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

CIVIL JURISDICTION

Civil Action No. 189 of 2012

BETWEEN : **GROUND STABILISERS LIMITED** a limited liability company duly registered office situated at Marina Complex, Uduya Point, Lami, Fiji and T/A **SOUTH PACIFIC KIT HOMES**

PLAINTIFF

A N D : **LAILAI BEACH RESORT LIMITED** a limited liability company duly registered in Fiji and having its registered office at c/- HLB Crosbie & Associates, 3 Cruickshank Road, Nadi Airport and T/A **TROPICA ISLAND RESORT**

DEFENDANT

Appearances : **(Ms) Vreetika for the plaintiff**
Mr. Ravneet Charan for the defendant

Hearing : **Friday, 31st January, 2020**

Decision : **Wednesday, 06th May, 2020**

D E C I S I O N

[A] INTRODUCTION

(01) The Court on its own motion issued a notice to the parties on the 03rd July, 2019 listing the matter for the parties to show cause as to why the case should not be struck out for "want of prosecution" or as an "abuse of process of the court" since no action was taken for a period of more than (06) six months.

(02) The notice was issued pursuant to Order 25, rule 9 of the High Court Rules, 1988.

(03) Upon being served with notice, the plaintiff filed an affidavit to show cause as to why the matter should not be struck out for "want of prosecution" or as an "abuse of process of the court".

(04) The defendant did not oppose the plaintiff's affidavit to show cause. Counsel for the defendant asked the court that the action be allowed to proceed to trial.

[B] THE BACKGROUND

(01) This is an action begun by writ issued on 23-08-2012, by plaintiff who claimed damages against the defendant for breach of renovation contract. The plaintiff claimed against the defendant a sum of $86,450.45 being the work performed pursuant to the contract.

(02) The defendant in its defence alleged that the plaintiff breached the contract. It counter claimed against the plaintiff for the sum of $2,160,697.96 being the additional sum paid by the defendant in order to complete the resort's renovation work as per the contract after the plaintiff walked out of the contract.

(03) The pleadings were closed on 09-10-2013. The summons for directions was heard on 28-01-2014. The copy pleadings were filed on 28/11/2014. The action was initially set down for two day trial on 09th and 10th November, 2016. On the 09th of November, 2016 the plaintiff's Solicitors Messrs Neel Shivam Lawyers withdrew from the matter. The trial was re-fixed for 26th, 27th and 28th July, 2017. The plaintiff was wound up on 11-05-2017.

(04) On the 20th March, 2018 the Messrs Patel and Sharma wrote a letter to the Official Receiver asking for consent to act as Solicitors for the plaintiff. There has been no response from the official receiver to date.

[C] THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing the striking out for want of prosecution.

(2) Rather than refer in detail to the various authorities, I propose to set out very important citations, which I take to be the principles in play.

(3) Provisions relating to striking out for want of prosecution are contained in Order 25, rule 9 of the High Court Rules, 1988.

I shall quote **Order 25, rule 9,** which provides;

> *"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 process of the court.*
> *Upon hearing the application the court may either dismiss the cause or matter on such terms as maybe just or deal with the application as if it were a summons for directions".*

(4) Order 25, rule 9 expressly gives power to the court on its own motion to list any cause or matter, where no step has been taken for at least six (06) months.

(5) The Court is allowed to strike out an action on the failure of taking of steps for six (06) months on two grounds. The first ground is for **want of prosecution** and the second is an **abuse of process of the Court.**

(6) The principles for striking out for **want of prosecution (first ground)** are well settled. Lord "Diplock" in **"Birkett v James[1]"** succinctly stated the principles at page 318 as follows:

> *"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; (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 either as between themselves and the plaintiff or between each other or between them and a third party."*

(7) The test in **"Brikett vs James"** *(supra)* has two limbs. The first limb is **"intentional and contumelious default".** The second limb is **"inexcusable or inordinate delay and prejudice."**

(8) In **Pratap v Christian Mission Fellowship[2], and Abdul Kadeer Kuddus Hussein v Pacific Forum Line[3],** the Court of Appeal discussed the principles expounded in **Brikett v James** (supra).

