

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 332 of 2013

BETWEEN : KALARA VUSONIWAILALA Tenant of 52 Ratu Sukuna Road.

PLAINTIFF

AND : LEECORP LIMITED a limited liability company having its registered office at Suva in
the Republic of the Fiji Islands.

DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Anand Singh - for the Plaintiff
Ms. Choo - for the Defendant

DATE OF RULING: 19th July, 2017

RULING

*[Defendant's Summons to Strike Out the Plaintiff's Writ of Summons
and the Statement of Claim pursuant to Order 25 Rule 9 of the
High Court Rules, 1988 and the Inherent Jurisdiction
of this Honourable Court]*

(A) INTRODUCTION

1. The Defendant filed a Summons For Strike Out on 31st December, 2014 and sought for the following orders-
 - (i) The Plaintiff to show cause why the proceedings should not be struck out for want of prosecution;
 - (ii) That the Plaintiff's claim be struck out for want of prosecution;
 - (iii) Such further or other order as to the court seems fit; and
 - (iv) The cost of this action be paid by the Plaintiff on full indemnity basis.
2. The Defendant relied on the affidavit in support deposed by Lemeki Sevutia.
3. This application is made pursuant to *Order 25, r 9 of the High Court Rules 1988* and the *Inherent Jurisdiction* of this Honourable Court.
4. Subsequently, the Plaintiff filed an Affidavit in Response deposed by Kalara Vusoniwailala on 09th February, 2015.
5. The Defendant filed an Affidavit in Reply to the Plaintiff's Affidavit in Response on 12th February, 2015.

(B) BACKGROUND

6. The Plaintiff's tenancy on the property comprised and described as CT 38381 Lots 9 and 10 on DP 2226 had expired and the Defendant who once owned the property refused to grant a renewal of the tenancy for a further term.

The Defendant had not renewed the Plaintiff's Lease Agreement from February 2013 due to numerous breaches of the Tenancy Agreement and illegal restructure of the said property without the consent of the Defendant.

The Plaintiff filed her claim against the Defendant but the Defendant in or about May 2014, sold the said property to one Binjie Investment Limited. The Plaintiff has since refused to vacate the property.

The Plaintiff in her claim seeks inter- alia;

- (a) A declaration that the Plaintiff's acceptance of the Lease is the result of unconscionable conduct of the Defendant;

- (b) An order for a Lease as represented to the Plaintiff on such terms and conditions as the Court deems just; and
- (c) Damages in a sum or sums as specified prior to trial in respect of the losses and damage detailed in the claim.

The Defendant in its Defence states that these redresses are now of no consequences and the claim is rendered invalid as the court can now no longer make an order against the Defendant and the damages sought above are nullified as Defendant is no longer the lessor by virtue of the sale of the said property to Binjie Investment Limited.

(C) CHRONOLOGY OF PLEADINGS FILED

7. Following documents were filed:

- (a) Plaintiff filed a Writ of Summons on the 13th November 2013.
- (b) Statement of Defence filed on the 19th December 2013.
- (c) On the 20th January, 2014 notice of Change filed by Messrs Singh & Singh.
- (d) Notice of intention to proceed filed on the 1st October 2014.
- (e) Summons for Strike out filed on the 31st December 2014.

(D) THE LAW

8. This application is made pursuant to Order 25 Rule 9 of the High Court Rules 1988, which *inter-alia* states as follows:

"9. - (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.'

9. Abovementioned rule was introduced on 13th September 2005. After the introduction of this rule the Court of Appeal has had the opportunity to review the law on want of prosecution in Fiji both before and after the coming in to effect of the same.
10. Prior to the introduction of Rule 9, the Court of Appeal in Abdul Kadeer Kuddus Hussein v. Pacific Forum Lime Civil Appeal No. ABU 0024 of 2000s (30th May 2003) in

readopting the principles expounded in Birkett v. James [1978] AC 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 amount 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."

