IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 274 of 2005

BETWEEN : **FORUM HOTELS LIMITED** a limited liability company having its registered office at Suva, Fiji .

Plaintiff

AND : **THE NATIVE LAND TRUST BOARD** a statutory body established under the Native Land Trust Act of 431 Victoria Parade, Suva.

1st Defendant

THE REGISTRAR OF TITLES the office responsible for the registration of titles and the Land Transfer Act of Suvavou, Suva

2nd Defendant

THE ATTORNEY GENERAL OF FIJI for and on behalf of the Registrar of Titles

3rd Defendant

Before : Master U.L. Mohamed Azhar

Counsel : Mr. R. Singh for the Plaintiff
Mr. Nayare for the 1st defendant
Mr. Mainavolau for the 2nd and 3rd Defendants

Date of Ruling: 10th August 2018

RULING

(On striking out under Or 25 r 9)

01. This court issued a notice on 18.11.2015, on its own motion pursuant to Order 25 rule 9 of the High Court Rules to the plaintiff to show cause, why this matter should not be struck out for want of prosecution or as an abuse of the process of the court. The plaintiff company filed the affidavit sworn by one of its directors together with the annexures marked as **HL 1** to **HL 4**. The first defendant did not file any affidavit, but the second

and third defendants did file their affidavit supporting the motion of the court. The plaintiff company thereafter filed an affidavit replying the affidavit filed on behalf of the second and third defendants and re-iterated what had already been deposed in the affidavit filed to show cause.

02. At the hearing, the counsel for the plaintiff made oral submission and also filed his written submission together with the bundle of authorities containing both local and English authorities. The counsel for the first defendant in his oral submission stated that, they were willing to settle the matter, however, supported the court's motion. Though the counsel for the first defendant stated that, he would file the written submission, no such submission was filed until the date this ruling.

03. The Order 25 rule 9 provides for the jurisdiction of 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. Justice Scott, striking out of plaintiff's action in **Hussein v Pacific Forum Line Ltd** [2000] Fiji Law Report 24; [2000] 1 FLR 46 (6 March 2000), stated that;

> *"The principles governing the exercise of the Court's jurisdiction to strike out for want of prosecution are well settled. The leading English authorities are **Allen v. McAlpine** [1968] 2 QB 299;[1968] 1 All ER 543 and **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801 and these have been followed in Fiji in, for example, **Merit Timber Products Ltd v. NLTB** (FCA Reps 94/609) and **Owen Potter v. Turtle Airways Ltd** (FCA Reps 93/205)".*

05. The Court of Appeal of Fiji in **Trade Air Engineering (West) Ltd v Taga** (supra) reiterated that, the new rule (Or 25 r 9) does not confer any additional or wider power to the court except the power to act on its own motion. It was held in that case that;

> *"In our view the only 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. While this power may very valuably be employed to agitate sluggish litigation, it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority".*

06. The above decision of the Court of Appeal made it abundantly clear that the principles set out in **Birkett v. James** (supra) are still applicable to strike out any cause, where no step is taken for six months, despite the introduction of new rule (Or 25 r 9). 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 want of prosecution. His Lordship held that;

> *"Although the rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for direction and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution except upon disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.*
>
> *To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in Reggentin vs Beecholme Bakeries Ltd (Note) [1968] 2 Q.B. 276 (reported in a note to Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229) and Fitzpatrick v Batger & Co Ltd [1967] 1 W.L.R. 706*
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> *The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer to as Allen v McAlpine [1968] 2 Q.B. 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to*

R.S.C, Ord. 25, R. 1 in the current Supreme Court Practice (1976). ***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****".*(emphasis added)

07. As Lord Diplock clearly explained in his judgment, the above principles were set out in the notes to Order 25 rule 1 of Rules of Supreme Court 1976 which is equivalent to Order 25 rule 1 (4) of Fiji High Court Rules, under the Summons for Directions. However those principles of prophesy had caused to the development of the new rule such as Order 25 Rule 9. The first limb in the above case is ***the intentional and contumelious default.*** Lord Diplock in his wisdom did not leave the first limb unexplained, but, His Lordship gave two examples for that first limb. One is ***disobedience to a peremptory order of the court*** and the other is ***conduct amounting to an abuse of the process of the court.*** Thus the second ground provided in Order 25 Rule 9, which is 'abuse of the process of the court', is a good example for '***the intentional and contumelious default'*** as illustrated by Lord Diplock in **Birkett v. James** (supra). According to Lord Diplock abuse of the process of the court falls under broad category of '***the intentional and contumelious default'*** However, Lord Diplock did not explain what act does exactly amount to an abuse of the process of the court.

08. There is a latest judgment by the House of Lords in **"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,** where Lord Woolf held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held as follows;

> *"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. Where 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".