The Fiji Court of Appeal in **"Pratap v Christian Mission Fellowship"** (supra) held;

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[1] (1987), AC 297,
[2] (2006) FJCA 41
[3] ABU 0024/2000

"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. Most recently, in ***Abdul Kadeer Kuddus Hussein v Pacific Forum Line –ABU0024/2000 – (FCA B/V/ 03/382)*** *the court, readopted the principles expounded in* ***Birkett v James [1978] A.C. 297; [1977] 2 All ER 801*** *and explained that:*
The power should be exercised only where the court is satisfied either (i) 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) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) 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."

(9) 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**[4],

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

(10) In **Culbert v Stephen Wetwell Co. Ltd**[5], Lord Justice Parker succinctly stated,

> *"There is however, in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice."*

Lord Justice Nourse in Choraria [Girdharimal] v Sethia (Nirmarl Kumar)[6] said;

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[4] Civil Appeal No. ABU 0041/2006
[5] (1994) PIQR 5
[6] Supreme Court Case No. 96/1704/B, C.A. 15.1.98

"However great does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, 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."

It has been further stated by ***Nourse J:***

"That is the principle on which the court must now act. Whether it is identified as being comprehended within the first limb of ***Birkett v James*** *or as one having an independent existence appears to be a point of no importance. I have already said that it is clear that the relevant ground of decision in* ***Culbert*** *was based on the first limb of* ***Birkett v James****. In other words, it was there effectively held that the plaintiff's conduct had been intentional and contumelious.*

In my view that conclusion was well justified on the facts of the case, which demonstrated not only the plaintiff's complete disregard of the rules but also his full awareness of the consequences. He had, at the least, been reckless as to the consequences of his conduct and, on general principles that was enough to establish that the defaults had been intentional and contumelious.

(11) Therefore, the failure to comply with peremptory orders and/or flagrant disregard of the High Court Rules amounts to contumaciousness.

(12) The next question is what constitutes **"inexcusable or inordinate delay and prejudice".**

In **Owen Clive Potter v Turtle Airways Ltd**[7], the Court of Appeal held,

"(Inordinate).....means so long that proper justice may not be able to be done between the parties. When it is analyzed, it seems to mean that the delay has made it more likely than not that the hearing and/or the result will be so unfair vis a vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties."

And at page 4, their Lordships stated:

"Inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It simply allows the Judge to put into the scales the Plaintiff's conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him opportunity from pursuing his action or perhaps any action against the Defendant."

[7] Civil Appeal No. 49/1992

In **Tabeta v Hetherington**[8] the court observed;

> *"Inordinate delay means a delay which is materially longer than the time which is usually regarded by the courts and the profession as an acceptable period."*

(13) The Court of Appeal, in **"New India Assurance Company Ltd v Rajesh K Singh and Anor**[9]**,** defined the term "prejudice" as follows;

> *"Prejudice can be of two kinds. It can be either specific that is arising from particular event that may or may not occur during the relevant period or general, and prejudice that is implied from the extent of delay."*

(14) Lord "Woolf" in **"Grovit and Others v Doctor and Others**[10] has discussed the principles for striking out for **"Abuse of process" (Second ground in Order 25, rule 9) as follows,**

> *"This conduct on the part of the appellant constituted an abuse of process. The Court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. When this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C.297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

(15) 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 principles set out in **Brikett v James** (see paragraph 16 of the judgment). Their Lordship 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*

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[8] (1983) The Times, 15-12-1983
[9] Civil Appeal No. ABU 0031/1996
[10] (1997) 01 WLR 640, 1997 (2) ALL ER, 417

*ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the tests for striking out established in **Brikett v James** [1972] 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."*

(16) **It seems to me perfectly plain 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 them may amount to "abuse of process" which justifies for want of prosecution without having to show prejudice.**

[D] CONSIDERATION AND THE DETERMINATION

(01) As noted above, this is an action begun by writ issued on 23-08-2012, by plaintiff who claimed damages against the defendant for breach of renovation contract. The plaintiff claimed against the defendant a sum of $86,450.45 being the work performed pursuant to the contract.

(02) The defendant in its defence alleged that the plaintiff breached the contract. It counter claimed against the plaintiff for the sum of $2,160,697.96 being the additional sum paid by the defendant in order to complete the resort's renovation work as per the contract after the plaintiff walked out of the contract.

