IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 116 of 2022

BETWEEN:

GOUNDER SHIPPING LIMITED
PLAINTIFF

AND:

FIJI ROADS AUTHORITY
1ST DEFENDANT

AND:

MARITIME SAFETY AUTHORITY OF FIJI
2ND DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSEL:

Reddy & Nandan Lawyers for the Plaintiff
Fiji Roads Authority In-house Counsel for the 1st Defendant
Maritime Safety Authority of Fiji In-house for the 2nd Defendant

Date of Hearing:
No Hearing – Written Submission

Date of Ruling:
16 February 2024

RULING

01. The Court has issued a notice on its own motion on 19/06/2023 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 due to the failure of the Plaintiff to take any steps in the matter for over 06 months.

02. The Plaintiff then filed a Notice of Intention to Proceed on the 03/07/2023 and an Affidavit to Show Cause on the 03/10/2023 sworn by one Avinesh Vigyandra Reddy, a Director of the Plaintiff's company.

03. This cause has commenced by way of a Writ Summons filed on the 08/04/2022 claiming for damages against both the Defendants over an alleged claim of a maritime accident due to the negligence of the defendants, as filed on the 05/07/2022. Affidavit of service of the Writ of Summons had been filed on the 04/05/2022.

04. On the 03/05/2022, the Acknowledgment of Service for 1st Defendant was filed and the 2nd Defendant filed the Acknowledgment of Service on the 04/05/2022.

05. Statement of Defence for 1st Defendant was filed on the 18/05/2022. 2nd Defendant filed its Statement of Defence on the 19/05/2022.

06. Thereafter, as no steps were taken by the Plaintiff to proceed with the matter for over 13 months, the Court on its own motion had issued the Order 25 Rule 9 Notice on the 19/06/2023.

07. A Notice of Intention to Proceed was only filed thereafter on the 03/07/2023.

08. Matter was mentioned before this Court on the Order 25 Rule 9 Notice and the Summons to Strike Out on the 21/09/2023 when the Plaintiff was given further time to respond to above subject to costs. Accordingly, the Plaintiff filed its Affidavit to Show Cause in respect of the Order 25 Rule 9 Notice on the 03/10/2023 and an Affidavit in Opposition to the Summons to Strike Out on the same day.

09. An Affidavit in Reply was filed by the 2nd Defendant on the 11/10/2023.

10. Comprehensive written submissions have been filed by both the Plaintiff and the 2nd Defendant on the 25/10/2023.

11. The first matter to be dealt with is the Order 25 Rule 9 Notice issued by the Court on its own motion on the 19/06/2023. I shall therefore rule upon the same before coming to the Summons to Strike Out filed by the 2nd Defendant. Accordingly, the Court shall now proceed to make its Ruling having considered the Affidavit to Show Cause filed by the Plaintiff and the respective written submissions by the parties.

12. 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".*

13. The grounds provided in the above rule are firstly, want of prosecution and secondly, abuse of process of the Court. This is a rule that was introduced to the High Court Rules for case management purposes and was 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 unduly lethargic litigation (**see; *Trade Air Engineering (West) Ltd v Taga [2007] FJCA 9; ABU0062J.2006 (9 March 2007***).

14. Well before the introduction of this rule, the courts in Fiji have 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.

15. Justice Scott, striking out the 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)".*

16. The Court of Appeal of Fiji in ***Trade Air Engineering (West) Ltd v Taga*** (supra) held,

"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. Pursuant to the above decision of the Court of Appeal, it is 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, 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

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)

18. The first limb in the above case is ***the intentional and contumelious default***. Lord Diplock gave two examples for that first limb in the above judgment. 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.'***

19. 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 are 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".*

20. 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."

21. Master Azhar in the case of **Amrith Prakash v Mohammed Hassan & Director of Lands; HBC 25/15: Ruling (04 September 2017)** has held,
*"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."*

22. **It is however, to be noted that the Defendant, is under no duty to prove the prejudice to him/her, or for that matter for the Court to consider the prejudice to the Defendant, to strike out an action under Order 25 Rule 9 of the High Court Rules 1988, if the abuse of the process of the Court is established.** Whereas it is sufficient to establish Plaintiff's inactivity coupled with the complete disregard of the Rules of the Court with the full awareness of the consequences, for an action to be struck out pursuant to Order 25 Rule 9 of the High Court Rules.

23. The burden of proof in determining the matters under Order 25 Rule 9 of the High Court Rules may fall as a "negative burden of proof" on the Plaintiff itself. Master Azhar in **Amrith Prakash v Mohammed Hassan & Director of Lands** (Supra) further held,

"If the court issues a notice, it will require the party, most likely 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 plaintiff's 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. In the instant case, it was the notice issued by the court on its own motion. Thus, the Plaintiff has the burden of negative proof and or to show cause why his action should not be struck out for want of prosecution or abuse of the process of the court."

24. 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 and the prejudice which makes the fair trial impossible.

25. 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".

26. In considering whether a period of delay to be inordinate and contumelious pursuant to Order 25 Rule 9 of the High Court Rules, Master Azhar in **Amrith Prakash v Mohammed Hassan & Director of Lands** (Supra) went on to hold,

'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."

27. All in all, since the notice was issued by this Court on its own motion pursuant to Order 25 Rule 9, it is the Plaintiff who must show cause why his action should not be struck out under that rule. Surprisingly in this case it is however, in the affidavit sworn by a 'Director' for the Plaintiffs company, submits that "That the solicitor who was in carriage of the matter had left the firm on or about February this year and the proper handing over of the file was not conducted in a proper manner". This is the sole reason advanced on behalf of the Plaintiff to clarify a thirteen-month delay in taking any steps to move this matter forward to bring it to a conclusion.

