**IN THE HIGH COURT OF FIJI**
**WESTERN DIVISION**
**AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. HBC 202 of 2015**

**BETWEEN** : **GLYNNE HILTON** of Lot 20, Norma's Place, Martintar, Director and Manager of Tadra Institute (Fiji) Limited.

**Plaintiff**

**AND** : **MICHAEL STUARTSON WATERS** of Votualevu, Company Director of Tradra Institute of (Fiji) Limited.

**Defendant**

Before : Master U.L. Mohamed Azhar

Counsels : Mr. R. Singh for the Plaintiff
Mr. C.B. Young for the Defendant

Date of Ruling: 25th February 2020

# RULING

(On striking out under Or 25 r 9,
burden of the parties under that rule,
inordinate and inexcusable delay)

01. The plaintiff's cause of action against the defendant is based on the alleged misrepresentation made by the defendant on two stages of the transaction between them to establish an educational institute in Fiji. The plaintiff alleged in her statement of the claim that, the defendant fraudulently made representation and induced her to invest with him a substantial amount of money. The plaintiff, relying on the alleged misrepresentation the defendant initially made, brought money from Australia and formed the company in which both of them were the directors. The defendant further influenced the plaintiff by the subsequent representation that he was the sole proprietor of a house and convinced the plaintiff to bring money to purchase the said property for use of the company, as it is alleged. However, the plaintiff later found that, the defendant was the owner of undivided half share of that property and his wife was the co-owner. The plaintiff also came to know that, only an undivided half share of that property was transferred to the company and the balance share owned by the wife of the defendant was

not transferred. The plaintiff therefore, claimed all the moneys she brought into Fiji and the damages. The plaintiff later amended the claim increasing the special damages.

02. The original writ was filed on 19.11. 2015. The amended writ was filed on 01.12.2015 and the defendant filed the acknowledgment on 21.12.2015. The defendant did not file the defence and the plaintiff too failed to take further steps in this matter. Having observed the inaction of the plaintiff for more than six months, this court on its own motion issued the notice on 23.09.2016 to the plaintiff, pursuant to Order 25 rule 9 of the High Court Rule to show cause why her action should not be struck out. The plaintiff filed her affidavit and the defendant just supported the court's motion; however did not file any affidavit. At hearing of the summons, the counsel for the defendant appeared and made oral submission and the counsel for the plaintiff filed his written submission in addition to his oral submission.

03. The Order 25 rule 9 of the High Court Rules provides jurisdiction to the court to strike out any cause or matter for want of prosecution or as an abuse of process of the court if no step has been taken for six months. The said rule reads;

> *"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.*
>
> *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".*

04. The grounds provided in the above rule are firstly, want of prosecution and secondly, abuse of process of the court. This rule was introduced to the High Court Rules for the case management purpose and is effective from 19 September 2005. The main characteristic of this rule is that, the court is conferred with power to act on its own motion in order to agitate the sluggish litigation (**see: Trade Air Engineering (West) Ltd v Taga** [2007] FJCA 9; ABU0062J.2006 (9 March 2007). Even before the introduction of this rule, the courts in Fiji exercised this power to strike out the cause for want prosecution following the leading English authorities such as **Allen v. McAlpine** [1968] 2 QB 299;[1968] 1 All ER 543 and **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801. This was confirmed by Justice Scott in **Hussein v Pacific Forum Line Ltd** [2000] Fiji Law Report 24; [2000] 1 FLR 46 (6 March 2000).

05. Lord Diplock, whilst articulating the principles for striking out the actions for want of prosecution and abuse of the court process in **Birkett v. James** (supra), explained the emerging trend of English courts in exercising the inherent jurisdiction for striking out the actions. His Lordship summarized the ground and held that:

*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".*

06. The first ground in the above case is the intentional and contumelious default. The examples of the intentional and contumelious default, as per Lord Diplock, are disobedience to a peremptory order of the court and conduct amounting to an abuse of the process of the court. The second ground is (a) 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. Briefly, inordinate and inexcusable delay that makes fair trial impossible or that likely causes or to have caused prejudice to the defendant.

