

IN THE SUPREME COURT OF WESTERN SAMOAHELD AT APIAC.P 149/91BETWEEN: LEAFA VITALE of Malie, Minister
of WorksPlaintiffA N D: POROTESANO MALIFA also known as
SANO MALIFA of Afega, Publisher
carrying on business as "The
Observer" now known as "Samoa
Observer"DefendantCounsel: L.S. Kamu for Plaintiff
T. Malifa for DefendantHearing:Decision: 27th June 1994

DECISION OF LUSSICK, J

This is a motion by the defendant to strike out the plaintiff's Statement of Claim on grounds which I shall refer to later.

The law applicable to the striking out of pleadings is well settled.

Halsburys Laws of England (Vol. 37, 4th Ed., at para 435) states that "the power to strike out, stay or dismiss under the Court's inherent jurisdiction is discretionary. It is a jurisdiction which will be exercised with great circumspection and only where it is perfectly clear that the plea cannot succeed; it ought to be exercised sparingly and only in exceptional cases".

Again, at para. 430 : "The parties will not lightly be driven from the seat of judgment", and for this reason the court will exercise its discretionary power with the greatest care and circumspection, and only in the clearest cases".

Halsburys cites the case of *Dyson v A.G* (1911) 1 K.B 410 at 419, C.A., where Fletcher-Moulton LJ said : "To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad".

I need only to refer to one other authority, and that is the case of *Development Bank of Western Samoa v Bauer and Anor* (7 May 1990) where Sapolu ACJ (as he then was) considered the relevant authorities supporting this principle, including the leading New Zealand case of *Takaro Properties Ltd v Rowling* (1978) 2 NZLR 314.

The usual grounds upon which a court will strike out the Plaintiff's Statement of Claim are where it discloses no cause of action, or is scandalous, frivolous or vexatious or otherwise an abuse of the process of the court.

The present motion is not based on any of those grounds but on the ground that the Plaintiff has "sat on his claim without reasonable justification causing undue delay in the hearing of the suit".

There is no doubt that the Plaintiff has been guilty of some delay, but such delay can be explained, at least in part, by the history of this case.

The Plaintiff's Statement of Claim was filed on 3 July 1991. The action was thus brought ^{very promptly} when it is considered that one of the publications complained of was dated 7 April 1991. The defendant filed a defence on 12 August 1991 (which, incidentally, was out of time) and requested the plaintiff to allow him until 11 September 1991 to make any alterations thought necessary by overseas counsel. On 22 October 1991, plaintiff's counsel sent the following Fax to defendant's counsel :

"I'm very disappointed with your failure to answer or return my numerous phone calls to you over the last 3½ weeks. I do not believe that you are so busy that you lack the courtesy to talk to a professional colleague on the phone.

"What I want to know from you are as follows :

- (1) Is Barton still appearing in Leafa's claim against Sano Malifa. If not, we will try to fix a hearing date now.
- (2) We want to consult overseas counsel in Tuilaepa Sailele's case against Sano Malifa. "Would you agree to a five weeks adjournment to enable us to consult overseas counsel".

(See Exhibit "A")

It appears that nothing was then heard from the defendant until 5 February 1993 when he obtained an Order for Discovery.

This long delay then - from October 1991 to February 1993 only brought forth from the defendant a request for discovery. He made no allegation of

undue delay on the plaintiff's part. The history goes on to show that from February 1993 onwards there were no circumstances from which undue delay could be claimed.

The plaintiff provided an affidavit of documents on 25 June 1993, and an amended affidavit of documents on 30 November 1993. The plaintiff also obtained an order for discovery on 28 June 1993, in response to which the defendant filed an affidavit of documents on 22 July 1993. The plaintiff later obtained an order for inspection of documents on 7 December 1993.

After the order for discovery was served on the plaintiff on 5 February 1993 he was notified by his solicitor that the solicitor's firm was being wound up, so it then became necessary for the plaintiff to obtain the services of another solicitor. I note that the defendant also changed solicitors in December 1993 or thereabouts.

At no time during 1993 when both parties were complying with discovery orders did the defendant complain that the plaintiff was delaying, or had delayed, in bringing the suit on for hearing. In fact, the Court record shows that on 25 January 1994 the plaintiff requested the Registrar to set the case down for hearing, complaining that the defendant had not returned a Request for Setting Down forwarded to him on 23 December 1993. On 9 February 1994 the plaintiff again requested the Registrar to give him a hearing date, pointing out that the matter was urgent and that the defendant had still not returned the Request for Setting Down.

The present motion was filed on 7 March 1994, and on 11 March 1994 the Registrar allocated a hearing date for the cause, viz : 25 August 1994.

There was certainly some unexplained delay between October 1991 and February 1993 but it was not of such an inordinate length of time as to cause injustice to the defendant. And, indeed, the defendant himself did not think so, because his only reaction in February 1993 was to obtain an order for discovery. It does not follow then that at that stage the defendant considered himself at any disability because of delay. From then on, that is from February 1993 to date, it cannot be said that the plaintiff has been guilty of any unreasonable delay.

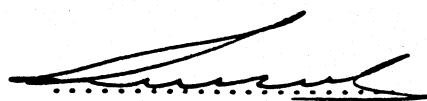
Against this background, the authorities referred to by counsel for the defendant have no application.

It seems unreasonable and contradictory that, with all requirements of discovery having been completed, and with the plaintiff anxious to obtain a hearing date, the defendant would at that stage file the present motion to strike out the plaintiff's statement of claim for "causing undue delay in the hearing of the suit".

Furthermore, the grounds of this motion do not fall within the principles upon which the Court would consider exercising its discretion to strike out.

The motion is entirely without merit and must fail.

The defendant is ordered to pay the plaintiff's costs within 14 days
Costs are allowed at \$250.00


JUDGE