11. Basically, the Court of Appeal affirmed the principle enunciated in Brikett v. James (1978) AC 297 (1977) 2 ALL ER where the House of Lords held as follows:-

"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 pre-emptory 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 (in the present case Defendant's lawyers); (b) that such delay would give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or is such as it 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 then and a third party."*

12. After the introduction of Order 25 rule 9, Birkett v. James was revisited by the court of Appeal. This largely arose due to the case management system introduced by the Court to agitate those cases which were lying idle in the registry for many years some ranging over 20 years. This High Court had tended to strike-out the actions based on delay alone.
13. The first case which went on appeal and decided by the Court was Bhawis Pratap v Christian Mission Fellowship Civil Appeal No. ABU 0093 of 2005 (14 July 2006). His Lordship Mr. Justice Coventry struck out the action on a number of grounds one of which was delay of 7 years since the action was filed. On appeal, after reviewing the law on want of prosecution the Court of Appeal affirmed that the applicable law in this country is still as was pronounced in Brikett v. James. At para. 23 of judgment the Court unreservedly stated:-

"[23] - 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 Lime Civil Appeal No. ABU 0024 of 2000 - FCA B/V 03/382* the court, in readopting the principles expounded in *Birkett v. James [1978] AC 297; [1977] 2 All ER 801*"

(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."

14. Again the Court of Appeal was invited to consider the position of *Order 25 rule 9* in the *Trade Air Engineering (West) Ltd v. Taga Civil Appeal No. ABU 0062 of 2006 (9 March 2007) (per Gordon P, Barker and Scott JJA*. In considering the appeal the Court categorically formulated the following question:-

"[4] - The central question raised by this appeal is whether the Court's powers under *O 25 r 9* should be exercised in substantial conformity with the powers it already possessed prior to the making of the new rule or whether an additional jurisdiction, exercisable on fresh principles, has been conferred on the Court."

15. In observing the new feature of *Order 25 rule 9* their Lordships stated:-

"[15] - A notable feature of the new *Order 25 rule 9* is that it confers on the court the power to act on its own motion. Within our present High Court Rules such a power is only rarely conferred. One example is *O 34 r 2 (6)*, another is *O 52 r 4*. In a number of overseas jurisdictions much wider case management powers have been given to the High Court and most of these powers are exercisable upon the court's own motion. Such developments have however not yet reached Fiji."

16. Their Lordships then conclusively and unanimously held that:-

"[16] - 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."

17. The issue then is whether delay alone is sufficient for the Court to strike-out an action for want of prosecution. The Court of Appeal in *New India Assurance Company Limited*

v. *Rajesh Kumar Singh* Civil Appeal Number ABU 0031/1996 emphasized that while inordinate and inexcusable delay might be established, these factors were not, *on their own, sufficient to warrant the striking out of the action.*

18. The Court of Appeal in *Bhawis Pratap v Christian Mission Fellowship (supra)* discussed and distinguished the new rules which applied in England after the introduction of the new Civil Procedure Rules after 2000 inter-alia as follows:-

"[28] - *Securum Finance Limited v. Ashton* (*supra* is especially instructive since it explains why, following the introduction of the new Rules, the courts in England and Wales have been more ready to strike out actions on the ground of delay alone. At paragraphs 30 and 31 Chadwick L.J wrote that:

"30 the power to strike out a statement of claim is contained in CPR r3.4. On particular, rule 3.4 (2) (b) empowers the court to strike out a statement of case ... if it appears to the court that the statement of case is an abuse of the court's process. ...In exercising that power the court must seek to give effect to the overriding objective set out in CPR 1.1: see rule 1.2 (a). The overriding objective of the procedural code embodied in the new rules is to enable the court "to deal with cases justly": see rule 1.1 (1). Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into accounts the need to allot resources to other cases".

"31 In the *Arbuthnot Latham* case this court pointed out in a passage which I have already set out that:-

"In *Birkett v. James* the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration which was in issue. From now on it is going to be a consideration of increasing significance."

[29] In Fiji there is as yet no equivalent of the English CPR r 1.1 or 3.4 and therefore the approach exemplified in *Securum* has not yet become part of our civil procedure.

19. Thus the developments which have been taken in England after the introduction of the new rules do not apply in this instant to Fiji without the introduction of new rules. As such the principle in *Birkett v James* applies on all fours. This was also confirmed by the Court of Appeal again in 2008; *Avinash Singh v Rakesh Singh, Nirmala Devi & Sarojini Kumar* Civil Appeal No: ABU 44/06 (8 July 2008).

