IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 135 of 2011

BETWEEN : **ORISI TAMANI** of Lot 10, Naduru Lane, Derrick Street, Raiwaqa, Businessman.

Plaintiff

AND : **COMMISSIONER OF POLICE** presently at Vinod Patel Plaza, Centrepoint, Nasinu.

1st Defendant

AND : **THE ATTORNEY GENERAL OF FIJI** of Level 6, Suvavou House, Suva.

2nd Defendant

Before : Master U.L. Mohamed Azhar

Counsel : Mr. T. Duanasali (on instructions) for the Plaintiff
Mr. J. Mainavolau for the Defendants

Date of Ruling : 19th July 2019

RULING

(On striking out under Or 25 r 9)

Introduction

01. The plaintiff and his co-accused were both charged and convicted of two counts of armed robbery and each was sentenced to a term of five years on each count to be served concurrently. Both appealed the conviction and sentence to the Fiji Court of Appeal and it quashed the conviction and acquitted both of them. The plaintiff thereafter by the writ issued by this court on 19.08.2011, sued the defendants and claimed special damages for loss of income caused due to false imprisonment and legal expenses for defending the charges against him, together with the general damages for malicious prosecution. The defendants filed their statement of defence and denied plaintiff's claim. The pleadings were closed and the summons for directions was filed and orders were made for the

parties to file and serve the affidavits verifying list of documents. The plaintiff filed the affidavit on 27.05.2013 and thereafter there was no steps taken in this matter. The plaintiff then changed his solicitors and filed the notice of change of solicitors together with a notice of intention to proceed which was filed on 19.06.2014. Two years later, the plaintiff again expressed his intention to proceed with this matter and filed the notice of intention to proceed on 10.06.2016, but again failed to take steps.

02. As a corollary, this court issued a notice on its own motion on 22.11.2017 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 filed his affidavit sworn by himself. The defendants too filed an affidavit supporting court's motion. The plaintiff without filling any affidavit in response to the affidavit filed on behalf of the defendants, filed the written submission and moved the court to dispose this matter by way of written submission.

Law

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 note to Ord 25 rule 1 of Rules of Supreme Court 1976 which is equivalent to our Order 25 rule 1 (4) 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. Lord Woolf delivering the judgment of the House of Lords in **Grovit and Others v Doctor and Others** (1997) 01 WLR 640, 1997 (2) ALL ER, 417 held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. His Lordship expounded that:

> *"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 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. Though it is traditionally understood that, **Birkett v. James** (supra) deals with the ground of 'want of prosecution' only, it is evident from the illustrations given in that case that, it deals 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 whichc 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 parties.

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. The Order 25 Rule 9 by its plain meaning empowers the court to strike out any cause either on its own motion or an application by the defendant if no steps taken for six

months. 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 excusable 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. 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, 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 which causes prejudice or makes fair trial impossible should be established in order to succeed in an application under first limb of Or 25 r 9.

Analysis

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 cause why his action should not struck out under that rule. Admittedly, there has been a delay of 3 years and 5 months from the date of filling the notice of change of solicitors and till this court issued the notice. The plaintiff flailed to take any step during this period. The plaintiff in paragraphs 12 to 15 of his affidavit states the reasons for not taking any step in this matter as follows:

> *12. My Solicitors changes office and filed Notice of Change of Solicitors and Notice of Intention to Proceed which was both served on 24th June, 2014.*
>
> *13. That due to change of staff and shifting of office, my file was misplaced and was overlooked.*
>
> *14. That when my file was located, my Solicitors again filed Notice of Intention to Proceed which was served on 10th June, 2016. My Solicitors thereafter intended to file an Application for Dispensation of PTC. This was not finalized as between the period June, 2016 to October, 2017, my Solicitors had difficulties in contacting me as I had gone to my village in Kadavu and had changed my mobile number which they were unaware of. I did not contact them nor visited them as I was away in my village.*
>
> *15. In November, 2017 I travelled to Suva and visited my Solicitors and was advised that they had intended to file the said application but could not as they were unable to locate me. Notice was received from the High Court thereafter.*

