

THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 71 of 2014

BETWEEN : **WATER AUTHORITY OF FIJI** a statutory body created pursuant to the provisions of the Water Authority of Fiji Promulgation 2007 having its Head Office in Suva, Fiji Islands.

1ST PLAINTIFF

AND : **TABUA INVESTMENTS LIMITED** a limited liability company having its registered office at Level 10, FNPF Place, 343 Victoria Parade, GPO Box 855, Suva, Fiji.

2ND PLAINTIFF

AND : **DENARAU CORPORATION LIMITED** a limited liability company having its registered office at c/- KPMG, Lautoka and now at Jetpoint Complex, Queens Road, Martintar, Nadi in the Republic of Fiji and **RYLESTONE LIMITED** a limited liability company having its registered office at c/- PricewaterhouseCoopers, 52 Narara Parade, Lautoka

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr Devenesh Sharma - for the Plaintiff
Ms. Lo. P - for the Defendant
Mr Prakash - for the Third Party

Date of Ruling: 30th July, 2018 @ 9am

RULING

[Notice 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]

On the outset, both Counsels are to note that since the Plaintiff's Affidavit to Show Cause was deposed by a Senior Legal Officer within the Plaintiff's Company and no authority has been annexed and the Defendant's Affidavit by Solicitor within the Legal Firm of Howards representing the Defendant, therefore it is not proper in law for court to take on board in evidence both Affidavits and will be expunged from the Court record. This Court will deal with the Current application on the written submissions only.

(A) INTRODUCTION

1. The Court on its own **Motion** issued a **Notice** to the parties on 17th June, 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 27th June, 2016 and the Defendant filed his Affidavit Supporting the striking out on 14th September, 2016.
4. The application was heard with Written Submissions on 123rd May, 2017.

(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.'*

(C) ANALYSIS and DETERMINATION

6. The Plaintiff is required to **show cause** herein and the Court to **determine** as to why the Plaintiff's action ought not to be **struck out for want of prosecution or an abuse of the process of the Court**.
7. The **principles** to be applied on the basis upon which the discretion to **strike out proceedings for want of prosecution** should be exercised is well established in the decision of the House of Lords in the case of *Birkett v James [1978] AC 297* and in particular the statement by Lord Diplock at 318:

"The power should be exercised only where the court is satisfied either (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; or (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 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."

8. In the present case before this Court, the Court's own Motion by Notice pursuant to *Order 25 Rule 9 of the High Court Rules, 1988* is asking the Plaintiff to show cause why the matter should not be struck out for *want of prosecution* or as *an abuse of the process of the Court* for there being no action taken in this matter for six (6) months.
9. The Defendant submitted that the Plaintiff has failed to show cause, and have not adequately explained or justified the extensive delay in prosecuting these proceedings. The Plaintiff has not taken any steps to otherwise progress these proceedings or shown that they are ready or able to do so.
10. Therefore the court is concerned with the application of both principles (1) and (2) within the *Birkett v James [1978] AC 297* case.
11. 'Intentional' and 'Contumelious' default within *Birkett v James [1978] AC 297* in the context of want of prosecution refers to the **disobedience of any orders or directions** of this court or the conduct as such amounting to an abuse of the process of the court.
12. '*Inordinate*' and '*inexcusable*' within *Birkett v James* have their ordinary meaning. Whether delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case. *The New India Assurance Company Limited -v- Rajesh K. Singh and Anr. Civil Appeal no: ABU 0031 of 1996S (26 November 1999) C.A.*
13. Where principle (2) is also relied on, both grounds of inordinate and inexcusable delay needs to be established before an action is struck out. There must be both **delay** of the kind described and a risk of an **unfair trial or serious prejudice** to the defendants.
14. Reference is therefore made to the case *Department of Transport v Smaller (Transport) Limited [1989] 1 All ER 897-*

"The House of Lords did not accept a submission that the decision in *Birkett* should be reviewed by holding that where there had been **inordinate** and **inexcusable** delay, the action should be **struck out**, even if there can still be a **fair trial** of the issues and even if the defendant has suffered **no prejudice** as a result of the **delay**".

"Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ **delay** will either make a **fair trial** impossible or **prejudice** the defendant. He went on to affirm the **principle** that the **burden** is on the **defendant** to **establish** that **serious prejudice** would be caused to it by the **delay**". (*In this case the burden is on the Defendant to establish any prejudice*).
15. 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* and cited the *Chronology of Events* that has taken place in this case as set out hereunder-
 - *On 7th March 2014, the Plaintiff filed and served its Writ of Summons and Acknowledgment of Service on the Defendant.*

- On 15th April, 2014, the Defendants filed its Statement of Defence together with a Third Party Notice to join Denarau Corporation Limited and Rylestone Limited as Third Parties to the proceedings.
- On 10th June 2014 the Third Parties filed and served its Statement of Defence against the Defendant's Statement of Claim.
- On 30th June 2014 the Plaintiff filed its Reply to Statement of Defence and subsequently on 24th July 2014 issued a Summons for Direction.
- It wasn't until 25th of September 2014 when the Defendant filed its Reply to Third Parties defence and entered for Summons for Direction for Third Parties.
- Plaintiffs Summons for Directions was filed on 24th July 2014.
- Defendants Summons for Directions against Third Parties was filed on 25th September 2014.
- Orders were made on the Summons for Directions 22nd October 2014.
- On 15th December 2014, the Defendant filed its Affidavit Verifying List of Documents
- The Plaintiff filed its Affidavit verifying List of Documents on 15th June 2015.
- The Third Parties have to date not filed their Affidavit Verifying List of Documents.

Delay

16. In considering whether **delay** of the kind required in terms of *Birkett v James* case has been established, the court is concerned only with **delay** on the part of the Plaintiff or his lawyer. It is that delay which must be shown to be **inordinate** and **inexcusable**.
17. The Plaintiff has endeavored to explain the reasons for the Delay in pursuing this case to its conclusion by filing an Affidavit to Show Cause as follows-
 - The Plaintiff does not deny that there has been delay but this delay can be explained and is neither contumelious nor deliberate.
 - The Defendant has issued Third Party Proceedings in is matter. It is a fact that once third parties are joined to any ordinary court proceedings then matters do get delayed due to different sets of discoveries and issues that arise from the two sets of litigation.
 - After the Defendant filed its Affidavit Verifying List of Documents on 15th December 2014 then on 11th February 2015 Messrs Howards wrote to Plaintiffs Solicitors and as stated that their client was keen to hold genuine talks to resolve the matter.
 - Messrs Howards proposed that all parties meet to discuss a way forward in the litigation.
 - On 16th February 2015 Messrs Lateefs who represent Denarau Corporation Limited also wrote and agreed to the proposal to hold a meeting.
 - On 20 March 2105 the Solicitors for all parties met and decided that the most prudent way forward was for the Plaintiff to carry out a new audit verification process.
 - The parties agreed that a further audit verification be carried out by the Plaintiff on Denarau Island.
 - The Audit took a considerable period of time because Denarau Island is substantially developed area.
 - The Defendant and Third Parties were supposed to assist the Plaintiff in the audit verification process but they have failed to do this. Even to date Denarau Corporation Limited is required to procure and

- install isolation valves specifically for the Denarau Reticulation System to enable the Plaintiff to complete the audit.
- The Plaintiff carried out its part of the audit by itself. It verified all meters and checked for individual leaks.
 - This has been the reason for the delay in moving this case forward.
 - The Audit Process will assist and expedite litigation because it is aimed to clear any doubt whether it is one of the current metered users who is stealing the water. It will in fact assist the Defendant if liability is clarified once and for all.
18. It can be clearly ascertained from the court record and above in terms of the **chronology of events** that the Plaintiff took proactive action to progress with his case. The Plaintiff explained that "the Defendant and Third Parties were supposed to assist the Plaintiff in the audit verification process but they have failed to do this. Even to date Denarau Corporation Limited is required to procure and install isolation valves specifically for the Denarau Reticulation System to enable the Plaintiff to complete the audit. The Plaintiff carried out its part of the audit by itself. It verified all meters and checked for individual leaks".
19. The Plaintiff filed his Notice of Intention to Proceed twice on 19th June, 2015 and 29th March, 2016 respectively in the matter in terms of *Order 3 Rule 5 of the High Court Rules, 1988* after being served with the Court's Notice and stated that "*the Plaintiff intends to proceed in this action n herein after the expiration of 30 days from the date hereof.*"
20. **Notice of Intention to Proceed** under *Order 3 Rule 5 of the High Court Rules, 1988* does not prevent an application to dismiss a case for want of prosecution. It buys no immunity from the exercise of the Court's inherent powers. The application of this rule could not be used for the perpetration of an action.
21. It can be ascertained from the **Defence** submissions and stance that it was adamant that the Plaintiff has failed to show cause and has not adequately explained or justified the extensive delay in prosecuting these proceedings. The Plaintiff also has not taken any steps to otherwise progress with these proceedings or shown that they are ready or able to do so.
22. The Defence added that the **delay** by the Plaintiff in prosecuting this case and especially in failing to bring these proceedings to its conclusion, amounts to **an abuse of the court process and contumelious behaviour**.
23. Upon a careful perusal of the court record together with the chronology of events and the written submissions, I find that the the Plaintiff has **admitted** to the fact that there was a **delay on his part and overcome the same by explaining satisfactorily to court what transpired that caused this Delay**. However, I find that the Defendant and the Third Party have as well contributed to this Delay when the Defendant and Third Parties were supposed to assist the Plaintiff in the audit verification process but they have failed to do this.
24. This matter was commenced by the Plaintiff on 07th March, 2014 and within an **expeditious period of 3 months**, the pleadings were closed. Thereafter the parties progressed well with the cause of action until allegedly the Defence did not cooperate with the Plaintiff in the audit verification process and had failed to do this.