(03) The pleadings were closed on 09-10-2013. The summons for directions was heard on 28-01-2014. The copy pleadings were filed on 28/11/2014. The action was initially set down for two day trial on 09th and 10th November, 2016. On the 09th of November, 2016 the plaintiff's Solicitors Messrs Neel Shivam Lawyers withdrew from the matter. The trial was re-fixed for 26th, 27th and 28th July, 2017. The plaintiff was wound up on 11-05-2017.

(04) On the 20th March, 2018 the Messrs Patel and Sharma wrote a letter to the Official Receiver asking for consent to act as Solicitors for the plaintiff. There has been no response from the official receiver to date.

Default is contumelious

(05) Contumelious in the context of want of prosecution refers to disobedience of any orders or directions of this Court.

The first arm of the test does not apply in this case because no procedural step on the part of the plaintiff is called for by the rules of the Court.

Delay

(06) The test for delay is both 'intentional' and 'inordinate'.

Intentional

(07) From 20th March, 2018 Messrs Patel and Sharma were awaiting the consent of the official receiver to act as Solicitors for the plaintiff.

For this reason, I find that the delay was not intentional.

Inordinate

(08) This relates to the length of the delay. Turning to the period of delay, it is, at least two years, one month and eight days. The length of the delay is long and substantial. The delay is inordinate.

(09) Turning to the second issue, that is the reason for the failure to bring the action on for trial, Messrs Patel and Sharma says that they were awaiting the consent of the official receiver since the plaintiff company was wound up.

(10) They were plainly wrong. There is no need to obtain the consent of the Official Receiver when the plaintiff company is wound up. The Official Receiver's consent is necessary when the defendant company is wound up. It is critical to note **Section 531 of the Companies Act 2015** which provides;

Actions stayed on Winding Up Order

531. *When a winding up Order has been made or an interim liquidator has been appointed under Section 537, **no action or proceedings must be***

proceeded with or commenced against the company, *except by leave of the Court and subject to such terms as the Court may impose.*

[Emphasis added]

Prejudice

(11) In **Bhawis Pratap v Christian Mission Fellowship**[11] the Fiji Court of Appeal reviewed the authorities and explained that mere delay without prejudice to the other parties is not ordinarily a sufficient ground for striking out an action for want of prosecution.

(12) In both **Allen v McAlpine & Sons Ltd**[12] and **Birkett v James** (supra) reference is made to the risk that there could not be a fair trial of the action and of prejudice to the defendants which one would suppose was intended to mean some prejudice other than mere inability to have a fair trial.

(13) In the exercise of a judicial discretion to applications to strike out, it is necessary to consider two issues;

- a plaintiff's ordinary but fundamental right of access to the court to have his/its claim adjudicated; and
- the need or desirability of expedition in the administration of justice.

(14) The authorities clearly establish that prejudice maybe of varying and it is not confined to prejudice affecting the actual conduct of the trial. The thrust of the jurisprudence does acknowledge collateral type of prejudice (which is unknown to the plaintiff) as sufficient to justify the striking out of an action.

(15) The burden is on the defendant to establish that serious prejudice would be caused to it by the delay. Has the defendant been prejudiced by the delay? The defendant in this case did not raise any question on prejudice. It is not shown by way of affidavit evidence that the defendant has suffered prejudice as a result of the delay. Therefore, it is safe to infer that the defendant is not prejudiced by the delay.

(16) I must also consider the prejudice which the plaintiff may suffer in having its action dismissed. The period of limitation for the plaintiff's cause of action had expired. The plaintiff cannot issue a second writ claiming the same relief and on the same grounds as

[11] Civil Appeal ABU 93/05-14-07-2006
[12] (1968) 2.Q.B. 229

those advanced in the original writ. Therefore, the plaintiff will be prejudiced if the action is dismissed for want of prosecution.

Is it possible to have a fair trial ?

(17) So far as the case depends on documents, the fair trial of the issue on the alleged breach of contract has not been greatly prejudiced by the delay.

[E] ORDERS

1. The action is allowed to proceed to trial.

2. I make no order as to costs.

HIGH COURT OF FIJI
LAUTOKA

06/05/2020

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Jude Nanayakkara
[Judge]

At Lautoka
Wednesday, 06th May, 2020.