MERIT TIMBER PRODUCTS LIMITED

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v.

NATIVE LAND TRUST BOARD

[SUPREME COURT, 1995 (Tuivaga P, Cooke, Mason JJ.SC),
22 November]

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Civil Jurisdiction

Practice (Civil)-want of prosecution-inordinate and inexcusable delay-prejudice to the holding of a fair trial-status of findings of fact and exercise of discretion.

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On a second appeal following dismissal of the Plaintiffs claim for want of prosecution the Court reaffirmed the principles governing such applications to dismiss and reemphasised that it would be slow to depart from concurrent findings of fact and the exercise of discretion by Courts below.

Cases cited:

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Baffsky v. Brewis (1976) 51 A.L.S.R. 170
Birkett v. James [1978] A.C. 297
Dart Industries v. Decor Corporation (1993) 179 CLR 101
Muschinski v. Dodds (1985) 160 CLR 583
Srimati Devi v. Kumar Ramendra Narayan Roy [1946] A.C. 508

E *The Commonwealth v. Introvigne* (1982) 150 CLR 258

Appeal to the Supreme Court from the Fiji Court of Appeal.

H. M. Patel for the Appellant
N. Nawaikula for the Respondent

F **JUDGMENT OF THE COURT**

On 10 December 1993, Scott J. dismissed the appellant's action for want of prosecution. On 25 November 1994, the Court of Appeal dismissed an appeal from that order. The Appellant has appealed to this Court from the decision of the Court of Appeal.

G The Respondent is responsible for the administration of native land on behalf of the landowners. The Appellant is a logging company. On 6 March 1980 the Respondent entered into an Agreement with the Appellant which was expressed to come into force on 1 April 1980 and to terminate at the expiration of thirty years. By the Agreement the Respondent, on terms and conditions set out in the Agreement granted the Appellant the exclusive right to enter and fell and

remove species of native trees in an area referred to as "the Concession Area" in Naitasiri, being native lands, and to convert them into logs lumber, firewood and timber products and by-products. The Agreement provided for the payment by the Appellant to the respondent and of royalties and annual payments of $35,000, the first payment to be made on the execution of the Agreement.

On 17 December 1981 the Appellant commenced the action against the Respondent, seeking an injunction and damages for breach of the Agreement. The Appellant then sought an interlocutory injunction restraining the Respondent from terminating the Agreement and from entering into the Concession Area. No injunction was granted but consent orders were made for the payment of the second and third annual payments of $35,000.

On 4 June 1982 the Respondent issued a summons seeking dismissal of the action for want of prosecution, no statement of claim having been filed. It was filed on 10 June. Although the summons was dismissed, the Appellant was ordered to pay the costs. On 23 December 1982 the Respondent issued a second summons seeking dismissal for want of prosecution, the Appellant having failed to comply with directions given on 25 August 1982. This application was dismissed. On 24 February 1983 the Respondent issued a third summons for dismissal for want of prosecution. On 29 March 1983 Kermode J. ordered that, unless the directions given on 25 August 1982 were complied with by 12 April 1983, the action would stand dismissed. It seems that the Appellant complied on 12 April 1983. According to the primary judge, the Appellant failed to appear on at least four occasions when the matter was listed on call days.

After the action was set down for trial on 1 September 1986, the Appellant was granted leave by consent to add the Attorney-General as a defendant and to amend the statement of claim. The Appellant was ordered to pay the Respondent's costs of that application. The pleadings were finalized in the succeeding two months and, on 5 December 1986, the action was again set down for trial, to commence on 4 August 1987. The length of the trial was estimated at three weeks.

On 11 March 1987 directions were given, requiring each party within fourteen days to serve a list of documents and file an affidavit verifying such list. Inspection was to take place within ten days of the service of the list. Why these further directions were given is not clear. It may well be that they were necessitated by the amendments made to the pleadings, a matter to which we shall refer later. It seems that the Appellant failed to comply with these directions for a long time.

In September 1987, the Respondent filed a re-amended defence and counter claim. Thereafter nothing happened for almost four years.

Then, on 2 July, 1991 the Appellant filed a notice of intention to proceed under Order 3 Rule 5. That rule requires the giving of such a notice when a year or more has elapsed in any cause or matter. On 3 July the Appellant filed an amended defence to the re-amended counter claim.

