IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 49 OF 1992
(High Court Civil Action No. 1025 of 1983)

BETWEEN:

OWEN CLIVE POTTER — APPELLANT

-and-

TURTLE AIRWAYS LIMITED
RAVINDRA SINGH MINHAS — RESPONDENTS

A N D:

CIVIL APPEAL NO. 50 OF 1992
(High Court Civil Action No. 1024 of 1983)

BETWEEN:

KERRY FRANCIS THOMAS — APPELLANT

-and-

TURTLE AIRWAYS LIMITED
RAVINDRA SINGH MINHAS — RESPONDENTS

Mr. V. Maharaj for the Appellants
Mr. J. Singh for the Respondents

Date of Hearing : 11th May, 1993
Date of Delivery of Judgment : 20th August, 1993.

JUDGMENT

The issues in each of the above appeals may be treated as virtually identical, as indeed they were so treated by the learned Judge who heard the applications to dismisss the respective actions for want of prosecution; the proceedings before this Court are appeals from those decisions. Accordingly for convenience, in this judgment we will refer to "the plaintiff" in the singular, counsel having consented to hear the appeals together.

The action is a claim for damages allegedly suffered by the plaintiff on the 23 November 1981 when the plane in which he says he was a paying passenger, crashed en route from Nadi to Nausori. The plaintiff alleges that the plane was owned and operated by the first defendant and flown by the second defendant. Apparently the latter has never been served or appeared in the action to date.

In paragraph 2 of his Statement of Claim the plaintiff alleges:-

> *"2. The Operator at all such times was a commercial airline engaged in public transport by air for reward in and around the Fiji Islands and was the owner and had charge of the operation and control of a certain airplane registered under the laws of Fiji of a type and make known as Cessna 172."*

This is not admitted by the first defendant although it does raise defences in paragraphs 13, 18 and 19 which would imply that it does not cavil with much of what is pleaded in paragraph 2 of the Statement of Claim.

The plaintiff alleges that the crash and the injuries sustained by him were caused, inter alia, by the negligence of the 1st Defendant by its agent the 2nd Defendant, and one of the particulars he gives, is that:-

> *"The pilot flew the airplane into wires erected 18ft from the ground."*

This, along with all particulars of negligence alleged, is denied by the first defendant.

Approximately 11 1/2 years have passed since the accident. In dealing with the matters that must be considered as relevant in varying degrees on an application of this nature, we feel it appropriate to set out at length the steps so far taken in the action:-

23.11.81	Accident
11.11.83	Writ of Summons with Statement of Claim attached, issued
1985	W/S and S/C served on 1st Defendant (no precise date given)
16.4.85	Entry of appearance for the 1st Defendant
22.4.85	Defence of 1st Defendant delivered
13.5.92	Notice of Change of Solicitors (signed on 8.5.92) filed. (Note: In Thomas' case these dates are respectively 17th June 1992 and 18th June 1992 but nothing turns on this)
13.5.92	Notice of plaintiff's intention to proceed after expiry of 30 days (signed on 8.5.92) filed. (Note: In Thomas' these dates are respectively 17th June and 18th June 1992 but nothing turns on this.
17.7.92	Both parties signed summonses, the plaintiff for directions for trial, the first defendant, for dismissal for want of prosecution
9.9.92	Affidavit of Plaintiff (sworn in New South Wales on 25th August 1992) filed
18.9.92	The Honourable Mr Justice Michael J. Scott who heard the application, orders that the action be dismissed for want of prosecution
7.10.92	Plaintiff files Notice of Appeal to this Court.

There has obviously been considerable delay by the plaintiff and/or his solicitors in proceeding to trial. A review of the cases, whether in England, Australia or Fiji clearly points out the necessity to consider, in a case such as this, whether that delay has been inordinate and inexcusable. See Birkett v James (1978) AC 297 @318; See also William Crosby & Co Pty Ltd v Commonwealth (1963) 109 CLR 490 @496.

On a close review of the evidence and material placed before the honourable Chamber Judge, we are of the opinion that the delay although lengthy, was not "inordinate and inexcusable". The plaintiff obviously suffered severe injuries. In providing "particulars of injury" in his Statement of Claim, it was alleged that "The plaintiff's injuries have not yet stabilised and full particulars will be supplied at the trial of this action". No attempt was made in the first defendant's defence to challenge this. It was not specifically addressed and the Defence includes no general denial of all other allegations not otherwise dealt with. No further and better particulars were sought. His Lordship did not advert to this although he did make reference to the matters sworn to in the plaintiff's affidavit.

