IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Civil Jurisdiction

Action No. 237 of 1978

BETWEEN: JOSAIA NAINOKA — Plaintiff

A N D : BA, TAVUA DRAINAGE BOARD — 1st Defendant

A N D : EATU ETUATE RATU — 2nd Defendant

Mr. Chand — Counsel for the Plaintiff

Mr. N. Mohammed — Counsel for the 1st Defendant

R U L I N G

A writ was filed by the plaintiff on 10/8/78 in respect of an accident occurring on 19/6/77. This was served on the defendants who entered appearance, the first defendant on 21/9/78 and the second defendant on 26/1/79. No further action being taken by the plaintiffs, counsel for the defendants on 20/6/80 made application to have the action dismissed for want of prosecution.

Thereafter on 26/6/80 counsel for the plaintiff gave notice, in accordance with O.3 r.6, that the plaintiff intended to proceed after one month. The plaintiff has now filed a statement of claim in court though he has not caused it to be served on the defendants yet, the month's notice not having expired.

The plaintiff has filed no affidavit explaining the delay in prosecuting the action, though from the bar counsel for the plaintiff has merely said that there was a mistake in the office, presumably counsel's office.

Clearly the court has a discretion whether to dismiss the action for want of prosecution, or to allow the plaintiff to serve the statement of claim which is now ready for service.

I have been referred to the cases of Allen v Sir Alfred McAlpine (1968) 1AER 543 Clough v Clough (1968) 1AER 1179 in which the English Court of Appeal under Lord Denning M.R. were said to have injected a new element of expedition in the conduct and preparation of cases before trial, by striking the cases out for want of prosecution. But in the Allen case, three cases were dealt with at the same time and the delay involved, described by Lord Denning as intolerable was in one case 9 years, in the second 9 years and in the third 14 years. In the Clough case the delay amounted to 7 years, described by Lord Denning as prolonged and inexcusable,

and in that case, as in this, no affidavit was put in to explain the delay. That was one of the factors that weighed against the plaintiff.

In all these cases, it was said that the enquiry was seriously prejudiced by the delay and it was no longer possible to do justice to the parties. In each case the unfortunate plaintiff who suffered because of the striking out was left to his remedy against the solicitors concerned. Since the solicitors were insured against such loss the plaintiffs were not left without any remedy, and this also was a factor that weighed in the mind of the Court of Appeal.

In this case the total delay is about 3 years from the date of the accident giving rise to the action. Incidentally no affidavit has been filed by the defendants and it has not been alleged that the delay is such that it was no longer possible to do justice to the parties. The longer the case is delayed, clearly the more the enquiry may be prejudiced, but I do not think that at this stage it can be said that it is no longer possible to do justice to the parties.

I therefore decline to dismiss the action. The statement of claim now should be served without any further delay. Costs in the cause.

LAUTOKA
4th July, 1980

(sgd.) G. O. L. Dyke
JUDGE