28. As held in **Amrith Prakash v Mohammed Hassan & Director of Lands (Supra)**, the legally acceptable period for inaction in a civil cause in Fiji is 06 months as embodied in Order 25 Rule 9 of the High Court Rules 1988. In such an event this Court is faced with the question of, can a delay beyond the limit of 06 months be simply excusable by submitting 'resignation of a solicitor who was in carriage of the file? Or in the absence of any other justifiable reasons be held inordinate and inexcusable?

29. The Plaintiff is, in fact, in breach of series of rules within this period of thirteen-months inactivity and even beyond that time gap. Pursuant to Order 18 Rule 3, the Plaintiff has 14 days to file and serve a Reply to the Statement of Defence. Time period for filing a Reply has lapsed sometime in the first week of June 2022. In the event where no Reply to the Statement of Defence is filed, then pursuant to Order 18 Rule 13 the pleadings shall come to a closure and the Plaintiff is to attend to Discovery and Inspection pursuant to Order 24 Rule 2 within 14 days from the close of pleadings. There upon the Plaintiff is under obligation pursuant to Order 25 Rule 1 to file for Summons for Directions within 30 days from the close of pleadings. In failure to file for Summons for Directions as per the above rule, the Defendant in the cause is entitled to apply for an order to dismiss the action pursuant to Order 25 Rule 1 (4) of the High Court Rules.

30. In Courts considered view, this unprecedented approach to its own cause coupled with the series of breaches of the Rules and the extended delay cannot be duly justified solely on the basis of 'resignation of the counsel in carriage of the file and no proper handing over been done'. Even if that reason is to be considered as an excuse, then it is to be noted that this parting of the counsel in carriage had taken place in 'February this year (2023)' as per the Affidavit to Show Cause filed on behalf of the Plaintiff. It is therefore clear that even at the time of the parting of the counsel in carriage, there is an obvious delay of eight months on the part of the Plaintiff in moving the matter forward. There is no explanation at all given for this unacceptable delay by the Plaintiff. In the Court's view, as observed above, the inaction by the Plaintiff in this case clearly amounts to an inordinate and inexcusable delay and or otherwise an abuse of the process of the Court.

31. Lord Justice Parker in ***Culbert v Stephen Wetwell Co. Ltd,*** *(1994) PIQR 5* held,

> *"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).

32. In my view, although the Plaintiff instituted this action against the Defendant, it seems from his conduct as described above, he appears not to share any intention to bring it to a conclusion within a reasonable time. 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".

33. As already highlighted in the foregoing paragraphs, 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. In this case, other than claiming that a delay of thirteen-month is just due to an officer having carriage of the file departing the Plaintiffs company and not doing a proper handing over of the file, there are no other reasons whatsoever advanced to explain this inordinate delay on the part of the Plaintiff.

34. Moreover, pursuant to the Affidavit in Support of the 2nd Defendants Summons to Strike Out, it is alleged that there are no records of a reported maritime accident as alleged by the Plaintiff. The Plaintiff in its Affidavit in Opposition filed on the 03/10/2023 has completely failed to counter this allegation. Given these facts, the inordinate and inexcusable delay created by the Plaintiff in this cause, in my view, seriously impede the fair trial of the matter.

35. It should be noted that in litigation there are some parties that pursue their cases sporadically or make default with the intention of keeping the matters pending against the other parties without reaching a finality. The Courts should not ignore such practice or parties. Such practices must be disallowed promptly for reasons that it is an abuse of the process of the Court, and it is a waste of Court's time and resources which are not infinite. '*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 to be heard within a reasonable time'* (see; ***Singh v Singh*** -supra). Such practice also violates the fundamental rights guaranteed by the sections 15 (2) and (3) of the Constitution which read,

(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.

(3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time. (Emphasis added)

Further, such a practice may also constitute serious prejudice to the other party as justice may not be done between the parties since the matter is pending idle without any steps being taken to reach a finality.

36. For the reasons and findings set out above, it is the Courts conclusion that the Plaintiff has no interest at all in duly pursuing this cause and the delay caused by the Plaintiff in these proceedings is inexcusable and inordinate or otherwise amounts to an abuse of the process of the Court. I therefore conclude that the Plaintiff has failed to duly show cause as to why his action should not be struck out for abuse of the process of the Court or for want of prosecution and accordingly this Court orders that the Writ of Summons

filed on the 08/04/2022, to be struck out pursuant to Order 25 Rule 9 of the High Court Rules 1988.

37. As the Court has already concluded that the Plaintiffs action to be struck out pursuant to Order 25 Rule 9 of the High Court Rules, there is no necessity for the Court to rule on the Summons to Strike Out the Claim as filed by the 2nd Defendant. As the Writ is to be struck out pursuant to Order 25 Rule 9 of the High Court Rules, to rule on this summons shall serve no valid purpose.

38. Consequently, the Court makes the following final orders,

I. Plaintiff's Writ of Summons and the Statement of Claim is hereby struck out subject to a cost of $ 3000.00, as summarily assessed by the Court, to be paid to each of the Defendants pursuant to Order 25 Rule 9 of the High Court Rules and,

II. The Summons to Strike Out filed on the 04/08/2023 by the 2nd Defendant is also struck out and dismissed subject to no order for costs and,

III. The Cause is accordingly dismissed.

L. K. Wickramasekara,
Acting Master of the High Court.

At Suva,
16/02/2024.