The only sworn evidence at the hearing was from the plaintiff, who in his affidavit swore:

> *"I suffered serious injuries in the aeronautical accident the subject of my claim and serious disabilities which continue."*

No attempt was made to have him present for cross examination on his affidavit.

Wherever fault may be and how much of it (if any) is attributable to the lawyers, the plaintiff swore in his affidavit:-

> *"3. My standing instructions to my Sydney solicitors were to prosecute this claim with all proper despatch with a view to bringing the matter to a hearing at the earliest possible date.*
>
> *4. I understand that following the filing of Defences my solicitors requested their Fijian agents to set the matter down for hearing and were waiting for a hearing date but it appears that the agents did not in fact set the matter down for hearing.*
>
> *5. This was contrary to my standing instructions and it is my wish that the matter now be set down for hearing at the earliest possible date."*

As we have said above, no attempt at cross examination was made. The evidence stands uncontroverted.

On the question of the responsibility of an applicant for his solicitors' negligence or inadvertence, we would refer to and adopt the view expressed by the former Chief Justice of the High Court of Australia at a time when he was a Puisne Judge of the Supreme Court of Queensland. He said:

> *"In my opinion the question whether good reason has been shown (for excepting the particular proceedings from the general prohibition which the rule imposes) must depend on all the circumstances of the particular case and it cannot be said that there is any fixed rule that when the failure to proceed was attributable to the inadvertence of the applicant's solicitor that necessarily means that good reason either has, or has not been shown."*

Campbell v United Pacific Transport Pty Ltd (1966) Qd.R. 465 at p.481 (per Gibbs J)

Another factor that must not be overlooked in considering the gap between 1985 and 1992 in the chronological summary we have given, are the events of 1987 in Fiji.

This Court of Appeal is well aware of the problems facing litigants wishing to seek redress to it, during this period. Although no material was before us to that effect, it would be unreal to assume there was no dislocation in the work of the other Courts and in the work of the legal profession during some part of this period. However in the view we take of this matter so far as the question of delay is concerned, we need to take this subject no further.

Again, the cases show that although there may not be "inordinate and inexcusable" delay, the plaintiff may still fail if it can be shown that the prejudice to the parties (and of course particularly to the defendant) would result in "a substantial risk that a fair trial would not be possible or is likely to cause or would cause serious prejudice" (see Birkett v. James (supra) and particularly the speech of Lord Diplock at page 318 G-H).

In ordering that the action be dismissed, His Lordship dealt at some length with an argument which once appears to have found more favour than in recent times and which may be rather crudely summarised by saying "sue the other insurer - sue the legal advisers who were at fault". In this day and age, following as it does on the economic events of the 1980's this could well be

barren advice. In our view it should be given little weight in a case such as this particularly on the material as here presented. In all events, this proposition was finally put to rest in Birkett's case - see the speeches of Lord Diplock @ pp. 324 C-D, Lord Edmund Davies 335H and Lord Russell of Killowen @ 336 C-E.

In the case before us, the judgment of the learned chamber Judge, referred to the submission of Mr. Singh for the respondent on this very point:- "He (Mr. Singh) pointed out that even if the plaintiff's action was struck out he could still pursue his remedy against his former solicitors".

His Lordship then went on to say that Mr. Singh had referred him to, inter alia, Birkett's case. Birkett's case deals with many aspects of this type of application and it seems that this particular part of the decision was overlooked by His Lordship. This Court is, of course, not bound by decisions of the House of Lords. They are nevertheless of considerable persuasive effect. Suffice to say that we agree, with great respect, with the reasoning of their Lordships referred to above.

In dealing with the question of prejudice to the defendant His Lordship referred to the absence of evidence from or on behalf of the 1st defendant and the absence from the action of the 2nd defendant. Substantially his decision seemed to turn upon the inevitable prejudice that delay of this kind must cause to a litigant. Relying solely upon his reasons for judgment, he

did not appear fully to consider the other matters to which we have made reference.

