THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 315 of 2014

BETWEEN : **PATRICK PAUL** of Haycroft, Shelborne, GL54, 3NB, England.

PLAINTIFF

AND : DIRECTOR OF LANDS

1ST DEFENDANT

AND : REGISTRAR OF TITLES

2ND DEFENDANT

AND : ATTORNEY GENERAL OF FIJI

3RD DEFENDANT

BEFORE: **Master Vishwa Datt Sharma**
COUNSELS: **Ms. Choo** for the Plaintiff
Mr. Prakash for Defendants

Date of Hearing: 17th November, 2016
Date of Ruling: 09th February, 2017

RULING

[Application to strike out the Plaintiff's substantive Writ of Summons and Statement of Claim pursuant to Order 25 Rule 9 of the High Court Rules, 1988]

(A) INTRODUCTION

1. The Court on its own **Motion** issued a **Notice** to the parties on 28th April, 2016, listed the matter for the parties to **show cause** why the case should not be **struck out for want of prosecution or as an abuse of the process of the Court** since no action was taken for a period of more than six (6) months.

2. This Notice was issued pursuant to ***Order 25 Rule 9 of the High Court Rules, 1988.***

3. The Plaintiff filed its Affidavit to Show Cause on 28th June, 2016.

4. The application was heard with Written Submissions on 17th November, 2016.

(B) THE LAW

5. This application is issued pursuant to ***Order 25 Rule 9 of the High Court Rules 1988,*** 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.'*

6. 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."*

7. 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).

8. 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.**"

9. 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.

10. 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,***
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> 1. *Insolent reproach or abuse, insulting or contemptuous language or treatment; despite; scornful rudeness; now esp. such as dishonor or humiliate.*
> 2. *Disgrace; reproach."*

11. 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 "**Grovit 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."*

12. 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."*

13. 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.

(C) ANALYSIS and DETERMINATION

14. I have perused the court file in terms of the pleadings filed as required by the set down procedures and the ***High Court Rules 1988*** accordingly.

15. **This case was commenced by a Writ of Summons and a Statement of Claim on 12th November, 2014.**

16. The Defendants were served and accordingly filed the **Acknowledgement of Service on 08th December, 2014.**

17. The **Statement of Defence** was filed on **09th April, 2015.**

18. Subsequently, **on 28th April, 2015,** the **Plaintiff** filed his **Reply to the Statement of Defence.** Hence, the pleadings were complete in this case. The Plaintiff was then required to attend to the further cause of action in terms of filing the Summons for Directions and seek further directions and orders in the matter. Nothing was done after the close of pleadings on 28th April, 2015.

19. On **28th April, 2016**, this Court on its own **Motion** issued a **Notice** to the parties to the proceedings to **show cause why the case should not be struck out for want of**

prosecution or as an abuse of the process of the Court since no action was taken for a period of more than six (6) months.

20. The Plaintiff was served with the Court's Notice on 25th May, 2016 and thereafter on the same day filed the **Notice of Intention to Proceed**.

21. The **Plaintiff** filed its **Affidavit to show Cause** on **28th June, 2016**.

22. This Court notes from the Court record that the Plaintiff ought to have filed a Summons for Directions after the pleadings were closed on 28th April, 2015. No action was taken by the Plaintiff until 25th May, 2016 when it filed a **Notice of Intention to Proceed. The Notice of Intention to Proceed is not a cause of action in itself rather an intention expressed in the notice to proceed with the matter after an action lapses outside the 6 months' timeframe** .This was only done upon the service of the Court's Notice and after a lapse of almost **1 year 1 month's** timeframe.

23. This meant that since the last pleading was filed on **28th April, 2015**, and until the ***Order 25 Rule 9*** application was filed, a period **of 01 year and 01 month had lapsed**. 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.

24. 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 **28th April, 2015**.

25. 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

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

27. The **Plaintiff** filed the **reply** to the **Statement of Defence** as was required of him in terms of the Law and therefore the pleadings in this action were then closed. Thereafter, the parties are required to pursue the claim and act in compliance with the set down procedures and the ***High Court Rules, 1988*** respectively and fully comply with all cause of action until the case is ready for hearing and determination either before a Master or a Judge of the High Court.

