

**IN THE HIGH COURT OF FIJI  
AT SUVA  
CIVIL JURISDICTION**

Civil Action No.: HBC 146 of 2009

**BETWEEN** : **NATADOLA BAY RESORT LIMITED** **PLAINTIFF**  
**AND** : **DBI DESIGN PTY LIMITED** **DEFENDANT**  
**AND** : **BURCHILL VDM PTY LIMITED** **THIRD PARTY**  
**AND** : **ENGINEERED DESIGNS LIMITED** **FOURTH PARTY**

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**APPEARANCES/REPRESENTATION**

**PLAINTIFF** : Mr D Sharma [R Patel Lawyers]  
**DEFENDANT** : Mr F Haniff with Mr C Yee [Haniff Tuitoga]  
**THIRD PARTY** : Mr P Knight [Cromptons]  
**FOURTH PARTY** : Mr E Kumar [Parshotam Lawyers]  
**RULING OF** : Acting Master Ms Vandhana Lal  
**DELIVERED ON** : 26 July 2019

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**INTERLOCUTORY RULING**

[Application for Dismissal Pursuant to Order 25 rule 9]

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**Application**

1. On or about 27 April 2016, my Predecessor had taken the matter off the cause list with liberty for parties to file any appropriate actions.

At this juncture the parties were said to be at discovery stage.

The Plaintiff's counsel had sought three (3) months for discovery due to the volume of documents involved.

It was the counsel for the Defendant who had suggested to the Court that the matter should be taken off the cause list and counsel for the Third Party had submitted they will make appropriate application.

Counsel for the Fourth Party had informed the court that this is an old case.

2. Thereafter no application was made to the court until the Plaintiff's current Solicitors filed a notice of change of Solicitors on 01 November 2016.

Thereafter they filed notice of intention to proceed on 19 December 2016 and 25 May 2017.

3. The counsel for the Fourth Party on 10 July 2018 moved the Court by filing a summons seeking orders that:
  - a. *The Third Party's claim against the Fourth Party be struck out;*
  - b. *The Fourth Party's cost be paid by the Third Party on an indemnity basis.*

Said application was made pursuant to Order 25 rule 9 of the High Court Rules and on the grounds that the Third Party has failed to progress its claim in the proceedings for two years.

4. Following the said application, the Defendant on 10 August 2018 filed its summons to strike out. This was also filed pursuant to Order 25 rule 9 of the High Court Rules.
5. Following affidavits were filed by the Defendant and the Plaintiff:
  - i. *Affidavit in Support by Vukicanavanua Rokodreu sworn and filed on 10 August 2018;*
  - ii. *Affidavit in Response by Shandiya Goundar sworn on 11 September 2018 and filed on 12 September 2018;*
  - iii. *Affidavit in response by Vukicanavanua Rokodreu sworn on 18 October 2018 and filed on 23 October 2018.*
6. On the hearing date of the application, the Fourth Party informed the Court it will await the outcome of the Court's ruling on the Defendant's application before it intended to proceed with its application.

#### **History of the File**

7. The Plaintiff's claim is for damages for breach of the Defendant's contractual obligation under a written consultancy agreement dated 20 December 2004 and for negligence and breach of duty by the Defendant whilst engaged to act as a consultant and for the negligence of its sub-contractors employed by the Defendant and for which the Defendant assumed responsibility.

A statement of claim was filed on 18 June 2009.

8. An acknowledgment of service was filed by the Defendant's then counsel on 2 July 2009 with a statement of defence and counter claim filed on 21 July 2009.

9. Reply to defence and defence to counter claim was filed on 9 November 2009 following by a summons for direction filed on 23 February 2010.

10. On the call over date the summons for direction was adjourned to allow the Plaintiff to seek further particulars.

Orders were later made on the summons on 6 May 2010.

11. The Defendant in the interim made an application for transfer of the matter to Lautoka High Court. Said application was listed for hearing on 18 June 2010.

12. On or about the 26 August 2010, the Defendant's counsel filed a summons for further and better particulars and production of documents.

Said application was listed for call on 1 November 2010 and thereafter listed for hearing on 18 February 2011. Since the documents requested was supplied the application was withdrawn by consent.

13. The matter was adjourned thereafter for review of the compliance orders made on the summons for directions.

14. The Plaintiffs filed its affidavit verifying list of documents on 01 June 2011.

15. On 1 September 2011, the then Master of the High Court Mr Amaratunga (as he was then) made orders that the Defendant files and serves its affidavit verifying list of document in 21 days. If not done the defence should be struck off.

No returnable date was assigned with orders that matter shall take its normal course.

16. The Defendant's on 22 September 2011 filed with the Registry its application for leave to issue and serve third party notice against Burchill VDM Pty Limited. An order in terms was granted on 14 October 2011.

Further orders were for the matter to take its normal course.

17. The third party notice was filed on 21 October 2011 and the third party acknowledge service on 04 November 2011.

A summons for third party direction was filed on 01 December 2011. An order was granted on 19 January 2012 with matter to take its normal course.

