

**IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION**

Admiralty Action No.: HBG 01 of 2014

BETWEEN : **WIN FENG MARLIN LTD** **PLAINTIFF**

AND : **ZHEJIANG XINLONG OCEAN FISHERIES CO. LTD** **1ST DEFENDANT**

: **SHENZHEN SHUIWAN PELAGIC FISHERIES CO. LTD** **2ND DEFENDANT**

APPEARANCES/REPRESENTATION

PLAINTIFF : No Appearance [Mamlakah Lawyers]

DEFENDENT : Mr K Jamnadas [Jamnadas & Associates]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 21 January 2019.

INTERLOCUTORY RULING

[Striking Out action for want for prosecution pursuant to Order 25 rule 9 High Court Rules]

INTRODUCTION

1. It is the Defendants summons dated 27 February 2018 seeking orders to strike out and or dismiss the claim for want for prosecution as no steps have been taken by the Plaintiff in the cause for over six months.

They further seek orders that the sum of \$343,900 paid into the court as security for the release of the vessel 'Zhong Yang 19' is returned to the Defendants by way of payment of the full sum into the Trust Account of Jamnadas & Associates.

Said application is made under Order 25 rule 9 of the High Court Rules.

2. Despite service, the Plaintiff and or its solicitors have failed to appear and contest the application.

BACKGROUND

3. Via a Writ of Summons dated 05 August 2014, the Plaintiff claimed a sum of \$265,974.41 being sum due and owing for supply of motor vessels spare parts from the year 2012 to 2013 at the request of the First Defendant.

A statement of claim was later filed on 27 February 2015.

4. There were other applications made for arrest of vessel Zhong Yang 19 and the Defendant's being restrained from removing the vessel from the jurisdiction.

Orders were subsequently made on these applications.

5. On 18 August 2014, an Acknowledgment of Service was filed by the 1st and 2nd Defendant.

6. Later on 26 September 2014, on an application by the Defendants, orders were made for the Defendants to deposit \$343,900 as security deposit for the release of the vessel Zhong Yang 19 and the dissolution of the injunction against the vessel.

7. The Defendants filed their statement of defence and counterclaim/setoff on 13 March 2015.

8. A reply to statement of defence and defence to counter claim was filed on 30 March 2015.

9. On or about 28 April 2015 a Summons for Directions was filed and was first called on 28 May 2015 when orders were granted. Matter was adjourned to 25 June 2015 to check on compliance.

10. The Plaintiff filed its Affidavit verifying list of documents on 03 August 2015.

11. On 20 August 2015 the Plaintiff's counsel informed the Court that there was some error in the list so filed. They were granted further time to file an amended list. One was not filed until 19 February 2016.

The Defendants thereafter were given time to file and serve their list.

12. Court records show that since 09 May 2016, the Plaintiff and or its Counsel have failed to appear in Court. No reason was provided for their non-appearance.

13. On 19 September 2016 the matter was taken off the Court's List. Reasons stated was that the Plaintiff has failed to appear in Court and an appropriate application may have to be filed to bring the matter to conclusion.

14. On 13 October 2017, the Defendants filed the said application for striking out for want for prosecution.

LAW

15. Order 25 Rule 9 of the High Court reads:

- (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.*

16. In the case of **Gaffar Ahmed & Others v. Ligairi & Others** a Suva High Court Civil Action HBC 100 of 2003, Winter J dealt with an application by the 5th and 6th Defendants for an order that the Plaintiff's statement of claim be struck out on the grounds that it is an abuse of process of the court.

In paragraph 8 to 14 he described what the law is when dealing such application:

- [8] *The rule of law requires the existence of courts for the determination of disputes and that litigants have a right to use the court for this purpose. Courts must also, however, be alert to their processes being used in a way that results in an oppression or injustice that would bring the administration of justice into disrepute. This is because "the courts authority possessed neither by the purse or the sword ultimately rests on some sustained public confidence in its moral sanction" (Justice Felix Frankfurter in Baker v Carr, 369 US 186267 [1962]).*
- [9] *In exercising this jurisdiction the court is then protecting its ability to function as a court of law in the case before it as much as in the future (cf Reid v NZ Trotting Conference [1984] 1 NZLR 8 at page 9 per Richardson J).*
- [10] *While there is a caution to be exercised when the court considers strike out applications and the jurisdiction should be sparingly exercised only in exceptional circumstances there comes a point in time when it should be exercised and in those plain and obvious cases the court should not hesitate to strike out for an abuse of process.*
- [11] *Deliberate and inexcusable non-compliance with a preemptory court order can be justification for striking out proceedings (cf Birkett v James [1978] AC 297, although dealing with dismissal for want of prosecution the principles are relevant).*
- [12] *This disobedience to preemptory orders may be treated as indicative of contumelious conduct (cf Tolley v Morris [1979] 1 WLR 592, 603 per Diplock LJ).*
- [13] *The basis of the principle establishes that orders of the court must be obeyed and a litigant who deliberately and without proper excuse disobeys such orders cannot be allowed to proceed with his*