We regret that we find it necessary to disagree with His Lordship on a question that is essentially one of discretion. We are impressed by the full and careful defence of the 1st defendant. It could not be said that it was guilty of any delay in providing its answer to the Statement of Claim. It seems that it was clearly not taken by surprise nor was it unprepared for its arrival. The very nature of the crash of any aircraft (particularly one in commercial use and the more so where serious injuries have occurred) is such as normally to cause an immediate investigation to be held. Indeed there may be investigations from more than one source. The careful defence pleaded by the legal advisers of the 1st defendant reflects this. There is no material to show that in this case there was any prejudice to the 1st Defendant other than that which delay can cause to the memory of most witnesses as to precise details. This is a factor present in varying degrees in most litigation however vigilant the parties may be in achieving an early trial.

In the result we are of the view that His Lordship erred in finding that to allow the matter to proceed to trial would result in a substantial risk of unfairness. In our opinion there are ample grounds for "excepting this action from the general prohibition" which the rule imposes (see William Crosby & Co Pty Ltd v Commonwealth (1963) 109 CLR 490 @496).

In arriving at our decision to allow this appeal we are mindful of the requirement that our power to interfere with the exercise of a discretion by a Judge of first instance, is hedged about by well established rules. We again refer to Birkett's case and the speech of Lord Diplock at p.317 E-G:-

> *"... an appellate Court ought not to substitute its own "discretion" for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account;...."*

We have not overlooked the defences raised by the 1st defendant under Statutory provisions which, if made good, might either prevent the action going to judgment or at least might limit damages. There are issues to be tried before such pleas can succeed. Those issues are germaine to the other issues in this action and should not prevent this appeal being allowed.

We would allow the appeal. Costs of the appellants of each appeal are to be costs in the action.

The matter will be remitted to the High Court to enable it to deal with the plaintiff's summons for directions.

E. A. Williams

Sir Edward Williams
Justice of Appeal

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JUDGMENT

We agree with the reasons for judgment of Sir Edward Williams, and the orders that he proposes. We would like to add some observations of our own on the matter of delay.

We think it proper to draw attention to the fact the defendant filed no evidence at all in support of its motion to dismiss the proceedings for want of prosecution. While, of course, a defendant is not required to take action at any time to

bring proceedings to an end in the way it sought to do here, and it is entitled to refrain from doing so for tactical reasons, the fact is that the defendant did nothing until after a notice of the plaintiff's intention to proceed was filed and served. That is the first matter.

The second is that the only facts admitted on the pleadings were that the pilot was employed by the defendant to operate on its behalf an aeroplane which had the plaintiff as a passenger when it crashed. While there was no evidence at all that the defendant, after the commencement of proceedings, did not know where the pilot was or how to locate him, this Court was told that the pilot had disappeared shortly after accident. If this can be taken into account, it would tend to demonstrate that no prejudice on this score has been suffered by the defendant as a result of the delay once the proceedings had been commenced (the writ was not served until 1985, some 4 years or more after the accident). That is the second matter.

The third is this. We believe that in this day and age this Court, and any Court, is entitled to take judicial notice of the fact that an aeroplane crash is ordinarily, if not invariably, followed by an inquiry into the circumstances and causes by an appropriate government authority, and a report made following, inter alia, an inspection of the site, interviews with any persons who may be able to throw light upon what happened, and so on. There is no evidence that such an inquiry and report was not held and made in this instance, that the investigator(s) is (are)

not still available, as well as any witnesses. Whether or not a statement was taken from the pilot or passengers is not known. There has been no debate as to whether, if such a report exists, the material in it is admissible, whether as evidence of the facts, opinion of experts, admissions by the pilot, or whatever. If, as appears to be the case, the accident occurred in adverse flying conditions, there may well have been no witnesses, and the pilot is not likely to be called in the plaintiff's case. We do not think that, in the absence of any evidence at all, inferences that the defendant has been or is likely to be prejudiced, certainly not seriously prejudiced, by the delay can be drawn.

It is perhaps timely to have a brief look at the so called principle that is said to apply in cases such as this, namely that the plaintiff's delay must be inordinate and inexcusable before his action will be struck out.

