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

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 87 OF 2013

BETWEEN : **RASUAKI SALABABA and JOKAVETI DOLANAISORO** both of Varadoli, Ba, Police Officers.

Plaintiffs

AND : **PREM CHAND, SUSHIL CHAND & VINOD CHAND** formerly of Nadari, Ba, but now residing in Canada the exact address is unknown to the Plaintiffs.

1st Defendants

AND : **MOHAMMED HAROON** trading as **HAROONS HARDWARE** a hardware and construction business having its registered office in Rakiraki, Ra.

2nd Defendant

Appearances:

Mr S. Titoko for the plaintiffs
No appearance for the defendants

Date of Hearing: 9 April 2014
Date of Ruling: 12 May 2014

RULING

Introduction & Background

[1] This is a notice issued upon plaintiffs by the High Court Registry at Lautoka under Ord. 25, r. 9 of the High Court Rules 1988 (the HCR) to show cause why the action should not be not be struck out for want of prosecution or an abuse of the process of the court.

[2] Ord. 25, r. 9, so far as material, provides that:

(1) 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.***

2) 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.***(Emphasis added).

[3] In the affidavit in show cause (show cause affidavit) the plaintiffs stated that, the first defendants are residing in Canada and they do not know the whereabouts of Urmila Devi the holder of the power of attorney. So they could not serve the writ to the first defendants personally. The affidavit further stated that it would cost him a fortune to advertise the writ in Canada. But they state, they will be making necessary application soon to have it served on the Urmila Devi by way of advertisement. The plaintiffs also state that although there is a delay in taking the next step but such is not contumelious and seek to apologise for any inconvenience caused.

[4] The plaintiffs launched this action through writ of summons dated 17 May 2013 with attached statement of claim against the first defendants for, inter alia, a declaration that the defendants are unjustly enriched by the said property and compensation for house and improvements effected on the first defendants property by the them (plaintiffs) and for damages against the second defendant for negligence and breach of contract. The plaintiffs claim arises out of a construction made by the plaintiffs on the first defendants land mistakenly in March 2006.

Principles relating to strike out proceedings for want of prosecution

[5] In **Re Manlon Trading Ltd** [1995] 4 All ER 14, the Court of Appeal, Civil Division discussing the principle applicable to application to strike out proceedings for want of prosecution held:

Held *– (1) The conventional approach to striking out for want of prosecution, which applied to all civil proceedings and required the court to inquire whether there had been* ***inordinate and inexcusable delay giving rise to a substantial risk that a fair trial would not be possible*** *or was such as was likely to cause or to have caused* ***serious prejudice to the defendant****, also applied to disqualification proceedings under the 1986 Act, but was modified by an additional consideration, namely the need to protect the public in whose interest the disqualification proceedings were brought. On that approach, if the court concluded that a fair trial was not possible owing to the delay, it should always strike out the proceedings.* ***Where a fair trial was possible, the court should permit the case to proceed*** *unless there was evidence of serious prejudice caused to the director by the delay, both in launching the proceedings and thereafter, which outweighed the public interest in obtaining a disqualification order. In laying down a two-year period within which proceedings were to be brought, Parliament had clearly indicated that expedition was required and if the Official Receiver delayed in launching proceedings until the end of that period, greater diligence was required of him. It was not the case that the public interest in obtaining the protection of a disqualification order diminished with the passage of time and the judge had erred in so holding. It followed that the judge had erred both in his approach to disqualification proceedings and in his conclusion on adopting that approach (see p 21 d f to h, p 22 c j to p 23 g, p 26 c j to p 27 a g to p 28 b and p 29 d e j, post);* ***Birkett v James[1977]2 All ER 801 applied****; dictum of* ***Vinelott J in Re Noble Trees Ltd*** *[1993] BCLC 1185 at 1190 approved.*

(2) Given that any evidence of prejudice suffered by a director had to be set against the public interest in obtaining a disqualification order, a judge would rarely be justified in striking out on the sole ground of the prejudice inherent in the pendency of disqualification proceedings in the absence of evidence of other specific prejudice. On the judge's alternative approach, it was doubtful whether the inherent prejudice caused to A was sufficient to justify striking out in view of his earlier finding that a fair trial was possible and his

rejection of the specific prejudice asserted by A. However, the substantial culpable delay on the part of the Official Receiver had clearly caused prejudice to A through its effect on the memories of the witnesses. It followed that such prejudice, together with the inherent prejudice on which the judge relied, amounted to prejudice which was sufficiently serious to outweigh the public interest in pursuing the disqualification proceedings and that the judge's conclusion that the proceedings should be struck out could therefore be supported on the facts. The appeal would accordingly be dismissed (see p 24 j to p 25 b e h j, p 26 b c, p 28 j and p 29 j ,post).