After that brief and unusual flurry of activity, the action again went into hibernation, only to be enlivened by the Respondent's fourth summons for dismissal for want of prosecution on which Scott J. made the order out of which the present appeal arises.

The affidavit, in support of the summons was brief in the extreme. It referred to the early steps taken in the action.

> "5. THAT the Plaintiff on the 3rd day of July 1991 filed Amended Statement of Defence to Re-amended Counter-Claim by 1st Defendant and Notice of Intention to proceed after years of delay.
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> 6. THAT since the above matters the Plaintiff did not take any further legal steps with a view to proceeding and determining the action.
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> 7. THAT the Plaintiff's prolonged delay is unexcusable and has not only caused injustice to the Defendant but has continued to prejudice our "business" interest on behalf of the native owners while the on- going court action is considered an "abuse of process."
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> 8. THAT I verily believe that the Plaintiff is guilty of excessive delay in the prosecution of this matter."

The appellant filed an answering affidavit which, though not as brief as that of the Respondent, was perhaps even more uninformative. The affidavit stated that the delay after 11 March 1987 was due to the military coups, the fact that the courts were not functioning, the difficulty of obtaining statements from witnesses living in remote areas and the problem of securing instructions from directors of the Appellant who are in the United States of America. The affidavit claimed that it was the Appellant rather than the Respondent which had sustained heavy loss, that loss being sustained in consequence of setting up logging operations which had been frustrated by the Respondent's actions. The damages claimed by the Appellant amount to $25,903,198.

The primary judge, after reviewing the history of the matter, much as we have stated it, noted that the respondent relied upon inordinate and unexcusable delay and prejudice. The learned judge stated that counsel for the Respondent enlarged on the prejudice which it claimed to have suffered. His Lordship went on to say

> "The matters complained of should have been incorporated

into the affidavit but Mr Patel did not object. I was told that the main prejudice suffered was

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(a) that many of the persons involved in negotiating the concession which the Plaintiff alleges the First Defendant to be in breach of had, since the events complained of, left Fiji or died and

(b) that the First Defendant had been unable to deal with the land since the commencement of the action in 1981. This had led to great resentment and difficulty with the landowners who not unnaturally wanted their land to be put to profitable use."

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Having found that there had been inordinate and incontestable delay on the part of the Appellant, the learned judge had this to say about prejudice

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"As was always known to the Plaintiff, the First Defendant was most anxious to have the action disposed of as soon as possible - hence its numerous applications to dismiss. The land in question has now lain fallow for 12 years. The First Defendant has been debarred from dealing with the land for the benefit of the owners for all this time. What clearer case of prejudice could there be?"

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On the question whether a fair trial could be held, the learned judge stated

"In my view in this action that stage has now been reached. Many of the First Defendant's witnesses have died or left the country. Some will now be untraceable. Although Mr Patel bravely attempted to assert that the real issue between the Parties was the interpretation of the written Agreement between them, he also advised me that he would be calling 12 or 13 witnesses and that the trial would take some weeks. This hardly suggests a trial confined to the mere construction of a written document."

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Before we refer specifically to the reasons given by the Court of Appeal, we should mention that the trial judge and the Court of Appeal were in agreement as to the principles of law to be applied to an application for dismissal of an action for want of prosecution. Indeed, on the hearing of the appeal in this Court it appeared that these principles were largely a matter of common ground, the principal issue before us being as to their application, particularly with respect to the Respondent's claim that it suffered prejudice and that the prospect of a fair trial had been impaired.

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The relevant principles were stated by Lord Diplock in Birkett v. James [1978] A.C. 297 at 318 in these terms:

> "The power [to strike out for want of prosecution] 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...."

Both the Court of Appeal as well as the primary judge had no hesitation in finding that there had been inordinate and unexcusable delay on the part of the Appellant. The critical period of delay was identified as the period which ran from September 1987 to the issue of the Respondent's summons to dismiss in October 1993. The only activity on the part of the Respondent in that period was the filing of its notice of intention to proceed and its long delayed amended defence to the Respondent's re-amended counter claim. Dislocation of the court system following the military coups occupied part of that time but no more than two years in the view of the primary judge, a view which appears to have been shared by the Court of Appeal.