(E) ANALYSIS and DETERMINATION

20. I have perused the court file in terms of the documents filed as required by the set down procedures and the *High Court Rules 1988* accordingly.
21. I reiterate the abovementioned paragraph 7 (a) - (e) inclusive which informs this court the steps taken and the documents filed by the Plaintiff and the Defendants in this proceedings.
22. This case was commenced by the Plaintiff on 19th November, 2013. The same was served on the Defendant on 20th November, 2013 and the Affidavit of Service filed.
23. No further steps were taken and or the pleadings filed by the Plaintiff hereinafter.
24. Whereas, the Defendant after the service of the Plaintiff's Writ of Summons, filed an Acknowledgment of Service on 22nd November, 2013 and thereafter Statement of Defence on 19th December, 2013.
25. It is noted from the perusal of the Court file that no reply to the Defendant's Statement of Defence was filed rather the Plaintiff filed a Notice of Change of Solicitors on 20th January, 2014. Notice of Intention to Proceed was filed on 01st October, 2014.
26. The Defendant then filed a Summons For Strike Out on 31st December, 2014 and sought for the Orders as enumerated hereinabove at paragraph 1 (i)-(iv) inclusive.
27. Subsequently, on 09th February, 2015, the Plaintiff filed her Affidavit in Response and in summary stated as follows-
 - a. That she made a number of attempts to discuss settlement with Mr. Lee of the Defendant Company until May, 2014. Mr. Lee promised her that he would consider the various issues raised by me and return to her.
 - b. That she was shocked to find out that he had secretly transferred the subject property to a Company namely Binjie Investment (Fiji) Limited.
 - c. The buyer of the Company gave her notice to quit, the matter became part of the Civil Action No. 266 of 2014, which was finally disposed of on 11th December, 2014.
 - d. That during the period up to the disposal of the Binjie Investment litigation, her primary focus has been Binjie Investment (Fiji) Limited, however, in September, 2014 instructed her Solicitors to proceed with the action against the Defendant.
28. The Affidavit in Reply was filed by the Defendant to this application on 12th February, 2015 and in summary responded as follows-

- a. The **Order 25 Rule 9** application relates to the fact that the **Plaintiff** has failed to do anything in this case for a period in excess of **6 months**.
 - b. That since 28th February, 2013, when the Plaintiff's Lease expired the Plaintiff has remained on the property as a trespasser.
 - c. That it is no business of the Plaintiff to whom the Defendant wishes to sell its property.
 - d. On 11th December, 2014, the Court granted vacant possession of the subject property to Binjie Investment (Fiji) Limited however, it appears that the Plaintiff continues to illegally occupy the property.
 - e. The Plaintiff filed a Notice to Proceed, however, took no action to proceed with this matter and it lay dormant for more than two (2) months. No reply to Defence has been filed and served on the Defendant since the Statement of Defence was filed on 19th December, 2013.
 - f. The Defendant now no longer owns the property and the Court has granted vacant possession of the property to Binjie Investment (Fiji) Limited, therefore, it would be an exercise in futility to proceed with this matter any further.
 - g. The action laid dormant for more than a year now.
 - h. The prejudice to the Defendant is substantial as it is **not the owner** of the property so **relief against the Defendant is of no consequence and the Defendant continues to accrue legal fees as a consequence of this action**.
29. It can easily be noted and confirmed from the Court record that the Plaintiff commenced this proceedings on 19th November, 2013 but failed to take any **proactive measures** to diligently pursue this matter to its final conclusion and determination.
30. Further, no active action was taken by the Plaintiff to at least ensure that the **pleadings** in this case were completed, not even a **Reply to the Defendant's Statement of Defence** was filed and served.
31. There was a change of Solicitors filed by the Plaintiff on 20th January, 2014. The new Counsel coming in to represent the Plaintiff only filed a **Notice of Intention to proceed** on 01st October, 2014 and did not bother to expeditiously file and serve a **Reply to the Defendant's Statement of Defence**. From the time of Change of Solicitors and filing of the Notice of Intention to proceed with the Plaintiff's case, it took the new Counsel on record some **nine (9) months** do so. It should be noted that a Notice of Intention is not a **pleading** in itself rather an intention to inform the other side that the Plaintiff intends to proceed with the Matter. Further, a Notice of Intention to Proceed is filed after a period of **lapse of six (6) months' time frame** when no active action has been taken by the Plaintiff with the cause of the action in terms of the **High Court Rules, 1988. Order 3 Rule 5** refers.