07. The onus to satisfy the court on these grounds is on the defendant. In **Pratap v Christian Mission Fellowship [2006] FJCA 41; ABU0093J.2005 (14 July 2006)** the Fiji Court of Appeal cited the dictum of Eichelbaum CJ in Lovie v. Medical Assurance Society Limited [1992] 2 NZLR 244 where the Chief Justice Eichelbaum expounded this burden. Eichelbaum CJ stated at page 248 that:

*"The applicant must show that the Plaintiff has been guilty of inordinate delay, that such delay is inexcusable and that it has seriously prejudiced the defendants. Although these considerations are not necessarily exclusive and at the end one must always stand back and have regards to the interests of justice. In this country, ever since NZ Industrial Gases Limited v. Andersons Limited [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."*

08. The above decision is the authority for the onus of the defendant in relation to the second ground articulated in the **Birkett v. James** (supra). However, this authority should not be used to exclude the onus of the defendant in relation to the first ground of **Birkett v. James** (supra) and the onus of the plaintiff too in cases where the court acts on its own motion under the same Order 25 rule 9. This proposition needs further elaboration, because the onus of the plaintiff to satisfy the court, when the notice issued on the own motion of the court, is sometimes confused. According to the plain meaning of this rule, the proceedings for striking out any cause for abuse of the process of the court or want of prosecution can be initiated by two ways. One is the application of any party and the

other is court's own motion. When any party makes such an application, that party has to show to the court either of the grounds that, there is want of prosecution or it is an abuse of the process of the court. This is the burden, on the party who moves the court to exercise its power to strike out any particular cause, to positively satisfy either of two grounds. That is to say the applicant, most likely the defendant, has to positively establish ***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.*** In that event, the other party probably, the plaintiff has to rebut what is has been established by the defendant in order to get the application filed by the defendant dismissed and to continue with the action.

09. However, the situation would differ when it comes to the court's own motion. If the court issues a notice, it would require the party, most likely the plaintiff, to show cause why his or her action should not be struck out under this rule. In such a situation, it is the duty of the plaintiff to rebut the two grounds for striking out, i.e. the plaintiff has to satisfy the court that there has been **no** intentional or contumelious default, there has been **no** inordinate and inexcusable delay and **no** prejudice is caused to the defendant and or the delay **will not** make fair trial impossible. In this case, the defendant does not, even, need to participate in this proceeding. He or she can simply say that, he or she is supporting court's motion and keep quiet, allowing the plaintiff to show cause to the satisfaction of the court not to strike out his or her cause. Even in the absence of the defendant, the court can require the plaintiff to show cause and if the court is satisfied that the cause should not be struck out, it can give necessary directions to the parties. Generally, when the notice is issued by the court, it will require the defendant to file an affidavit supporting the prejudice and other factors etc. However, this will not relieve the plaintiff from discharging his or her duty to show cause why his or her action should not be struck out.

10. Accordingly, the duty to satisfy the court shifts from the defendant to the plaintiff when the notice is issued by the court on its own motion. If these two different positions are not recognized, it would lead to the proposition that, the court should still depend on the defendant for the proof of inordinate and inexcusable delay and prejudice, even though it acted on its own motion or the court should get into the shoes of the defendant and prove the grounds having acted on its own motion. As a result, the purpose of granting special power to the court, to act on its own motion to agitate sluggish litigation, will be lost. Therefore, if the notice is issued by the court on its own motion under Order 25 rule 9, it is the duty of the plaintiff or the party on whom the notice is issued to satisfy the court that, that there has been no intentional or contumelious default, there has been no inordinate and inexcusable delay and no prejudice is caused to the defendant and or the delay will not make fair trial impossible. Furthermore, when the notice is issued by the

court, the plaintiff cannot argue that, the defendant failed to prove the intentional or contumelious default or the inordinate and inexcusable delay and prejudice.

11. In the instant case, it was the notice issued by the court on its own motion. Thus the plaintiff has burden of satisfying the court why her action should not be struck out for want of prosecution or abuse of the process of the court. The plaintiff filed the affidavit sworn by her to show cause and attached two documents with it. The documents are the copies of letters sent by both solicitors to each other.

12. The plaintiff in her affidavit clearly averred that, she filed an application (HBC 42 of 2011) for winding up the company formed by her and the defendant before instituting this action on 01.12.2015. The ruling of the court was pending in that matter as the defendant took up an objection on the locus of the plaintiff to file such application for winding up. The plaintiff further stated that, the solicitors for the defendant too advised the plaintiff's solicitors not to take any steps in this matter as both were waiting for the ruling of the court in that winding up application. The plaintiff annexed the copy of the letter from the solicitors of the defendant, which requested not to take any step, marking as **Exhibit A** with her affidavit. Though the solicitors of the plaintiff replied to that letter, the plaintiff was waiting for the ruling in that application for winding up.