18. Briefly, the plaintiff states two reasons for not taking steps for the period of 3 years and 5 months. Firstly, the file was missing at the office of his solicitors and secondly, he went to his island and changed his mobile number, as a result his solicitors could not contact him. The notice of change of solicitors filed with the first notice of intention to proceed on 19.06. 2014. The plaintiff's solicitors moved their office and in that process plaintiff's file was misplaced. In the meantime, the plaintiff went to Kadau and changed his mobile. He did not contact his solicitors, nor did he visit them as he was away in his village. He travelled to Suva only in November 2017. Accordingly, the plaintiff, who was uncontactable for his solicitors from June 2014 to November 2017, could not have given any instruction to his solicitors. Thus, it seems the plaintiff's solicitors filed the second notice of intention to proceed on 10.06.2016 without any instruction from the plaintiff. That is why the solicitors did not take any step till the court issued notice on 22.11.2017 as they were still lacking instruction from the plaintiff. The solicitors filed the second notice of intention to proceed just for the sake of it. In any event filling a notice of intention buys no immunity from the exercise of the court's powers under the Order 25 rule 9. The Fiji Court of Appeal in **Singh v. Singh** [2008] FJCA 27; ABU0044.2006S (8 July 2008) expounded that;

> *"For the avoidance of doubt, the fact that there was a Notice of Intention to Proceed under Order 3 Rule 5 of the Rules of the High Court does not prevent an application to dismiss a case for want of prosecution. It buys no immunity from the exercise of the Court's inherent powers. The application of this rule could not be used for the perpetration of an action where such a perpetration was, as here, an abuse. Further, Order 25 Rule 9 does not prevent such a course from being taken. Order 25 Rule 9(1) provides:*
>
> *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.*
>
> *The only step that was taken was the filing of the Notice of Intention to Proceed. That predated the application to dismiss a case for want of prosecution by a few days. We do not think that Order 25 Rule 9 provides the only circumstances in which the High Court could use its inherent powers. In the exercise of the discretion of the court, the inactive period which predated the filing of the Notice of Intention to Proceed was available for the Court to consider. In any event, well over the minimum 6 months had elapsed. It could not seriously be contended that the Respondents would have had to wait for another 6 months after the filing of the Notice of Intention to Proceed upon the basis that this was a step taken within the meaning of Order 25 Rule 9".*

19. Further, the plaintiff who went to his island in 2014 never returned to his solicitors until the notice issued on 22.11.2017 by this registry. There is nothing in his affidavit to say that, he at any point in time contacted his solicitors and advised them to construct the

missing file with the assistance of the registry and the counsel for the defendants. This clearly shows that, he did not have any intention to proceed with his matter. Lord Justice Parker 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."* (Emphasis added).

20. In other words, the plaintiff instituted this action against the defendants. However, he went to his island and changed his mobile number given to his solicitors too, voluntarily making himself uncontactable by his solicitors. It does not seem that he ever been interested in his case after going to his village. This conduct clearly indicates that, he did not have any intention to bring this action to conclusion. This amounts to an abuse of the process of the court. The House of Lords in **Grovit and Others v Doctor and Others** (1997) 01 WLR 640, 1997 (2) ALL ER, 417, 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".*

21. This total failure on part of the plaintiff to take any step, since filling of notice of change of solicitors, itself amounts to an abuse of the process of the court as expounded above and warrants the striking out of his action. Further, the abuse of the process of the court is one of the two examples illustrated by Lord Diplock in **Birkett v James** (Supra) for the first ground of dismissing an action that is ***the default has been intentional and contumelious.*** Thus in the light of above authorities, the action of the plaintiff should be struck out.

22. On the other hand plaintiff's solicitors, who misplaced his file in 2014, just filed the notice of intention to proceed without any instruction whatsoever from him. The plaintiff also tries to justify and mitigate his delay by blaming his solicitors for misplacing his file when they changed their office. Misplacing file is a total negligence on part of the solicitors for the plaintiff and wholly unjustified and inexcusable delay occurred due to this conduct. A diligent and responsible solicitor could have immediately constructed the file with the assistance of the registry and the solicitors of other parties to an action. However, the plaintiff solicitors failed to do so, and the affidavit of the plaintiff also does not say whether the file has been located at least now or not. In any event, the plaintiff cannot enjoy any immunity with this deplorable conduct of his solicitors for two reasons. Firstly, as a general rule a party is bound by, and responsible for the conduct of his or her solicitors (see: **Lownes v Babcock Power Ltd** [1998] EWCA Civ 211). In addition the incompetence or negligence of legal advisers is not a sufficient excuse (see: **R v. Birks** [1990] 2 NSWLR 677). Secondly, Lord Diplock, in **Birkett v. James** (supra) clearly articulated that, the inordinate and inexcusable delay to be on the part of the plaintiff or ***his lawyers***. Thus the delay caused by misplacement of file cannot be an excuse for the plaintiff in this case.

