, can be eliminated simply by the stay or discontinuance of one of the two matters. In this regard, ordinarily the second proceedings would be regarded as an abuse of process and therefore stayed. However, there is no reason in principle why the first should not be capable of being considered an abuse of process.

43. In that regard, to strike out or stay both proceedings – or - to strike out/stay one, on account that it was commenced whilst the other was also afoot, notwithstanding that the other has since been discontinued (as happened in this case), is arguably a denial of the right guaranteed under section 15(2) of Fiji's 2013 Constitution.

FACTORS RELEVANT IN DETERMINING WHETHER TO STAY PROCEEDINGS

44. The decision to strike out or grant a stay is a matter of discretion. From the cases discussed in **Commonwealth of Australia v Cockatoo**, it would appear that the practical effect of making or declining a stay order[7] is paramount and which

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[5] The NSWCA said:

56 Within two months of the decision in *McHenry v Lewis* the question of whether or not a stay of proceedings should be granted where there were proceedings between the same parties in different countries, in this occasion in England and France arose again. In *Peruvian Guano Company v Bockwoldt* (1883) 23 Ch D 225 at 233 Bowen LJ, after observing a plaintiff who came into an English Court seeking justice should not be confronted with difficulties, pointed out, however, that the courts would always interfere "to prevent a plaintiff under colour of asking for justice from harassing others." This was because "the prosecution of the actions simultaneously appears to the Court to be necessarily attended with injustice."

57 In *Peruvian Guano* Jessel MR illustrated what might constitute vexatious proceedings. "Pure vexation" according to his Lordship (at 230) were proceedings which were "so utterly absurd that the Judge sees it cannot possibly succeed, and that it is brought only for annoyance ...". The alternative was "the plaintiff not intending to annoy or harass the defendant, but thinking he would get some fanciful advantage, sues him in two Courts at the same time and under the same jurisdiction - two of the Queen's Courts. That is vexatious, because, whatever the intention of the plaintiff may be he cannot get any benefit in that way, and the defendant is harassed by two suits."

[6] The NSWCA said:

58 In *Williams v Hunt* [1905] 1 KB 512 the plaintiff, a mortgagee, had commenced an action by writ issued in the Chancery Division claiming an account of sums due under the mortgage deed, payment of the sum found to be due and, in default, sale or foreclosure. She subsequently commenced proceedings in the Kings Bench Division claiming principal and interest under the covenant in the mortgage deed. The relief claimed in the Kings Bench Division proceedings could have been sought in the Chancery Division proceedings. The court held that it was an abuse of process to divide a remedy where there was a complete remedy in the court in which the suit was first started. A year later, in *Logan v Bank of Scotland* (No 2) [1906] 1 KB 141 Sir Goreff Barnes P said (at 150):

[I]n this country, where two actions are brought by the same person against the same person in different courts governed by the same procedure, and where the judgments are followed by the same remedies, it is prima facie vexatious to bring two actions where one will lie; ...

59 *McHenry v Lewis* and *Williams v Hunt* were applied in *Maple v David Syme & Co Limited* [1975] 1 NSWLR 297 by Begg J in upholding a decision by Master Cantor QC in *Maple v David Syme & Co Limited* [1974] 1 NSWLR 290 that the commencement of defamation proceedings in relation to the same publication both in Victoria and in New South Wales constituted an abuse of process where there was a complete remedy in the Victorian Court. The plaintiff refused to undertake to stay the Victorian proceedings if permitted to proceed in New South Wales in respect of both publications. Master Cantor QC had concluded:

I must assume that it is the plaintiff's intention to proceed in separate actions in Victoria and in New South Wales against the same defendant for the publication of an identical article in the same newspaper in Victoria and in New South Wales respectively. Prima facie this seems to me to be the very conduct which is described in the authorities as an abuse of process or as vexatious.