18. The Defendant's statement of claim against the Third Party was filed on 23 January 2012 and defence by the Third Party on 21 February 2012.

Defendant's reply to the Third Party's defence was filed on 05 March 2012.

19. The Third Party's affidavit verifying list of document was filed on 29 June 2012.



20. On 04 July 2012 the Third Party filed its summons for leave to issue a fourth party notice. An order in terms was granted on 26 July 2012.
21. A fourth party notice was filed on 01 August 2012 and service acknowledged by the Fourth Party on 14 November 2012.
22. A summons for fourth party direction was filed on 26 November 2012 and an order granted on 13 February 2013 with further order for matter to take its normal course.
23. The Fourth Party filed its statement of defence on 06 March 2013.
24. Thereafter no action was taken by any of the parties until the Court on its own caused an Order 25 rule 9 Notice to be issued dated on or about 24 February 2015. This was first called on 03 March 2015.
25. The Plaintiff on 27 February 2015 filed its notice of intention to proceed.
26. On 3 March 2015, Master Bull made orders for the Fourth Party to file its affidavit verifying list of document and matter was adjourned to 18 March 2015 for further direction.
27. On 18 March 2015 the matter was adjourned to 01 April 2015 for the Fourth Party's application for security for cost to be processed and served.
28. The Fourth Party filed its affidavit verifying list of document on 31 March 2015.
29. The application for security for cost was not heard until 25 February 2016 and ruling was delivered on 14 April 2016.

Thereafter on 27 April 2016, the matter was taken off the cause list as outlined earlier in paragraph one.

**Grounds for the Application and Opposition.**

30. According to the Defendant, the proceeding has not progressed since 15 September 2011. The Plaintiff is said to have failed to take any steps to prosecute its claim for more than 7 years.

The delay is inordinate and inexcusable.

Since 27 April 2016 the Plaintiff has not sought to have the matter reinstated.

The Plaintiff has demonstrated lack of interest and/or inability to pursue the claim with any form of reasonable diligence.

The Defendant is said to have been prejudiced by the delay as it has for some nine (9) years had the burden of defending the proceedings indefinitely not knowing when the matter will be progressed (if at all) and brought to trial.

It will be difficult to conduct a trial for following reasons:

- a) *The Consultant Agreement to which the proceedings relate was entered into some 14 years ago;*
- b) *The matter complained about in the proceedings occurred in or about 2006 (some 12 years ago);*
- c) *Several key personnel are no longer in the employ of the Defendant;*
- d) *The Directors of the Defendants involved in the subject development have since retired;*
- e) *It is unreasonable to expect witnesses to remember the matters alleged given the passing of time.*

31. According to the Plaintiff, on or about 04 October 2016 a letter was sent by Barry Nilson discussing a way forward for the parties to settle the matter.

The Plaintiff then received an email from Wotton Kearney relating to possible settlement talks between the parties.

According to the Plaintiff, all the parties should have put forward all the relevant papers for the others to consider and map a timetable for settlement talks.

The Plaintiff claims to be dealing with some 3500 documents and had instructed its new solicitors on 01 November 2016. Due to the volume of the documents it took the solicitor's time to review the claim.

The Plaintiff's list of documents contains 256 documents whilst the Defendants have disclosed 2605 documents.

These documents are technical and experts' advice had to be sought.

As the parties were desirous to settle the matter, the Plaintiff did not move the case but filed notices of its intention to proceed.

The parties were in discussion with a view to settlement as late as 2017.

Since 15 September 2011, the Defendant joined the Third Party who joined a Fourth Party and the proceedings had revolved around those applications until 24 April 2016.

The Plaintiff is still interested in pursuing the claim. They would prefer the matter to be mediated or settled without the need for further litigation.

The Defendant is said to be acting in bad faith and has not disclosed the full facts.



The Defendants has not pursued its counter claim.

Since now the Defendant has no intention to settle the matter, the Plaintiff intends to proceed with trial as only the pre-trial conference is left between the parties.

Parties have done discovery.

As to the reasons for prejudice to Defendant, the Plaintiff states;

- a) *The agreement remains the same and the works designed by the Defendant was to stand for decades;*
- b) *The matters complained of were made in 2009 and the Defendant had time to gather all necessary information to defend the action;*
- c) *The Defendant do not state out who are no longer in the employ of the Defendant;*
- d) *The matter is largely based on documents created before 2009.*

The matter should proceed for trial as millions of dollars of Fijian taxpayer's funds is involved. There is meritorious claim. A report by Sinclair Knight Myers dated 02 May 2007 sets out the basis of the Plaintiff's claim.