32. The question that arises in mind here is why didn't the Plaintiff file any Reply to the Defendant's Statement of Defence?
- Is it because the Defendant now is not the owner of the property in Question comprised in Certificate of Title No. 38381 Lot 9 and 10 on Deposit Plan No. 2236 situate at 52 Ratu Sukuna Road, Nasese, Suva and that the Court has also granted the order for vacant possession of the property to Binjie Investment (Fiji) Limited against the Plaintiff, Kalara Vusoniwailala in Civil Action No. HBC 266 of 2014?
 - The Court also noted that currently two (2) applications are impending before this Court commenced by the same Plaintiff Kalara Vusoniwailala against Leecorp Limited and Binjie Investments Limited case reference HBC 332 of 2013 and 345 of 2014 respectively.
 - The claim against Leecorp Limited was filed on 19th November, 2013 and whereas against Binjie Investments Limited one year later on 08th December, 2014.
33. Documentary evidence before this court shows that the initial owner of the property in Question Leecorp Limited (Defendant), had refused to grant a renewal of the Tenancy Agreement to the Plaintiff from February, 2013.
34. Thereafter, he sold the property to Binjie Investments Limited around May, 2014. Binjie Investments Limited sought for an order for vacant possession and was accordingly granted vide Case Reference HBC 266 of 2014
35. The onus is on the Plaintiff to provide a cogent and credible explanation for not taking any steps to advance the litigation in this case after the 19th December, 2013, when the Defendant filed its Statement of Defence.
36. After 19th December, 2013, no action was taken by the Plaintiff which prompted the Defendant to file the current Summons for Strike Out in terms of Order 25 Rule 9 asking the Plaintiff to show cause why this matter should not be struck out.
37. This meant that since the last pleading was filed on 19th December, 2013, and until the Defendant filed and served the Order 25 Rule 9 Summons on 31st December, 2014, that over a year had elapsed. In fact the Law requires that the parties to the proceedings must ensure that the pleadings in terms of the Law must be filed and served on the parties to proceedings within a particular time frame provided for to complete the pleadings and allow the case to be heard and determined either before the Master or a Judge of the High Court accordingly.
38. This court is therefore required to deliberate on the following issues in terms of the impending Order 25 Rule 9 application to arrive at a determination whether to dismiss the cause or deal with the application as if it were a summons for directions accordingly:

- (i) that the default has been **intentional and contumelious**, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or
- (ii) that there has been **inordinate and inexcusable delay** on the part of the Plaintiff or his lawyers, (**In this case the Plaintiff's lawyers**); and
- (iii) 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."

Default is contumelious

39. "Contumelious" in the context of want of prosecution refers to disobedience of any orders or directions of this court.

This case was commenced by the Plaintiff by filing a Writ of Summons coupled with a Statement of Claim and same was served on the Defendant on 20th November, 2013. An Acknowledgment of Service was filed by the Defendant. Thereafter, in terms of the *High Court Rules, 1988*, the Defendant followed the procedures as per the requirement of the *High Court Rules, 1988* and therefore filed and served its **Statement of Defence** as per the requirement of the High Court Rules. The matter was yet to be listed before this Court with a **Summons for Directions** for any directions to be made as it was premature since no **Reply to the Statement of Defence** was filed. Therefore, there was no disobedience of any Court directions, since no directions were made until the Defendant filed and served his application for the striking out of the Plaintiff's Statement of Claim.

For the above rational, the first arm of the test does not apply herein.

Delay

40. The test for delay is both '*intentional*' and '*inordinate*'.

Intentional

For these two elements to be satisfied, the Defendant must establish that the delay was intentional on the part of the Plaintiff. In other words the Plaintiff has filed an action with having no intention to proceed with the same.

The Plaintiff submitted that the alleged delay ought to be computed from 01st October, 2014 when the Notice of Intention to Proceed was filed by the Plaintiff. The end date for the computation of the alleged delay is 31st December, 2014 when the Summons was filed for the striking out. Further, the Writ alleges a number of causes of action including a breach of statutory provisions as contained in the Commerce Decree 2010. The Plaintiff's action is in relation to business premises that the Plaintiff was leasing from the Defendant.

The Defendant then sold and transferred the property. Therefore the Plaintiff had to defend the action by the New Owner, Binjie Investment (Fiji) Limited to avoid an eviction order and bring formal proceedings against the new owners which the Plaintiff did in both instances. Therefore, priority given to the eviction proceedings brought by the new owners, Binjie Investment (Fiji) Limited. Hence the delay.

The Defendant submitted that the delay was intentional. The Plaintiff filed its Writ of Summons on 19th November, 2013 and for more than 1 year, the Plaintiff did not take any proactive measures to move the matter forward expeditiously. From 19th December, 2013 when the Defendant filed its statement of Defence the Plaintiff allowed the matter to lay in abeyance until almost a year later when the solicitors for the Plaintiff on the 01st October, 2014 filed a Notice to Proceed. However, in terms of Order 3 Rule 5 of the High Court Rules, 1988, a Notice to proceed must give not less than one month's notice of their intention to proceed. Reference was made to the case of *Deo v Ascot Motors Proprietary Limited [2011] FJHC 453; HBC331.2008 (18 August 2011)* Justice Calanchini on the issue of Notice of Intent made this observation-

'This no doubt was a reference to Order 3 Rule 5. I do not consider that this observation adds a great deal to the principal issue of the delay between April 2009 and January 2011. Even if a notice under Order 3 Rule 5 had been filed and served it would have made no difference to the issue of delay unless the Plaintiff had taken a further step in the action.'