In fact, neither any further action was taken by the **Plaintiff** after the pleadings were closed nor did this Court make any directions and orders for the parties to comply.

For the above rational, the first arm of the test does not apply herein since this court at this stage of the proceedings did not make any directions rather the set down procedure in law should have been adhered to. The Plaintiff after filing the Reply to the Statement of Defence should have filed and served a Summons for Directions and sought the directions and orders of this Court to move the matter further, but failed to do so and had the matter remained pending in the system till now.

Delay

28. 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 it had a genuine desire to proceed with this matter and stated in the affidavit of Lemeki Sevutia deposed on 28th June, 2016, that primarily the delay to proceed in this matter was Plaintiff's reliance on the outcome of the action in the Court of Appeal ABU 0068 of 2015. The Defendants who are also a party to the proceedings in the Appeal matter are well conversed with the issues surrounding the Appeal Case and are fully aware of the outcome of the Appeal on the current case.'*

The Defendants submitted ' that Affidavit deposed by Lemeki Sevutia at paragraphs 11 and 16 essentially states that the reason as to why he had not filed the Summons for Directions is because after 28th April, 2015 the Plaintiff was awaiting the outcome of an Appeal in the Court of Appeal action no. ABU 0068 of 2015. However, the Plaintiff did not on any occasion write to inform the Defendants that he was awaiting the outcome of HBJ

01 of 2013 or to file a Notice of Appeal for the Appeal action ABU 0068 of 2015. The Plaintiff did not file a Notice of Intention to Proceed once 6 months had lapsed to notify the Court that he intended to proceed with this action. The Plaintiff did not make any application to have the matter adjourned awaiting the outcome of the ABU 0068 of 2015.'

29. Bearing in mind the contents of the Plaintiff's Affidavit deposed by Lemeki Sevutia showing cause, and the arguments raised by the Defence Counsel and both written submissions, I find that the Plaintiff has a desire to proceed with this matter. The Plaintiff has explained to the Court that the current matter HBC 315 of 2014 and the action pending in the Court of Appeal ABU 0068 of 2015 were interrelated and concurrent proceedings, therefore the Plaintiff deemed appropriate to wait for the outcome of the Appeal, which has already been set for directions, to ultimately set HBC 314 of 2014 into its perspective. The delay was for a period of 12 months which in the circumstances is not **materially longer** than the time usually regarded by the profession and courts as an acceptable period.
Upon the perusal of the Court record, I also found that the Defendants themselves had filed the Acknowledgment of Service on 08th December, 2014 but it was not until 09th April, 2015 when the Statement of Defence was filed with the consent of the Plaintiff. The Defendant delayed filing its Statement of Defence up to a period of 04 months contrary to the assertion of 3 weeks at paragraph 8 of the Deponent, Ajay Singh's affidavit. The Defendants partially contributed to the timely filing of the pleadings and cannot just push the blame on the Plaintiff.

Therefore, the **delay** in the manner and circumstances described hereinabove was **unintentional** on the part of the Plaintiff. The Plaintiff's conduct also does not tantamount to an **abuse of the Court process** because there was no intention of the Plaintiff not to pursue this case any further and or bring this action to a conclusion.

30. The other requirement is the 'inordinate' delay.

Inordinate

This relates to the **length of delay**. The word '**inordinate**' is defined in the Supreme Court Practice meaning '***materially longer than the time usually regarded by the profession and courts as an acceptable period.***'

The issue this Honorable Court is burdened with is whether the inordinate delay was so material that it gives rise to a substantial risk that it is not possible to have a fair trial of the pending issues in this action. The Plaintiff filed the Reply to the Statement of Defence and the pleadings in this case were closed. The Plaintiff did not pursue the cause of action hereafter. The time calculated from the date of the filing of the last pleadings in terms of the Plaintiff's Reply to the Statement of Claim, and until the

issuance of the ***Order 25 Rule 9*** Notice on 28th April, 2016, adds up to 01 year 01 month.