#### Law

32. Order 25 rule 9 of the High Court Rules provides:

- i. *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 for prosecution or as an abuse of process of the court.*
- ii. *Upon hearing the applications 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 direction."*

33. There are various local case authorities that have set out the principles upon which the court is allowed to strike out the action under Order 25 rule 9 – **Anita Subamma and Edward Henry Thompson v. The Fantasy Company Fiji Limited & Others** a Lautoka High Court Civil Action No. HBC 111 of 2003; **Nilesh Chand v. Yankesh Naidu & Others** a Labasa High Court Civil Action No. HBC 08 of 2002 delivered on 7 June 2007; **Trade Air Engineering (West) Limited & Others v. Taga & Others** a Fiji Court of Appeal Civil Appeal No. ABU 0062 of 2006 delivered on 28 February 2007 to name a few.

These cases have relied on the principle outlined in **Birkett v. James (1987) AC 297.**

34. In **Brickett** (supra) Lord Diplock on page 18 stated the principles to be:

*"The power should be exercised only; -*

- i. *Where the court is satisfied either 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. *That there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyer's and that the 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 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."*

35. *"Although these circumstances are not necessary exclusive and at the end one must always stand and have regard to the interests of justice."*- Eichelbaum CJ in **Lovie v. Medical Assurance Society Limited** [1993] 2 NZLR 244 at page 248.

#### **Findings**

36. Upon perusing the file and reading the Court's minutes of 27 April 2016, I do not find there to be any peremptory order made which the Plaintiff has failed to abide by.

37. Extract of the Court minute for 27 April 2016 is reproduced herewith:

**BEFORE MASTER OF THE HIGH COURT: MR. V.D. SHARMA**  
**ON WEDNESDAY THE 27<sup>TH</sup> DAY APRIL 2016**  
**AT 9:00 O'CLOCK IN THE FORENOON.**

<b>Plaintiff</b>	-	<i>Mr. Vananalagi on instruction of AK Narayan</i>
<b>Defendant</b>	-	<i>Mr. Haniff</i>
<b>Third Party</b>	-	<i>Mr. Peter Knight</i>
<b>Fourth Party</b>	-	<i>Ms. Lagilevu</i>

**At Discovery Stage/PTC**

<i>Mr. Vananalagi</i>	:	<i>1. Seek 03 months. 2. Room full of cases.</i>
<i>Mr. Haniff</i>	:	<i>1. Take matter off the list.</i>
<i>Mr. Knight</i>	:	<i>1. Will make appropriate application.</i>
<i>Ms. Lagilevu</i>	:	<i>1. Too long old case.</i>
<i>Court</i>	:	<i>1. Matter taken off the list.  2. Counsels are at liberty to file/serve any</i>

*appropriate application.*

**Master V.D. Sharma**  
**27 April 2016.**

38. The Plaintiff's Counsel had informed the Court of the volume of documents involved in discovery and the Defendant's Counsel had suggested the matter should be taken off the cause list.
39. I cannot accept the Defendant's claim that Plaintiff has not progressed with the matter from 18 June 2009 till to-date.
40. After what transpired in Court on 27 April 2016 it is only prudent I accept the evidence of the Plaintiff that parties till end of 2017 were desirous to settle the matter.
41. Parties are said to have completed discovery.
42. Order 34 rule 2 allows for solicitor of any parties to make a request to all other solicitors to attend a conference.
43. There is no evidence shown that any such request was made by the Defendant's solicitors if they found the Plaintiff was not progressing with the case. Neither did the Defendant's solicitors made any application to the Court under Order 34 rule 2 (3) for an other requesting parties attend such a conference.
44. Only conclusion I can draw from the reading of the Court's Minute of 27 April 2016 is that such an application under Order 34 rule 2(3) was warranted for as the Defendant has a counter claim against the Plaintiff. The matter was taken off the cause list due to the volume of documents involved.
45. I cannot hold the Plaintiff responsible for the delay and strike out their claim due to the delay in proceedings.
46. The Defendants have outlined what prejudice they will suffer if matter is allowed to proceed.
47. However they have failed to state how a 14 years old agreement will cause prejudice to them.

I can only agree with the Plaintiff that the document remains the same.

48. The Defendant has only asserted key personnel are no longer in the employ of the Defendant.

However they have failed to highlight who they are. There is no evidence to say they are no longer available to stand trial. I find that these witnesses can be summoned to court for trial if no longer in employment of the Defendant.



49. The same would apply to the Directors.
50. With no evidence to state they cannot be located or have since passed away I do not find the Defendant is prejudiced.
51. There is no dispute looking at the claim and the defence and counter claim that mater will be largely dependent on documentary evidence.
52. There is no evidence that the documentary evidences are lost or cannot be located.
53. Despite delay since April 2016, I find the Defendant has failed to show prejudice. I also do not find there is an abuse of process.
54. For this reason the application by the Defendant shall fail and is dismissed with cost summarily assessed at \$1,000.

This cost is to be paid to the Plaintiff in 14 days.

55. Following orders are made to ensure the matter to be heard and determined earliest:
  - i. *The parties are to convene a Pre-Trial Conference in next 21 days and file a minute.*



  
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**Vandhana Lal [Ms]**  
Acting Master  
At Suva.