The Defendant stated that in this case the matter didn't proceed despite filing a notice to do so. The Plaintiff has not given any genuine reason why the matter should not be struck out only to say that they had prioritized action no. 266 of 2014 and can be implied she chose to dishonor the Rules of the High Court with the action. Nothing estopped the Plaintiff from pursuing this action.

41. The other requirement is the 'inordinate' delay.

Inordinate

This relates to the length of delay. The Plaintiff submitted that the issue for consideration is if there was inordinate delay. The Plaintiff filed the Notice of Intention to proceed on 01st October, 2014. The filing of this Notice was necessary compliance of the Rules of the High Court. Even if is no step in the proceedings, it clearly evinces the Plaintiff's intention that she was intending to proceed with her proceedings against the Defendant herein.

He submitted that what constitutes inordinate delay is a question of fact to be determined from the circumstances of the case. In all the circumstances placed before the court, it is submitted that there has not been an inordinate delay on the part of the Plaintiff. In other words the delay was not such that it ought to attract negative sanction of the court.

Further, that the delay has not been of a kind that can be classed as inexcusable. The alleged delay even if inordinate is excusable on the ground that the Plaintiff was prosecuting and defending proceedings connected with the subject matter of these proceedings, that is, the lease pertaining to the property.

The **Defendant** sets out the chronology of pleadings in its written submissions stating as follows-

- *Plaintiff filed a Writ of Summons on the 13th November 2013.*
- *Statement of Defence filed on the 19th December 2013.*
- *On the 20th January, 2014 notice of Change filed by Messrs Singh & Singh.*
- *Notice of intention to proceed filed on the 1st October 2014.*
- *Summons for Strike out filed on the 31st December 2014.*

The Defendant submitted that the Plaintiff filed a Notice of Intention to Proceed on 01st October, 2014. Despite filing this Notice to proceed, they failed to file any **Reply to the Defendant's Statement of Claim**. Issuing a Notice of Intention to proceed is not a step in a proceeding in any cause or matter. It does not progress the matter or cause. It merely gives a notice to the other party of the party's intentions. The Plaintiff has not given any genuine reason why the matter should not be struck out but said gave priority to action no. 266 of 2014. **Paragraph 3 of the Plaintiff's affidavit states that she had made several attempts to discuss settlement with Mr. Lee of the various issues raised but failed to annex any evidence of any such correspondences.** That despite the **delay of more than a year**, the Plaintiff deposes at paragraph 7 that she was in process of filing necessary reply to defence, however she fails to annex a proposed Reply to Defence. The Plaintiff was supposed to file a Reply within 14 days of being served with a Defence.

Therefore the Defendant submits that the delay on the part of the Plaintiff has been intentional and contumelious. There is **no excuse for the delay** and for more than a year the Plaintiff has slept on her rights to pursue her claim with diligence and now the Defendant is being prejudiced by the action or inaction of the Plaintiff.

In the above circumstances I am of the finding that the Plaintiff contributed to the delay in filing of their respective pleadings which has caused this matter to remain pending in the court. In particular the Plaintiff failed to file any Reply to the Statement of Defence within the time frame of 14 days allocated in the law nor did she file any application seeking the leave of this court to file and serve the Reply to the Defence.

However, the Plaintiff has **explained her delay** sufficiently which in the given circumstances is acceptable to this court.

Even if the **Defendant** succeeded in establishing **inordinate and inexcusable delay**, these **factors** would not, on their own, be **sufficient** to warrant the **striking out** of this action.