60 In *Reynolds v Reynolds* [1977] 2 NSWLR 295 at 306 Waddell J treated it as "well established that the maintenance of proceedings in two courts, in each of which the relief sought may be granted, may be an abuse of process." He referred to *McHenry v Lewis* and *Williams v Hunt* as respectively supporting the proposition that the existence of proceedings in two courts in the one country and of two proceedings in two divisions of the one court is "considered prima facie vexatious, and the court will generally, as of course, put the plaintiff to his election and stay one of the proceedings, or it may ... stay the proceedings which it considers to be inappropriate".

[7] The NSWCA said:

must involve a balancing between the advantage to the plaintiff compared to the disadvantage to the defendant taking account of the following[8]:

(a) circumstances relating to witnesses.
(b) the possibility that preparation done for the second case might be wholly or partly thrown away or wasted due to the creation of an issue estoppel arising from the earlier proceedings.
(c) principles against double recovery of damages.
(d) which proceeding was commenced first
(e) whether the termination of one proceeding is likely to have a material effect on the other.
(f) public interest.
(g) the undesirability of two courts competing to see which of them determines common facts first.

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62 In Moore & Ors v Inglis (1976) 50 ALJR 589 (upheld on appeal (1976) 51 ALJR 207), Mason J held that it was vexatious and oppressive or an abuse of the process of the High Court warranting the grant of a stay for the plaintiff to commence proceedings in the High Court of Australia when there were earlier commenced proceedings in the Supreme Court of the Australian Capital Territory. The only differences between the two actions were that in the Supreme Court there was one allegation of conspiracy against five defendants whereas in the High Court the plaintiff alleged five separate conspiracies but the object of the conspiracies was identical in both actions. Different relief was sought in that in the Supreme Court action the plaintiff sought damages only whereas in the High Court proceedings she sought relief by way of declaration and injunction but not damages. The parties in the two actions varied to a minor extent. In granting the stay his Honour acknowledged (at 593) that the power to stay on the ground that the commencement and continuation of an action in the High Court was vexatious and oppressive and an abuse of its process was one which should be exercised with caution.

63 Moore & Ors v Inglis was referred to in the joint judgment of Dawson, Gaudron, McHugh and Gummow JJ in Henry v Henry [1996] HCA 51; (1976) 185 CLR 571 at 591 as authority for the proposition that "(i)t is prima facie vexatious and oppressive, in the strict sense of those terms, to commence a second or subsequent action in the courts of this country if an action is already pending with respect to the matter in issue."

64 The Commonwealth referred to Hughes Motor Services Pty Limited v Wang Computer Pty Limited [1978] FCA 49; (1978) 35 FLR 346 ("Hughes") and Sterling Pharmaceuticals Pty Limited v The Boots Company (Australia) Pty Limited [1992] FCA 72; (1992) 34 FCR 287 ("Sterling Pharmaceuticals") in support of the proposition that a factor to take into account in determining whether or not to grant a stay is the practical effect of making, or declining to make, an order staying one or other of the proceedings.

65 In Hughes, Bowen CJ considered the circumstances in which proceedings properly brought in the Federal Court of Australia seeking relief pursuant to the Trade Practices Act might be stayed. The allegations made in the proceedings were substantially identical to those made in proceedings which had been earlier commenced in the Supreme Court of New South Wales, however the Trade Practices Act relief could not be obtained in the New South Wales proceedings. His Honour derived some assistance for the source of power to grant a stay from O 63 r 1 of the High Court Rules which governed the Federal Court's procedure in 1978. That rule conferred a general power to stay proceedings as to the whole or part, but did not indicate the principles upon which that discretion would be exercised. To the extent that O 63 r 2 explained the ambit of O 63 r 1, it provided for an application to be made to stay proceedings on the conventional bases of want of a reasonable or probable cause of action, or that the proceedings were vexatious, oppressive or an abuse of process. His Honour concluded the proceedings could not be characterised as within any of those categories as they had been conventionally interpreted.