If the Defendant encountered any delay on the part of the Plaintiff in pursuing with the cause of action, then the Defendant as parties to the proceedings should have filed and proceeded with an appropriate application for Court to decide rather than wait and only act once the court issued and served the ***Order 25 Rule 9 application.***

In the above circumstances, I am of the finding that both, the Plaintiff as well as the Defendant are to be blamed for contributing to this delay. 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 pleadings to complete the pleadings and the cause. If the Plaintiff still failed, then the Defendants should have taken the alternative steps provided for in the Rules, rather than wait for the Plaintiff to pursue his case further. This was also not done. It is the duty of the Plaintiff to prosecute his case diligently and this includes the procuring of legal representation and the securing of finances to commence and continue litigation without citing any difficulties whatsoever.

If I may add, *that the delay by the Plaintiff is neither intentional nor contumelious. Further, the delay is not inordinate and is excusable taking into consideration the reasons and the explanation provided to this Court. I do not find any reason or risk that it is not possible to have a fair trial of the issues in this action. In addition, the conduct of the Plaintiff does not constitute an abuse of the process of this court.*

Taking into consideration the Plaintiffs affidavit showing cause together with the written submission, I find that the Plaintiff has satisfactorily explained his delay which is not inordinate and excusable in the given circumstances and therefore is acceptable to this court.

Factors relating to inordinate and inexcusable delay on their own are therefore insufficient to warrant the striking out of this action in terms of Order 25 Rule 9 application.

Prejudice

31. It is trite law that the Defendant must establish that they are prejudiced by the delay.

The Counsel for the Defendant referred Court to the Case of ***Grovit and Others-v-Doctor and Others (1997) 01 WLR 640, 1997 (2) ALL ER 417*** which provides '***that if the Plaintiff institutes legal proceedings with no intention of bringing the proceedings to an end and leaves the litigation hanging on the heads of the other party, this constitutes an abuse of the process of the Court and the Court is entitled to dismiss the proceedings.***'

The Plaintiff submitted that 'this ***matter did not proceed for only 12 months. There was no prejudice caused to the Defendants within this time frame and on the contrary the Defendants themselves had delayed the filing of the Statement of Claim. He added that if the Defendants felt that the inactions of the Plaintiff in moving this matter amounted to an abuse of process then the Defendants can on the same token be held liable for failing to take immediate actions to dismiss the Plaintiff's application for want of prosecution.***

I have taken into consideration the submissions and the case authorities in terms of **Prejudice**.

The delay was for a period of over 01 year and 01 month, which in the circumstances is not materially longer than the time usually regarded by the profession and courts as an unacceptable period.

Therefore, I find that the Defendants have not suffered any prejudice.

Interest of Justice

32. The Plaintiff instituted the proceedings in 2010 and has been delayed by their acts to complete the pleadings and allow this Court to hear and determine the case once and for all. The substantive matter remains pending in the system with an interlocutory ***Order 25 Rule 9 application to be determined currently***. The Plaintiff commenced the proceedings herein and should have taken appropriate steps in terms of the set down procedures and Rules brought this action to a conclusion. The earlier the better in the interest of all the parties rather than playing a wait and see game.

33. Therefore, it has become appropriate that 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.*

34. 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.'*

35. 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.'***

36. I have carefully perused the substantive application, affidavit evidence , pleadings filed so far, written and oral submissions coupled with the applicable laws and the case authorities and therefore find as follows:-

(i) The delay is inordinate and unintentional;

(ii) Both cogent and credible explanation has been provided to the Court by the Plaintiff for the delay as such the Plaintiff has successfully overcome the factor of inexcusable;

(iii) The default is not contumelious since no orders or directions were made by this Court that the Plaintiff has disobeyed;

(iv) The Defendants have not any suffered real or substantial prejudice to any extent; and

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

37. For the aforesaid rational, I make the following orders:-

(a) **The Plaintiff's Substantive action remains intact.**

(b) **The Order 25 Rule 9 Notice is hereby converted into a Summons For Directions accordingly;**

(c) **The Plaintiff to take immediate necessary steps to move the matter further within 7 days in terms of the High Court Rules, 1988;**

(d) **An unless Order is invoked and will be activated upon striking out the Plaintiff's Substantive Action if the Plaintiff fails to comply with the Order at (b) and (c) hereinabove.**

(e) **There will be no order as to costs at the discretion of this Court.**

Dated at Suva this 09th Day of February, 2017

HIGH COURT OF FIJI * SUVA *

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MR VISHWA DATT SHARMA
Master of High Court, Suva

cc: *R. Patel Lawyers, Suva.*
Attorney General's Chambers, Suva.