Prejudice

42. It is trite law that the **Defendant** must establish that he is prejudiced by the delay.
43. The **Defendant** submitted that before the issue of prejudice can be discussed; acceptance and allowance of the Plaintiff's whole claim will be an abuse of process as the Defendant is no longer the proprietor of the said property therefore all relief sought against the Defendant is of no consequence. The Defendant is incurring unnecessary legal costs in having to defend this matter which has no cause of action against the Defendant and is absolutely non-meritorious. The Plaintiff is well aware that the Defendant has since sold the property to Binjie Investments Limited and their relief against the Defendant is a misconception and thus unenforceable. Permitting this action to continue would be an abuse of process. This court has inherent jurisdiction powers as per *Grovit* (supra) to strike out the action for want of prosecution.
44. The Plaintiff submitted that the Defendant has not made any allegations of prejudice be the delay. In fact it has sold the subject property and has had the advantage of the sale proceeds whereas the Plaintiff still faces an uncertain future relative to the lease. The Defendant has therefore failed to establish any grounds for the striking out of the Plaintiff's claim.
45. The matter is still before this court and the status of the matter in terms of pleadings the Plaintiff will have an uphill battle to file and serve a Reply to the Defendant's Statement of Defence filed on 19th December, 2013.

However, this court can be mindful of the fact that the court should give a **tight timelines** for the parties to comply with the same bearing in mind the nature of the substantive issue.

Further, this court is also aware of the fact that there is also a simultaneous case HBC 345 of 2014 filed by the same Plaintiff against the new owner (Binjie Investments Limited) of the property who succeeded in obtaining a vacant possession order against the Plaintiff in a third Court file referenced HBC 266 of 2014.

The overriding objective of the **procedural rule** and the requirement in '*Birkett v James*' is to enable the court "to deal with cases justly". Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into accounts the need to allot resources to other cases".

In this case, I reiterate that there are two (2) pending cases filed by the same Plaintiff against the initial owner of the property, Leecorp Limited and new current owner Binjie Investments Limited. The particulars of the Statement of Claim in both cases speak for themselves. This Court is of the view that both cases can be consolidated and heard together once directions are made by the court for the parties to comply and complete the cause of action expeditiously. This case was initiated in 2013, both Defendants are represented and documentary evidences together with any witnesses may be around to enable court to hear and conclude the cases accordingly.

This will certainly alleviate any prejudice to the Defendant.

Interest of Justice

46. Even if the Defendant satisfies the requirements in *Birkett v James*, the courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible. The Court of Appeal in *Chandar Deo v Ramendra Sharma and anor: Civil Appeal No. ABU 0041* of (23 March 2007) (Unrep) stated as follows:-

[15] A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the Birkett v. James principles namely: 'In view of the delays which have occurred, is a fair trial now possible?' (Also case of Department of Transport v, Chris Smaller (Transport Limited [1989] AC 1197 refers.

47. In *Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244 at 248*. Eichelbaum CJ reviewed the authorities and concluded:

'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 defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [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.'

48. Even the courts are reluctant to strike- out any matter summarily which has certain merits in it on the grounds of abuse of process. In *Dey v. Victorian Railway Commissioners* (1949) 78 CLR 62, at 91 Dixon J said:-

'26. This principle was restated by the Court of Appeal of Fiji in Pratap v Kristian Mission Fellowship [2006] FJCA 41. Also refer to; New India Assurance Co Ltd v Singh [1999] FJCA 69.

The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include; Metropolitan Bank Ltd


v Pooley (1885) 10 App Cas 210; Dey v. Victorian Railway Commissioners (1949) HCA 1; (1949) 78 CLR 62; Birkett v James [1978] AC 297; Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244; Agar v Hyde (2000) 201 CLR 552. Indeed the passage from Abdul Kadeer Kuddus Hussein v Pacific Forum Line reflects closely Birkett v James (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'

49. I have carefully perused the substantive application, the pleadings filed so far, the written and oral submissions coupled with the applicable laws and the case authorities and find as follows:-
- (i) *The delay is neither inordinate nor intentional;*
 - (ii) *Explanation has been provided by the Plaintiff for the delay as such the Plaintiff has overcome the factor of not inexcusable;*
 - (iii) *The default is not contumelious and the Plaintiff has not disobeyed any orders of this court;*
 - (iv) *The Defendant has not suffered any real prejudice; and*
 - (v) *In the interest of justice, a fair trial is still possible.*
50. For the aforesaid rational, I make the following orders:-
- (a) Application seeking dismissal of the substantive action is hereby dismissed;
 - (b) This case to take its normal cause;
 - (c) Further directions in terms of the compliance of subsequent pleadings to be made accordingly on 26th July, 2015 at 9.00 am.
 - (d) Each party to bear their own costs at the discretion of this court.

Dated at Suva this 19th Day of July, 2017



cc: Singh & Singh Lawyers, Suva
R.Patel Lawyers, Suva


VISHWA DATT SHARMA
Master of High Court, Suva