25. No doubt and the parties cannot deny the fact that the prosecution of this matter by the Plaintiff could have continued with the next cause of action until such time the matter was entered for trial before a Judge for hearing and determination.
26. The alleged substantive claim pending before this court is that for "**Water Theft on Denarau Island.**"
27. The Plaintiff had pleaded in his written submissions that the Plaintiff's Claim in this matter is that it has fully accounted for the usage by all individuals metered users on Denarau and the monies owed for the surplus usage has to be paid by the party that owns the remainder of Denarau Island which is the Defendant.
28. The Plaintiff further submitted that it is trite to note that neither the Defendant nor the Third Parties are denying that water has been consumed on Denarau Island. They just deny that they are liable to pay for the same.
29. The overriding objective of the **procedural rule** and the requirement in '*Birkett v James*' is to 'enable the court "**to deal with cases justly**". Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".
30. Further, these resources are not infinite and for every case which takes up time, another case is potentially delayed. If the case which takes up time and delays another case is, on any view, an utter waste of time and resources and stands in the way of other more deserving being heard at an earlier time, then that is a factor which the courts cannot ignore.
31. Reference is made to the case of *Bhawis Pratap v. Christian Mission Fellowship [2006] ABU 93/05 14 July 2006* and my view is that this matter ought not be struck out. The reason being that the Court can impose on the Plaintiff peremptory or unless orders to make the parties comply and conclude these proceedings expeditiously, failing with such compliance, the matter can be struck out.
32. I find for the aforesaid rational that the Plaintiff has **admitted** the **Delay** of the shorter period as mentioned herein but has alleged that the Defendant and the third party have both contributed to this Delay. He supports his case as to why the Plaintiff's claim should not be struck out for want of prosecution with supporting case authorities. This "**delay**" herein in itself is insufficient to warrant the striking out of this action.
33. Taking into consideration the case authorities cited herein, I therefore find that the period of inactivity is short and **excusable**. **Inexcusable** and **inordinate Delay** has not been established against the **Plaintiff** as per the requirement in *Birkett -v- James* by the Defendants accordingly.
34. It is only appropriate that the parties must now adhere to **expedite** the remaining cause of action and complete the pleadings. This will allow the matter to be entered for trial and then allocated to a Hon. Judge for hearing and determination once and for all.

Prejudice and fair trial

35. **Prejudice** can be of two kinds. It can be either specific that is arising from particular events that may or may not have occurred during the relevant period, or general, that is prejudice that is implied from the extent of the delay.
36. In order to establish **prejudice**, the **Defendants** are required to show that the **Delay** has prejudiced them in the conduct of their Defence. This will involve them in having to demonstrate, for example, that they have lost contact with their witnesses, their witnesses are untraceable, death of their witnesses, the witnesses recollections have been adversely affected, the destruction of documentary evidence without fault on the part of the Defendants.
37. Parties must note that the **presumption of prejudice** is not a **presumption of law**. It is a **presumption of fact** in the sense that, in most cases, it will only be the **Defendants** who are in a position to offer **evidence** as to the existence of **specific** or **actual prejudice**. The **presumption** is **rebuttable**.
38. The **Defendant** mentioned in the written submissions that further delays will only serve to drag this matter out further and continue to prejudice the Defendant unjustifiably and has incurred costs approximating to \$ 48,500.
39. Firstly, I make reference to the case of *Batiluva Beach Resort Limited v. Native Land Trust Borad & Others [2011] HBC 359/03s & HBC 545/04s 29 September, 2011 where Hettiarachchi J held:*

"In an application for striking out for want of prosecution, the Defendant must show actual prejudice which is reasonably foreseeable. It is not sufficient to simply show likelihood of prejudice."