09. The Fiji Court of Appeal in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006** followed the principles of **"Grovit and Others v Doctor and Others"** (supra) and held that;

> *"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 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 accepted tests for striking out established in **Birkett v James** [1977] 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"*

10. Both, the **The Grovit** case and **Thomas (Fiji) Ltd** (supra) which follows the former, go on the basis that, *"abuse of the process of the court"* is a ground for striking out, which is independent from what had been articulated by Lord Diplock in **Birkett v James** (supra). However, it is my considered view that, this ground of *"abuse of the process of the court"* is part of ***'the intentional and contumelious default'***, the first limb expounded by Lord Diplock. The reason being that, this was clearly illustrated by Lord Diplock in **Birkett v. James** (supra). For the convenience and easy reference I reproduce the dictum of Lord Diplock which states that; ***"...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..."*** (Emphasis added). According to Lord Diplock, the abuse of the process of the court, with its all forms, falls under broad category of ***'the intentional and contumelious default'***. In fact, if a plaintiff commences an action and has no intention to bring it to conclusion it is an abuse of the process of the court. Thus the default of a plaintiff intending not to bring it to conclusion would be intentional and contumelious. Accordingly, it will fall under the first limb of the principles expounded in **Birkett v. James** (supra). This view is further supported by the dictum of Lord Justice Parker who held in **Culbert v Stephen Wetwell Co. Ltd,** *(1994) PIQR 5* as follows;

> *"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."

11. Sometimes, it is argued that, ***Birkett v. James*** (supra) deals with the ground of 'want of prosecution' only and not the ground of abuse of the process of the court. However, it is evident from the illustrations given in that case that, it deals with both the grounds of 'abuse of the process of the court' and 'want of prosecution' as well. In any event, the defendant is under no duty to establish the prejudice in order to strike out an action if he can prove the abuse of the process of the court. Suffice to establish plaintiff's inactivity coupled with the complete disregard of the Rules of the Court with the full awareness of the consequences.

12. The second limb of the **Birkett v. James** (supra) is (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. In short, inordinate and inexcusable delay which make the fair trial impossible or cause prejudice to the defendant.

13. Their Lordships the Justices of 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"*. 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 court in an unreported case. 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".*

14. According to Order 25 Rule 9, the acceptable and or tolerable maximum period for inaction could be six months. The threshold is six months as per the plain language of the rule. It follows that, any period after six months would be inordinate and inexcusable so long that proper justice may not be able to be done between the parties and no reasonable excuse is shown for it. Therefore, whether a delay can be described as inordinate or

inexcusable is a matter of fact which to be determined in the circumstances of each and every case. As established by courts delay of itself, without being shown that the delay is seriously prejudicial to the defendant, is not sufficient to strike out of an action under the second limb of the **Birkett v. James** (supra). The Fiji Court of Appeal in **New India Assurance Company Ltd v Singh** [1999] FJCA 69; Abu0031u.96s (26 November 1999) has reaffirmed the burden of the defendant to establish that serious prejudice would be caused to it by the delay. It was held that;

> *"Where principle (2) is relied on, both grounds need to be established before an action is struck out. There must be both delay of the kind described and a risk of an unfair trial or serious prejudice to the defendants. In Department of Transport v Smaller (Transport) Limited [1989] 1 All ER 897 the House of Lords did not accept a submission that the decision in Birkett should be reviewed by holding that where there had been inordinate and inexcusable delay, the action should be struck out, even if there can still be a fair trial of the issues and even if the defendant has suffered no prejudice as a result of the delay. Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ delay will either make a fair trial impossible or prejudice the defendant. He went on to affirm the principle that the burden is on the defendant to establish that serious prejudice would be caused to it by the delay".*

15. 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. It was held in that case at page 248 by Eichelbaum CJ 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."*

16. The above analysis of law on striking out of an action clearly shows that, the courts in Fiji had, before the introduction of Order 25 rule 9, exercised the jurisdiction to strike out following the principles expounded in **Birkett v. James** (supra). Even after the introduction of the above rule the same principles apply as confirmed by the superior courts. The ground of '*abuse of the process of the court* advanced by the recent case of **Grovit v. Doctor** (supra) too comfortably falls into the first limb of **Birkett v. James** as Lord Diplock cited *'the abuse of the process of the court'* as one of the two examples for

the first limb expounded by him. The rationale is that, commencing an action without the intention of bringing it to conclusion amounts to an abuse of the process of the court and in turn it is an intentional and contumelious default. 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 be regarded as contumelious conduct or, an abuse of the process of the court under the second limb of Or 25 r 9. On the other hand the inordinate and inexcusable delay together with the prejudice should be established in order to succeed in an application under first limb of Or 25 r 9.

17. Since the notice was issued by this court on its own motion pursuant to Or 25 r 9, it is the plaintiff who has to show the cause why his action should not struck out under that rule, as this court held in **Prakash v Hassan** [2017] FJHC 658; HBC25.2015 (4 September 2017).