23. The acceptable and or tolerable period of inaction in any matter is 6 months as per the plain meaning of the Order 25 Rule 9. The threshold is six months and any delay thereafter would be inexcusable and inordinate so long as no reasonable excuse is provided and justice may not be able to be done between the parties or prejudice is caused to them. The reasons of being away from town after changing the mobile number and misplacing the file are not acceptable, because it is duty of the plaintiff to expeditiously prosecute this matter to the end. In the circumstances of this case, the delay of 3 years and 5 months is inordinate.

24. The next question is whether a fair trial is possible or prejudice to the defendants. Impossibility of fair trial and prejudice are two separate grounds and the court can exercise its power on any of those two grounds when there is an inordinate and inexcusable delay. In **Biss v. Lambeth, Southwark and Lewisham Health Authority** (1978) 2 All ER 125, Lord Justice Geoffrey Lane held at page 134 that:

> *The principles are set out in the Supreme Court Practice in a passage approved by Russell LJ in William C Parker Ltd v F J Ham Son Ltd as follows:*

'....this power should not be exercised unless the Court is satisfied (t) 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 Wallersteiner v Moir) or 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.'

It is clear from the passage that the risk that a fair trial is not possible is only one aspect. Prejudice to the defendant is equally a ground on which the court can exercise its power. (Emphasis added).

25. The Fiji Court of Appeal in **New India Assurance Company Ltd v. Singh** (supra) has reaffirmed the burden of the defendant to establish that serious prejudice would be caused to it by the delay. It is necessary to mention here the burden to establish the serious prejudice in cases where the court issues notices on its own motion under the same rule.

26. According to the plain meaning of this rule, the proceedings for striking out any cause for abuse of the process of the court or want of prosecution can be initiated by two ways. One is on the application of any party and the other is court's own motion. When any party makes such an application, that party has to show to the court either of the grounds that, there is want of prosecution or it is an abuse of the process of the court. This is the positive burden on the party who moves for the court to exercise its power to strike out any particular cause. That is to say the applicant, most likely the defendant, has to positively establish ***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.*** In that event, the other party probably, the plaintiff has to rebut what is established by the defendant in order to get his motion dismissed.

27. However, the situation would differ when it comes to the court's own motion. If the court issues a notice, it would require the party, mostly the plaintiff, to show cause why his or her action should not be struck out under this rule. In such a situation, it is the duty of the plaintiff to show to the court negatively that, there has been no intentional or contumelious default, there has been no inordinate and inexcusable delay and no prejudice is caused to the defendant. This is the burden of negative proof. In this case, the defendant does not, even, need to participate in this proceeding. He or she can simply say that, he or she is supporting court's motion and keep quiet, allowing the plaintiff to show cause to the satisfaction of the court not to strike out his cause. Even in the absence of the

defendant, the court can require the plaintiff to show cause and if the court is satisfied that the cause should not be struck out, it can give necessary directions to the parties. Generally, when the notice is issued by the court, it will require the defendant to file an affidavit supporting the prejudice and other factors etc. However, this will not relieve the plaintiff from discharging his or her duty to show cause why his or her action should not be struck out.

28. If the proposition, that the defendant is obliged to prove both grounds in all the cases including the cases where the court issues notice, is generally applied, it would put the court, which issued the notice on its own motion, in an awkward position. The reason being that, the court may have to still rely on the defendant, after issuing notice on its own motion and may have to ask the defendant supports it motion or may have to discharge the duty of the defendant if he or she is just supporting the court's motion without filling any affidavit. As a result it will futile the purpose of giving additional powers to act on its own motion. Thus, in cases where the courts issue notices on own motion, it is plaintiff to negative establish the issues in order to prevent his or her case being struck out by the court. In the instant case, it was the notice issued by the court on its own motion. Thus the plaintiff has burden to show that the default has not been intentional and contumelious, e.g. no disobedience to a peremptory order of the court or conduct does not amount to an abuse of the process of the court; or (2) (a) that there has not been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that the delay, if any, will not give rise to a substantial risk that may cause fair trial impossible or that may cause prejudice to the parties. The affidavit filed by the plaintiff is notably silent on this and therefore, the plaintiff failed to discharge his duty in this regard.