13. Moreover, the plaintiff stated in her affidavit that, after issuance of these proceedings, there were multiple correspondences between the parties evidencing the attempts to resolve this matter. All these had been made on a without prejudice basis. Furthermore, there was exchange of various versions of proposed terms of settlement; however the parties could not come to an amicable settlement. Though the defendant did not file any affidavit in this proceeding, the counsel for the defendant concurred with the counsel for the plaintiff during the hearing that there were attempts to settle this matter on the without prejudice basis. The counsel for the defendant did not deny that he sent the letter (Exhibit 1) requesting to wait for the ruling in that application for winding up of the company. This clearly shows that, both the plaintiff and the defendant were initially waiting for the ruling and thereafter tried to settle this matter. Hence, it cannot be said that, there was an intentional and or contumelious default on part of the plaintiff in this matter. This further demonstrates that, the plaintiff did not want to prolong this matter by abusing the process of this court, but tried to amicably settle it with the defendant. All these attempts were not disclosed to the court as they were, admittedly, on without prejudice basis. Thus, the plaintiff satisfied this court that, there has been neither intentional nor contumelious default on her part for the court to strike out her cause under the first ground in **Birkett v James** (supra).

14. The main factor in the second ground of striking out as per the decision of **Birkett v James** (supra) is the inordinate and inexcusable delay on part of the plaintiff or his solicitors. The Fiji Court of Appeal in **New India Assurance Company Ltd v Singh [1999] FJCA 69; Abu0031u.96s (26 November 1999)** unanimously held that:

> *"We do not consider it either helpful or necessary to analyse what is meant by the words 'inordinate' and 'inexcusable'. They have their ordinary meaning. Whether a delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case".*

15. However, in **Deo v Fiji Times Ltd** [2008] FJCA 63; AAU0054.2007S (3 November 2008) the Fiji Court of Appeal cited the meaning considered by the same court in an unreported case where it was held that;

> *"The meaning of "inordinate and inexcusable delay" was considered by the Court of Appeal in **Owen Clive Potter v Turtle Airways Limited v Anor** Civil Appeal No. 49 of 1992 (unreported) where the Court held that inordinate meant "so long that proper justice may not be able to be done between the parties" and "inexcusable" meant that there was no reasonable excuse for it, so that some blame for the delay attached to the plaintiff".*

16. In that first case, the Court of Appeal considered it neither helpful nor necessary to analyze the meaning of the term 'inordinate' and 'inexcusable' and left it to the court to decide based on the circumstances of each and every case. In the second case, it gave the definition. However, both cases are reconcilable when considering the unambiguous language used in the respective rule and the wisdom behind it. The Order 25 Rule 9 by its plain meaning empowers the court to strike out any cause either on its own motion or an application by the defendant if no steps taken for ***six months***. The acceptable and or tolerable maximum period of delay in prosecuting any matter is six months. The threshold is six months as per the plain language of the rule and before expiry of six months; neither the court nor any party can act under that rule. However, after six months any party may apply or the court may issue notice on its own motion requiring the delaying party to show cause. It follows that, if the delay exceeds six months it would be inordinate and inexcusable in the ordinary sense as per this rule. This is the rational of rule setting the threshold at six months. If the delay for six months cannot be considered as inordinate and inexcusable, the Order 25 rule 9 would have set the threshold at any time frame longer than six months.

17. This proposition is further supported by the mandatory requirement of one month notice to be given under Order 3 rule 5. The Order 3 rule 5 mandatorily requires a party to give not less one month's notice of intention to proceed to every other party where ***six months or more*** lapsed since the last proceeding. The corresponding rule in the Supreme Court Practice 1988 (White Book 1988) requires giving such notice where ***one year or more*** lapsed (see: Order 3 rule 6 at page 19 of White Book 1988 Vol. 1). In considering the corresponding English rule that requires such notice after lapse of one year, Lindley L.J. said in **Webster v Myer** 14 (1884-85) QBD 231 at p. 234 that the lapse of one year since the last proceeding tends to show that the plaintiff had intended to abandon the

prosecution of the action. The same reasoning applies in terms of Fiji rules, and it means that, lapse of six months since the last proceeding tends to show that the plaintiff had intended to abandon the prosecution of the action. Thus, the delay for six months without taking any step in a matter is disproportionately long which leads to the conclusion that, the plaintiff has intended to abandon the matter. The courts have rejected every step taken, including the interlocutory judgment entered (see: **Paviter's Departmental Store v Lodhias Limited** [1978] 24 FLR 70) without giving one month notice after lapse of six months from the last proceedings, because such delay which exceeds six months per se is inexcusable and inordinate and therefore capable of giving the conclusion that, the plaintiff had abandoned the matter.