18. The reasons given by the plaintiff for the inaction have posed a question as to whether this court could have sent the notice under this rule given the circumstances of this case. A brief history of this matter may bring the correct answer to this question. The plaintiff sued the defendants for the alleged termination of the lease No.NL 24345 by the first defendant. The plaintiff therefore moved for following reliefs;

1. A DECLARATION that the purported re-entry by the 1st Defendant was unlawful, void and of no effect.
2. AN ORDER that the 1st and 2nd Defendant restores the Plaintiffs lease.
3. AN ORDER restraining the 1st Defendant from dealing with the subject land or issuing a lease over it to a third party pending the outcome of the decision by this honourable court.
4. AN ORDER restraining the 2nd Defendant from registering any dealings or lease over the subject land pending the outcome of this action.
5. Relief against forfeiture of the Plaintiffs lease.
6. Damages to be assessed.
7. Costs in this action.
8. Any other order that the court may deem just and equitable.

19. All the pre-trial steps were completed and the Pre-Trial Conference Minutes too were filed. The matter was then taken up for trial before Madam Justice Gwen Phillips and the judgment was reserved. However, Her Ladyship's appointment came to an end at the time abrogation of the Constitution in April 2009, before delivering the judgment. The matter was then listed before Justice Inoke, who eventually delivered the judgment, dismissing plaintiff's action with the summarily assessed cost of $ 5,000 payable to each of first and second defendants. The plaintiff appealed the said decision of Justice Inoke to

the Fiji Court of Appeal and the Court of Appeal allowed the appeal and ordered for a new trial before another judge. It was held at paragraph 37 as follows;

> *Having considered the overall circumstances of this case especially the fact that the learned Judge had failed to address his mind to some of the grounds of appeal adequately, I am of the view that the orders made by the learned judge should be set aside.* ***Hence the appeal allowed. This is sent back for retrial before another judge.*** (Emphasis added).

20. The plaintiff's counsel stated that, there were some negotiations on the settlement; however, it was not eventuated. The plaintiff thereafter filed the 'Notice of Intention to Proceed' on 16.10.2015 and thereafter wrote to the registry on 22.10.2015 requesting a date be assigned to this matter. A copy of the said letter is attached with the affidavit filed to show cause. The plaintiff's counsel further stated that, the registry issued the Notice under the Order 25 rule 9 for want of prosecution on 18.11.2015 instead of fixing a date before a judge as per the request of the plaintiff. It is the argument of the plaintiff that, the registry should have issued the Notice of Adjourned Hearing (NOAH) to the parties after the Court of Appeal ordered for re-trial before a different judge, without issuing the Notice under Order 25 rule 9. The counsel further argued that, the registry has not complied with the order of the Court of Appeal, to re-fix the matter before another judge.

21. The Court of Appeal delivered its judgment on 13.03.2013 and the plaintiff filed the 'Notice of Intention to Proceed' on 16.10.2015, after almost two and half years. It is stated in the affidavit filed on behalf of the plaintiff that, there was a negotiation to settle the matter during the said period. Admittedly there is a delay on part of the plaintiff to file the 'Notice of Intention to Proceed'. The affidavit, filed by the first defendant supporting the motion of the court, too pointed out this long delay on part of the plaintiff. Furthermore, filling of 'Notice of intention to proceed' buys no immunity from exercising the inherent power of the court as held by Court of Appeal in **Singh v Singh** [2008] FJCA 27; ABU0044.2006S (8 July 2008). However, the question is whether the plaintiff was required to file such notice, given the circumstance of this case.

22. As stated above, the Court of Appeal set aside the judgement delivered by Justice Inoke in this case and directed for a trial *de novo* before another judge. The Court of Appeal also directed its registry to send the original record to this court. In this circumstance, it is the duty of the registry of this court to assign this matter to another judge for trial as ordered by the Court of Appeal. The initiation should be triggered by this court to that effect. This registry should have listed the matter before a judge and sent the Notice of Adjournment of Hearing (NOAH) to all the parties to the action. However, the registry issued the notice under Order 25 rule 9 without checking history of the case and the orders made by the Court of Appeal. The registry should have checked the record at least at the time when the plaintiff wrote to the registry on 22.10.2015 requesting to assign a date for this matter. In fact, the said letter had clearly indicated that, the Court of Appeal

remitted this matter to this court. In these circumstances, it cannot be said that, the plaintiff has not taken any step in this matter. The plaintiff should not be punished for the inadvertent move, by which the court issued the Notice under Order 25 rule 9 of the High Court Rules on its own motion. This is a case where the maxim *Actus Curiae Neminem Gravabit* can be applied.

23. As a result, the court should deal with the notice as if it was a summons for directions in terms of paragraph 2 of Order 25 rule 9. This matter was not fixed for re-trial since the orders made by the Court of Appeal in year 2013. Therefore, I direct that this matter should be fixed for trial at an earliest possible date.

24. Accordingly, I make the following orders;

a. The Notice issued by this court should be considered as it was a summons for direction,

b. The Deputy Registrar to call for the full records, if any part is still in Court of Appeal, and allocate the matter before a judge for trial, and

c. The parties to bear their own cost.

HIGH COURT OF FIJI LAUTOKA

U.L. Mohamed Azhar
Master of High Court

At Lautoka
10/08/2018