40. However, I find that the **Plaintiff** has raised this issue within his written submissions and made reference to the undermentioned case in support-

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. Here, no real prejudice has been put forward by the Defendant. There is also no evidence to suggest that the Plaintiff has maintained these proceedings with no serious to progress the matter.

41. I have taken into consideration the nature of the substantive matter impending hearing and determination and reiterate that the **delay** by the Plaintiff has been contributed by the Defendant and the Third Party.
42. I find that the **Defendants** have not made out a case for **prejudice** against the Plaintiff in one way or the other.

Interest of Justice

43. The demonstration of **inordinate Delay**, **inexcusable Delay** and **Serious Prejudice** does not lead necessarily to a **dismissal of the action**. Further, even if the **Defendants** satisfy the requirements

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

44. 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.'*

45. 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.'

46. I find from the contents of the Plaintiff's written submissions that the Plaintiff has the desire and concrete intention to pursue the litigation further expeditiously when stating and asking this Court to make further directions in the matter and get the process towards trial and its finality.
47. Taking into consideration the Plaintiff's and the Defendant's written submissions, a fair trial is still very much possible in the interest of justice.
48. This Court will allow the matter to proceed but the Plaintiff must assure that the litigation is brought to its conclusion in terms of hearing and determination by the Court expeditiously.

Abuse of Court Process

49. **Inordinate and inexcusable delay** alone, however great, does not amount to an abuse of the Court process. Reference is made to *Abbuthnot Latham Bank Ltd v Trafalgar Holdings [1998] 1 WLR 1426 (per Lord Woolf)*.
50. For this purpose, **Delay alone**, even delay of 11 years does not amount to an abuse of process. Reference made to *Barclays Bank Plc v Mailing (Unreported) 23 April 1997; CA (Civil Division) cited in Abbuthnot (supra)* at pg 1432, para G-H.
51. However, **Delay** which involves complete, total or wholesale disregard of the Rules of the Court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground. Case Reference *Choraria v Sethia [1998] CLC 625 9 per Nourse LJ [1998] EWCA Civ 24*.
52. In the present case, I find from the **pleadings and written submissions** that the Plaintiff has admitted **delaying** the matter for a period of beyond a **6 months'** timeframe, but has explained and has the intention of pursuing this matter and bring the litigation to its conclusion. It cannot be said in one way or the other from the evidence on the Court Record that the Plaintiff has **deliberately** commenced this action without any intention whatsoever of bringing it to a conclusion.
53. For the aforesaid rational, I find that there is no **abuse of court process**.
54. Bearing in mind the manner in which it has prompted this court to hear and determine the **Order 25 Rule 9 Notice** issued by the Court's own motion since there was a delay of 6 months and 25 days by the Plaintiff and upon admission of this delay obviously attracts Court to impose costs against the **Plaintiff summarily assessed at \$650 and to be paid within 14 days**.
55. Further, it has now become appropriate that I must impose some strict timetable in terms of the directions and an **unless order** against the Plaintiff in order to ensure that this matter is expedited on directions and costs and brought to its finality accordingly.
56. Following are the final orders of this court:-

FINAL ORDERS

- (i) The delay in terms of inordinate and intentional has not been established against the Plaintiff;
- (ii) The Plaintiff has admitted the delay of over 6 months but satisfactorily explained the Delay and as such the Plaintiff has overcome the factor of inexcusable;
- (iii) The Defendants have not suffered any real prejudice; and
- (iv) In the interest of justice, a fair trial is still possible to the current.
- (v) There is no abuse of the Court process by the Plaintiff;
- (vi) The Order 25 Rule 9 Notice is hereby struck out accordingly; and

- (vii) The substantive matter remains very much intact.
- (viii) There will be an order for costs summarily assessed at \$650 and to be paid within 14 days timeframe.
- (ix) Matter stands adjourned to 30th July 2018 for further directions and the imposition of the "unless" orders accordingly.

Dated at Suva this 30th Day of July, 2018



Master
VISHWA DATT SHARMA

cc: R. Patel Lawyers, Suva
Howards Lawyers, Suva
Lateef & Lateef, Suva