18. Hence there is a reason for the rules setting a threshold at six months; and the rational and analogical conclusion is that, the delay for six months without taking any step in a civil suit is, in the ordinary sense, inordinate and inexcusable. However, a plaintiff is allowed to show reasonable excuse for such delay and satisfy the court that, proper justice may still be done in a particular matter, even though the delay exceeded six months. If the court is satisfied with the reasons of the plaintiff for such delay, given the circumstances of that case, it cannot consider such delay for six months or even longer as inordinate and inexcusable. Therefore, I am fortified in my view that, the delay that exceeds six months would ordinarily be inordinate and inexcusable unless the plaintiff shows reasonable excuse for such delay and satisfies the court that, proper justice can still be done in a particular matter. If a plaintiff is successful in satisfying the court in such manner given the circumstance of his case, not only the delay that merely exceeds six months but also the one that exceeds much longer than six months cannot be considered as inordinate and inexcusable.

19. In this case, the plaintiff did not take any step for nine months from the date of filling acknowledgment by the defendant till the notice was issued by this court, and applying the threshold it is inordinate and inexcusable unless the plaintiff provides a reasonable excuse and explanation for such delay and shows proper justice may still be done in this case. The plaintiff too admitted that, there is a delay on her part. However, the plaintiff stated in her affidavit that, both she and the defendant were waiting for the ruling of the court on the application for winding up, and thereafter there were numerous attempts by both of them to amicably settle this matter. Therefore, she could not take steps in this matter. In fact, this was admitted by the defendant's solicitor too and it was the defendant solicitor who advised the plaintiff solicitor to wait for the ruling in the other matter as it is evident from the **Exhibit 1** annexed with the affidavit of the plaintiff. Therefore, it cannot be said that, the blame for the delay in this matter is attached to the plaintiff only. Thus I am satisfied that, the plaintiff has adduced a reasonable excuse and explanation for not taking any step for more than six months. Further there is nothing to suggest that, proper justice may not be able to be done in this matter despite the delay which is now justified by the plaintiff. Therefore, I am of the view that, the delay is neither inordinate nor inexcusable in the circumstances of this matter even though it exceeded the threshold of

six months. As such, discussion on the prejudice and possibility of fair trail is not warranted.

20. As per the statement of claim, the plaintiff being a foreign investor has brought more than $ 300,000.00 into the land and paid for the property comprised in CT No. 18014 and identified by the defendant. The defendant has not filed the statement of defence outlining his side of story and only documents before the court are the statement of claim and the affidavit filed to show cause. It appears from those two documents that, this matter should proceed for trail in the interest of justice. The court should be mindful of interest of justice at the end, as Eichelbaum CJ mentioned in **Lovie v. Medical Assurance Society Limited** (supra) that, at the end one must always stand back and have regards to the interests of justice.

21. For the reasons mentioned above, I am of the view that, this matter should not be struck out under Order 25 rule 9 of the High Court Rules. It must also be noted here that, the plaintiff filed the summons for summary judgment in this matter after receiving the notice to show cause from the court. The counsel for the plaintiff submitted that, the plaintiff filed that summons as soon as the settlement fell apart. It appears that, by filling that summons, the plaintiff attempted to show that, she did not delay the matter and she has the intention to proceed this matter. Had she followed the requirement of Order 3 rule 5 and filed the said summons before the notice was issued by the court under Order 25 rule 9, it could have been considered for the purpose she intended. I do not think that, any step taken by a delaying party, after the notice had been issued by the court or an application had been filed by any party under Order 25 rule 9, will be helpful to such delaying party in mitigating delay or inaction which led court or other party to act under the Order 25 rule 5. In any event, I have come to the conclusion that, the delay in this matter is neither inordinate nor inexcusable based on other reasons as mentioned above. Therefore, I do not need to consider such belated and abortive attempt of the plaintiff. In the meantime, the defendant too filed the summons for security for cost. Therefore, I consider it prudent to first allow the defendant to file his statement of defence and to deal the summons for security for cost.

22. The Fiji Court of Appeal in **Trade Air Engineering (West) Ltd v Taga**(supra) held that, the fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. Therefore, I give following directions to both parties;

    a. The defendant is allowed to file and serve his statement of defence within 21 days from today, i.e. on or before 23.03.2020

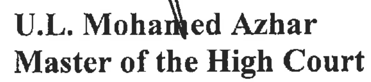
    b. The plaintiff to consider its application for summary judgment and to inform the court on her position after perusing the statement of defence,

c. The plaintiff also to file and serve the affidavit in opposition for the summons filed by the defendant for security for cost within 21 days from today, i.e. on or before 23.03.2020,

d. The defendant to file and serve the affidavit in reply within 14 days from 23.03.2020, i.e. on or before 07.04.2020,

e. The parties to bear their own cost, and

f. The matter to be mentioned on 07.04.2020.



**U.L. Mohamed Azhar**
**Master of the High Court**

**At Lautoka**

**25/02/2020**