29. **Lownes v Babcock Power Ltd** [1998] EWCA Civ 211 is a case where the delay was caused by the default of the solicitors of the plaintiff. Lord Woof, the Master of the Rolls said in that case that,

> *Inordinate and inexcusable delay in civil litigation caused by default on the part of solicitors was totally unacceptable. Prejudice to the client resulting from the striking out of his action had to be balanced against the prejudice to the other party, other litigants and the administration of justice in general.*

30. Thus, the prejudice that may be caused by delay of one party should not be looked at a narrow viewpoint and also not to be confined to the prejudice that may be caused solely by death or disappearance of witnesses or their fading memories or loss and destruction of records. Lord Denning in **Biss v. Lambeth, Southwark and Lewisham Health Authority** (supra) held that:

> *The one solution that I see is that the prejudice to a defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much*

prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial: like the prejudice to Damocles when the sword was suspended over his head at the banquet. It was suspended by a single hair and the banquet was a tantalizing torment to him. So in the President of India case which we heard the other day. The business house was prejudiced because it could not carry on its business affairs with any confidence, or enter into forward commitments, whilst the action for damages was still in being against it. Likewise the hospital here. There comes a time when it is entitled to have some peace of mind and to regard the incident as closed. It should not have to keep in touch with the nurses saying: 'We may need you to give evidence'; or to say to the finance department: 'We ought to keep some funds in reserve in case this claim is persisted in'; or to say to the keepers of records: 'Keep these files in a safe place and don't destroy them as we may need them.' It seems to me that in these cases this kind of prejudice is a very real prejudice to a defendant when the plaintiff is guilty of inordinate and inexcusable delay since the issue of the writ, and it can properly be regarded as more than minimal.

31. The case has been hanging over the heads of the defendants for the long period of 3 years and 5 months whilst the plaintiff had been in his own village without even thinking about this case. Thus, the prejudice is more than minimal. Likewise, when it comes to prejudice to the administration of justice mentioned in **Lownes v Babcock Power Ltd** (supra) the impact of a prolonged case on the limited resources of the courts should be considered. The Fiji Court of Appeal in **Singh v. Singh** (supra) succinctly expounded this and said that:

There is also developing a new line of authority which is not utterly critical to the decision of the learned Judge in this case. Nevertheless, it would be inappropriate to fail to refer to this development. The proposition is that regard should also be had to the impact of a case on the resources of the court. Those resources are not infinite and for every case which takes up time, another case is potentially delayed. If the case which takes up time and delays another case is, on any view, an utter waste of time and resources and stands in the way of other more deserving cases being heard at an earlier time, then that is a factor which the courts cannot ignore.

Conclusion

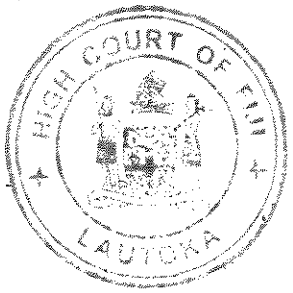
32. For the reasons expounded above, I am fully entitled to say that, the very existence of an action which the plaintiff has no interest at all in pursuing it, cannot be allowed to shuch a long period which is inexcusable and intolerable. There is no reason why the *Sword of Damocles* should be hanging over the defendant when the plaintiff has, absolutely, been

inactive and lethargic. Thus I decide that the plaintiff failed to establish to the satisfaction of this court, which issued the notice on its own motion, as to why his action should not be struck out for abuse of the process of the court or for want of prosecution under the Order 25 rule 9 of the High Courts Rules. Therefore I strike out the same. Since this notice was issued on the own motion of the court, I make no order as to cost.

33. In result, the final orders are;

a. Plaintiff's cause is struck out for want of prosecution and abuse of process of the court, and

b. The parties to bear their own cost.



U.L. Mohamed Azhar
Master of the High Court

At Lautoka
19/07/2019