Decision of ***Evans-Lombe J*** *[1995]1 All ER 988 affirmed on other grounds.* (Emphasis added).

Determination

[6] By notice dated 9 December 2013 issued by the Registry pursuant to Ord. 25, r.9 of the HCR requiring the plaintiffs to attend the court and to show cause why the action should not be struck out for want of prosecution or as an abuse of the process of the court. The court is empowered under Ord. 25, r.9 to issue notice on its own motion on any party, if no step taken in any cause or matter for six months to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court.

[7] The plaintiffs filed their writ of summons on 17 May 2013. The writ was served on the second defendant on 21 February 2014. The second defendant filed his acknowledge of service dated 3 March 2014 on 4 March 2014 and he filed his statement of defence 17 March 2014. The plaintiffs did not file any reply to the statement of defence. Nor did he apply for extension of time to file one. The plaintiff should have taken out summons for directions in relation to the second defendant. But he failed to do so. Within one month after the pleadings in the action are deemed to have closed, the plaintiffs must take out a summons for

directions pursuant to Ord.25, r.1 of the HCR. The second defendant filed his statement of defence on 17 March 2014. A reply to any defence must, pursuant to Ord. 18, r.3 (4), be served by the plaintiff before the expiration of 14 days after the service on him of that defence. So, the plaintiffs should have taken out a summons for directions in the case of the second defendant by 1 May 2014.

[8] I must assume that the show cause notice issued by the court relates only to the claim launched against the first defendants. Although the writ was filed on 17 May 2013 it was not served to the first defendants until the show notice was issued. Up to the date the court issued the show cause notice on 9 December 2013, there has been s delay of 6 months 22 days. It will be noted that the hibernating period allowed by Ord.25, r. 9 is 6 months. Logically speaking there has been 22 days delay on the part of the plaintiffs to take step in relation to the first defendants.

[9] The plaintiffs say they only know that the first defendants are residing in Canada, but they are unaware of their (first defendants') whereabouts in Canada. In that case the plaintiffs should have made application to seek to serve the summons out of jurisdiction pursuant to Ord.11, r.2 and to substituted service by way of advertisement in one of the daily news papers circulated in Canada, which the plaintiffs failed to do.

[10] In this matter I am to inquire whether there had been inordinate and inexcusable delay giving rise to a substantial risk that a fair trial would not be possible or was such as was likely to cause or to have caused serious prejudice to the defendant,

[11] Inordinate means so long delay that proper justice may not be able to be done between the parties. The delay in this case, I should say, not inordinate as the delay is just less than a month. One cannot say that the delay was likely to cause or to have caused serious prejudice to the first defendants particularly in the circumstance where summons

was still not served on the defendants, see In **Re Manlon Trading Ltd** [1995] 4 All ER 14, the Court of Appeal, Civil Division.

[12] It will also be noted the delay after issue of proceedings was neither inordinate nor inexcusable in this matter.

[13] The plaintiffs are not guilty to contumelious conduct. The power should be exercised only where the court is satisfied 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, see **Birkett v James** [1978] AC 297 at 318, **(Lord Diplock)**.

[14] In my view, the delay had caused no prejudice or serious risk of prejudice to the defendants and that therefore the action should be allowed to proceed.

Conclusion

[15] For the above stated reasons, I would permit the case to proceed as there was no prejudice caused to the defendants and fair trial still possible. However, the court may deal the O.25 r.9 notice as it were a summons for directions pursuant to O.25 r.9 (2). That rule provides that:

2) 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.***

[16] I therefore venture to deal the notice issued by the court for show cause as it were a summons for directions. I accordingly make the following directions:

(i) The Plaintiff will be granted permission to proceed with the matter;

(ii) The Plaintiff is to file within 21 days application seeking leave for service out of jurisdiction and application seeking leave for substituted service by way of advertisement in one of the daily news papers circulated in Canada, if need be;

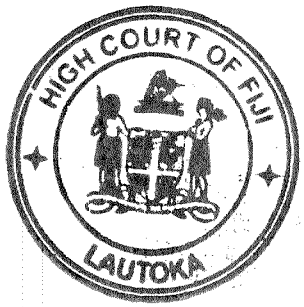
(iii) The plaintiff must within 21 days take out and serve a summons for directions with regard to second defendant;

(iv) The action will be struck out if these directions are not complied with;

(v) Make no order as to costs;

(vi) The matter is now adjourned to 19 May 2014 for mention only; and

(vii) Orders accordingly.



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M H Mohamed Ajmeer

Master of the High Court

At Lautoka

12 May 2014

Solicitors: Messrs Qoro Legal Barristers & Solicitors
Messrs Reddy & Nandan Lawyers Barristers & Solicitors