claim. Accordingly, while courts exist for the determination of disputes and litigants have a right to use the courts for that purpose those rights are not absolute as they cast on the litigant the responsibility of diligently pursuing his claim and obeying the court's orders.

[14] As observed by my brother Justice Coventry in *NBF Asset Management Bank v Adi Sainimili Tuivanuavou*, Civil Action No. 174 of 2000:

"There has been a sea change in the approach to delay in most if not all common law jurisdictions. Further, a new and important factor has entered the equation. That factor is the use of the court's time and resources. The more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition, and want their cases heard within a reasonable time. Courts now expect plaintiffs, at the time of issue of process, to be ready and willing to pursue their actions with reasonable diligence and expedition. There will, in unusual circumstances, be exceptions. The days of commencing an action, taking a few steps and then leaving it in abeyance for years are gone. If there are genuine settlement talks in train or matters are extremely complicated then time will of course be given. However, the courts cannot now contemplate the circumstance where a plaintiff commences an action, takes a few steps and then lets it sleep for months or years. Only to take a few more steps and then let it go to sleep again.

The general public would be surprised and understandably incredulous if it were widely known that cases can be commenced, then left to lie for years yet still be able to be pursued, unless it would be shown it was not possible to have a fair trial or there was serious prejudice to the defendant."

DETERMINATION

17. The progress of the Claim has been lamentably slow. The Defendants have breached the time for filing of their affidavit verifying list of documents.

They claim that the amended list so filed by the Plaintiff is defective. However the Court record has no mention of this. Neither did they move the Court to have the Plaintiff's list struck out.

18. The Plaintiff on their part have also failed to take any further action after filing their list of documents.

In addition there has been no appearances by the Plaintiff or it's Counsel since 19 May 2016 and no reason has been provided for their non -appearance.

Neither have they filed any affidavit to show cause why the claim should not be struck out.

19. In its submission the Counsel seeks that the Court takes judicial notice that the Counsel for the Plaintiff was unable to and had restriction in practicing from 01 March 2016 till 02 October 2017.

However the onus was on the Counsel to inform his client of the status of his practicing certificate and the client to decide what further action they wished to take. The Counsel having restriction in practicing till 02 October 2017 did not permit the Plaintiff not to attend Court and leave the matter in abeyance for a year after taken off the Court's Course list.

20. The Defendants have thereafter made 04 appearances before the matter was taken off the list. It claims that it has been prejudice by asking to pay the security of \$343,900. This is a significant amount of money and has affected the Defendants' business.

They also claim that witnesses crucial to the case have left the company and the company's attempt to locate them has been futile.

It is their submission that in the interest of justice no further time should be wasted. Plaintiff's by not taking any further action in last one and half years prior to filing I the application shows they are not interested in prosecuting with the matter any further.


21. There is blatant disobedience of the Court's order since 19 May 2016.
22. I find that there has been inordinate and inexcusable delay by both the parties.
23. I find that having regard to all of the matters discussed above, balance of justice favours in dismissing the action. Furthermore it is in public interest that the Court does not permit the matter which the parties have left in abeyance to take up the valuable and important time of the Court and delay access to Court for other parties who act promptly in pursuing their claims.

FINAL ORDER

24. That this action on its entirety will be dismissed for want for prosecution pursuant to Order 25 rule 9 of the High Court Rules.
25. Given the circumstance of the case parties are to bear own costs.

26. The security deposit in sum of \$343,900 so paid by the Defendants on 29 September 2014 shall be released to the Defendant forthwith by way of payment of the full sum into the Trust Account of Jamnadas & Associates.





Vandhana Lal [Ms]
Acting Master
At Suva.