Inordinate does not mean inexcusable. It probably means too long in all the circumstances. But what does `too long' mean? It clearly does not mean merely a long time. We think it means so long that proper justice may not be able to be done between the parties. When that is analysed, it seems to mean that the delay has made it more likely than not that the hearing and/or the result will be so unfair vis a vis the defendant as to indicate that the Court was unable to carry out its duty to do justice between the parties.

Lots of learned judgments exist in which Judges have solemnly recited passages from other judgments which explain that the delay must be inordinate and inexcusable in all the circumstances, and then go on to make a decision based on the particular facts before them and which, as a rule, will never have the slightest bearing on any other case. The fact is that the word inordinate is used to express one of those wonderful concepts in British law that enable a Judge to move in a way that he considers will provide a just result. It is a word which enables Judges of Appeal to apply their own sense of justice, and, if it differs from that of the Judge of first instance, wrap that up in some formula that enables them solemnly to pronounce that the Judge went wrong in principle. Judges of appeal courts do exactly the same exercise as a Judge of first instance, except that in their case the formula is put through a filter which makes allowance for the fact that a Judge at first instance is much closer to the workface of administrating justice, and which supplies the need for some disciplined framework for three or more Judges of appeal to do it in concert. This is the wonderful way in which the common law works, and long may it continue to do so.

The same sort of concept arises in relation to the word "inexcusable", only in reverse. A plaintiff will ordinarily be prejudiced by having his cause of action struck out. But inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It simply allows the Judge to put into the scales the

plaintiff's conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him his opportunity from pursuing his action or perhaps any action against the defendant. It is part of the formula by which a Judge is enabled to weigh factors bearing upon matter, to come up with an answer that he considers is the just one, and which gives him a handle to turn the wheels of justice. It also makes it very hard for a Court of Appeal to find that he did not have one.

By saying that delay must be both inordinate and inexcusable Judges are simply put in a position to do justice according to law.

Three matters can be added.

Firstly, if it was the view of Russell LJ that prejudice to the plaintiff is not a factor to be taken into account (Glorea v. Sokoloff (1969) 1 All ER 204 at p.207) we totally disagree.

Secondly we totally disagree with the dictum in Birkett v. James (1978 AC 279 at p.318 that inordinate means materially longer than the time usually regarded by the profession and Courts as an acceptable period. This is meaningless.

Thirdly, there are reported decisions which seem to suggest that although there may not have been inordinate and inexcusable delay, the plaintiff may still fail if it can be shown that the

prejudice to the parties (and of course particularly to the defendant) would result in "a substantial risk that a fair trial would not be possible or is likely to cause or would cause serious prejudice" (see Birkett v. James (supra) and particularly the speech of Lord Diplock at p.318G-H). We do not believe that this apparent additive is necessary if the principles we have adverted to above furnish the correct approach. However, we are not prepared to say that a case may not arise in which it is appropriate to apply such a formula. It probably comes down to doing the same exercise as that which we have adverted to earlier herein.

However, we should draw attention to what we believe is the correct statement of the principle to be applied in cases where the question arises as to whether the plaintiff should be permitted to proceed with his case or not. It was made in the reasons for judgment of Cross J in the Chancery Division of the High Court in Zimmer Orthopaedic Ltd v. Zimmer Manufacturing Co (1968) 2 ALL ER 309. At p. 311 his Lordship said:-

> *"The essence of the matter, as I understand it, is this. It if for the plaintiff and his legal advisers to get on with the action and to see that it is brought to trial with reasonable despatch. The defendant is normally under no duty to stimulate him into action, and the plaintiff cannot complain that he gave him no warning before applying to have the action dismissed for want of prosecution. But the court will not take the drastic step of dismissing the action unless (a) the delay has been inordinate, (b) there was no excuse for it, and (c) the defendant is likely to be seriously prejudiced by it if the action is allowed to go on."*

For reasons we have set out earlier herein we do not believe that the defendant company is likely to be seriously prejudiced if the action is allowed to go on, and we do not believe that there has been inordinate and inexcusable delay that might cause this.

In each case the appeal will be allowed. The judgment in the High Court will be set aside. The applications for directions and every other step should now be pursued with alacrity by the appellants.

Costs of the appellants of each appeal are to be costs in the action.

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Mr Justice Michael M Helsham
President, Fiji Court of Appeal

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Sir Mari Kapi
Justice of Appeal