The delay which occurred in that period of six years must be viewed in the light of the earlier history of delay and the clear indication from the Respondent's successive attempts to have the action dismissed for want of prosecution that it was greatly concerned about the Appellant's delays. In these circumstances we consider that the courts below were justified in finding that there had been inordinate and unexcusable delay.

That brings us to the issue of prejudice. The Court of Appeal like the primary judge, concluded that the Respondent had relevantly sustained prejudice and that the likelihood of a fair trial had been impaired. Counsel for the Appellant strongly contested the correctness of this conclusion, arguing that the affidavit in support of the summons did no more than identify the grounds on which the application had been brought without offering specific evidence of prejudice. So much may be acknowledged.

The Court of Appeal rejected, correctly in our view, the statements concerning prejudice made by the Respondent's counsel from the bar table before the primary judge, on the ground that they were not evidence and were not admitted by counsel for the Appellant.

It was argued that, notwithstanding its rejection of counsel's statement, the Court of Appeal must have had regard to it when it said in its reasons .

> "The pleadings also show there are considerable areas of dispute over alleged interference by the landowners who are represented

> by the respondent hampering the appellant's attempts to perform the agreement and whether they are sufficient to justify the appellant's failure or refusal to pay. The resolution of those would require evidence of events that occurred more than ten years ago."

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We do not consider that this passage indicates that the Court of Appeal was relying on counsel's statement. In our view the learned judges were simply drawing inferences from the pleadings and the nature of the litigation, something which they were entitled to do.

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It might be said against the Respondent that the areas of dispute to which the Court of Appeal referred were issues of fact in respect of which, for the most part, in its re-amended statement of defence, the Respondent puts the Appellant to proof of matters which it alleges and that the Respondent will not be presenting a positive case of its own. On the other hand, on the pleadings, there are a number of issues of fact to be resolved where, it appears, there will be conflicting oral evidence. For example, in support of its case that the Agreement contains an implied term, this being the central point of the Appellant's case, the Appellant relies on representations and statements made by persons on behalf of the Respondent in the years 1969, 1970, 1973, 1978 and 1979. These statements and representations, which are denied by the Respondent, are also relied upon by the Appellant to support other claims such as breach of collateral warranty and negligent mis-statement. Plainly enough the lapse of time since the years mentioned is likely to affect the accuracy of the recollection of the relevant witnesses, assuming that they are available to give evidence. However, it is not easy, to assess in any detail what the impact of this lapse of time will be.

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Viewing the materials to which we have referred, we doubt that, had the application come before us at first instance, we would have made the order made by the primary judge. But that is not the end of the matter. The findings made by the primary judge and the Court of Appeal with respect to delay, prejudice and fair trial are concurrent findings of fact.

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We think that this Court should be slow to depart from concurrent findings of fact made by courts below. That is the rule that has been adopted by the Judicial Committee of the Privy Council (Srimati Devi v. Kumar Ramendra Narayan Roy [1946] A.C. 508 at 513-522) and by the High Court of Australia (Baffsky v. Brewis (1976) 51 A.L.S.R. 170 at 172; The Commonwealth v. Introvigne (1982) 150 CLR 258 at 262,274; Muschinski v. Dodds (1985) 160 CLR 583 at 590-591; Dart Industries v. Decor Corporation (1993) 179 CLR 101 at 121.

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We are also mindful of the rule that an appellate court should not substitute its own view for that of the primary judge where a "discretionary" judgment is under review, in particular where elements of value judgment are involved. It would be wrong to substitute our view simply because we regard the balance as

tipped against the way in which the primary judge decided the matter. In a case such as this our function is primarily a reviewing function. It follows that the judgment below should stand unless we are satisfied that the court below erred in principle by giving weight to something which ought not to have been taken into account or by failing to give weight to something which ought to have been taken into account (see Birkett v. James at 317).

We are not persuaded that there has been such an error of principle or that the circumstances are such as to justify our overturning the concurrent findings of fact made by the courts below.

For these reasons the appeal is dismissed with costs.

(Appeal dismissed.)