66 His Honour held nevertheless (at 351), that relief could be granted pursuant to the Court's general power to control its own proceedings, a view for which he said O 63 r 1 gave comfort. He concluded that the question of the exercise of the discretion should take into account the advantage to the plaintiff compared to the disadvantage to the defendant as well as the following factors:

- Circumstances relating to witnesses
- The possibility that preparation done for the second case might be wholly or partly thrown away due to the creation of an issue estoppel arising from the earlier proceedings.
- Principles against double recovery of damages.

[8] The NSWCA said:

68 In *Sterling Pharmaceuticals*, Lockhart J considered the question whether a stay of proceedings should be granted in relation to proceedings brought in the Federal Court of Australia by a subsidiary of a US company (Sterling US) against the respondent, a subsidiary of a UK company (Boots UK) in circumstances where the New Zealand subsidiary of Sterling US had already commenced proceedings against a New Zealand subsidiary of Boots UK in the High Court of New Zealand. The New Zealand action was brought under the *Fair Trading Act* 1986 (NZ) and relied on sections equivalent to the *Trade Practices Act* (1974) (Cth) and was based on facts similar to the Australian case. The New Zealand proceedings had been commenced approximately one year before the Australian proceedings.

69 Lockhart J (at 291) saw the Federal Court's power to grant a stay as being found in O20 r 2 of the *Federal Court Rules* as well as the Court's status as "a superior court of record (which) may control its own proceedings including, where appropriate, the exercise of a power to grant a stay." He referred to the guidance to be drawn from *Hughes* and listed a number of considerations he thought might relevantly be taken into account on the question whether a stay should be granted, including:

- "Which proceeding was commenced first.
- Whether the termination of one proceeding is likely to have a material effect on the other.
- The public interest.
- The undesirability of two courts competing to see which of them determines common facts first.
- Consideration of circumstances relating to witnesses.
- Whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted.
- The undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues.
- How far advanced the proceedings are in each court.
- The law should strive against multiplicity of proceedings in relation to similar issues.
- Generally balancing the advantages and disadvantages to each party."

(h) the undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues.
(i) how far advanced the proceedings are in each court.
(j) the law should strive against multiplicity of proceedings in relation to similar issues.

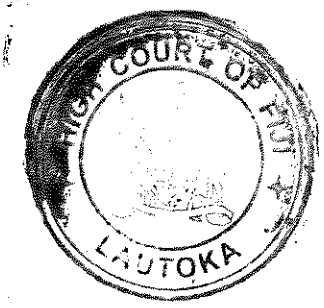
CONCLUSION

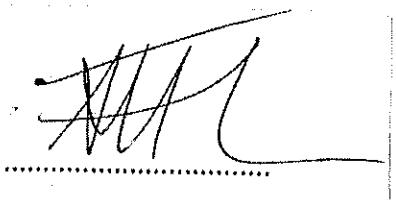
45. It is highly arguable that it was not an abuse of process for FDB to have filed the fresh Magistrates Court claim (12/2013) whist the appeal was on foot. I say that because the appeal was concerned about the Magistrate's dismissal of FDB's application to reinstate the earlier claim (455/2010).

46. The substantive matter in the fresh Magistrate's Court claim (12/2013) was about FDB's claim for the outstanding amount owing to it by the Respondents. As I have said, the option of filing a fresh claim was one that was open to FDB by virtue of the principles in **Pople v Evans** (supra). Neither the pending appeal nor the earlier action which was dismissed, not on the merits, could bar FDB from filing a fresh action.

47. In any event, even if it was an abuse of process for FDB to have filed the fresh claim during the pendency of the appeal, it is arguable that the *prima facie* vexation and oppression on the Respondents caused by the simultaneous pendency of the two related proceedings, was cured at the point when FDB elected to discontinue the appeal. Hence, to have then proceeded to also dismiss the Magistrates Court proceedings (12/2013) is a violation of section 15(2) of the 2013 Constitution.

48. I am of the view that FDB has an arguable case on appeal and that it has a fairly good chance of succeeding then. I grant Order in Terms of the applicant's summons. Parties to bear their own costs.





Anare Tuilevuka
JUDGE
01 July 2016