IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU0015 OF 1997S
(High Court Civil Action No.225 of 1988)

BETWEEN:

SURESH SUSHIL CHANDRA CHARAN AND ANURADHA CHARAN — *Appellants*

AND:

HOUSING AUTHORITY — *Respondent*

Coram: The Hon. Sir Moti Tikaram, President
The Rt Hon. Sir Maurice Casey, Justice of Appeal
The Hon Mr. Justice J.D. Dillon, Justice of Appeal

Hearing: Wednesday, 12 August 1998

Counsel: The Appellant Suresh Sushil Chandra Charan in Person
Mr. Vijay Maharaj for the Respondent

Date of Judgment: Friday, 28 August 1998

JUDGMENT OF THE COURT

On 31 March 1988 the appellants issued a writ and statement of claim against five defendants including the respondent in this appeal.

On 16 February 1995 the respondent issued a summons alleging that because the appellants had failed to prosecute their claim, it should be dismissed from the proceedings. This summons was set down for hearing before *Fatiaki J.* on 16 March 1995. For reasons that are unnecessary to consider the appellants did not attend that hearing. His Lordship in his judgment

dated 29 March 1995 referred to their non appearance as follows:-

> ***"It is a matter of regret that the 1st plaintiff who has had the personal conduct of the plaintiffs' case throughout, has uncharacteristically not seen fit either to file an affidavit in reply or to appear on the date fixed for the hearing of this application which was once deferred owing to the summons being 'short-served'."***

Following a comprehensive analysis of events from 31 March 1988 and consideration of the law applicable His Lordship then ordered that -

> ***"The Plaintiffs' (appellants) action against the defendant authority (respondent) is accordingly dismissed...."***

From that decision the appellants appealed. On 20 February 1996 this Court without considering the merits of the appellants appeal but with the consent of the parties set aside the judgment of *Fatiaki J.*; and remitted the matter to the "... Court below for the respondents summons to strike out the appellants writ to be heard de novo ...". The further hearing was before *Scott J.* who delivered his decision on 13 September 1996 and again dismissed the appellants action against the respondent. From that decision the appellants again appeal to this Court.

Chronology

Essential to the consideration of an application to strike out for want of prosecution is the fundamental issue of delay. For that reason a chronology of what steps the appellants have taken since they issued their claim on 31 March 1988 is necessary. *Fatiaki J.* prepared such a chronology which of course is nothing more than a summary of the relevant court records. Initially

before us Mr Charan questioned the accuracy of the Judge's chronology. However when pressed he was unable to identify any errors and so we simply record the chronology as set out in His Lordship's judgment dated 29 March 1995.

> (1) *On 31.3.88 the 1st Plaintiff issued a Writ of Summons with a statement of claim which I described on a previous occasion as : "bears unnumbered paragraphs and is in the nature of a narrative resembling an endorsement rather than a proper statement of claim with pleadings".*
>
> (2) *On 12.4.88 after appearances had been entered by all the 5 defendants sued, the 1st Plaintiff issued a summons for summary judgment under Order 14 of the High Court Rules in which an interim injunction was also sought against the 2nd and the then 3rd and 4th Defendants.*
>
> (3) *On 4.5.88 this Court delivered a judgment dismissing the plaintiffs 'Or.14 application' and granting the defendants "unconditional leave to defend the action".*
>
> (4) *On 10.5.88 the plaintiffs issued an application for leave to appeal to the Fiji Court of Appeal against this Court's 'Or.14 judgment' and amongst other orders renewed its application for an interim injunction against the 2nd and the then 3rd and 4th Defendants.*
>
> (5) *On 19.5.88 the plaintiffs sought to enter default judgment against the 1st Defendant company for "damages to be assessed by the registrar with costs". This was rejected.*
>
> (6) *On 24.5.88 the plaintiffs filed a notice appealing against the registrar's refusal to enter judgment in default of personal service of the 1st Defendant company's defence on the plaintiffs.*
>
> (7) *On 1.6.88 this Court delivered judgment rejecting all of the plaintiffs' applications in its summons of 10.5.88. (See : 4 above)*

(8) On <u>14.7.88</u> this Court dismissed the plaintiffs' appeal against the registrar's refusal to enter default judgment. (<u>See</u> : 6 above)

(9) On <u>6.10.88</u> the plaintiffs issued a motion seeking an interim injunction against the defendant Authority but in the course of argument on 20.10.88 the application was withdrawn by the plaintiffs.

Thereafter the action effectively went to sleep for almost two (2) years until:

(10) On <u>3.7.90</u> the plaintiffs filed a notice of discontinuance of the appeal in Civil Appeal No:10/89 (the subject matter of which remains a mystery). Also on the same day, the plaintiff sought leave to join his wife as a second plaintiff and <u>also</u> to join the directors of the 1st Defendant construction company as defendants jointly and severally with the 1st Defendant company and finally, leave to amend the <u>Statement of Claim</u>. Leave was granted on 10.8.90 by Byrne J.

(11) On <u>4.9.90</u> the plaintiffs filed an Amended Writ of Summons and an amended <u>Statement of Claim</u>. Noteworthy by their absence in the amended action were the former 3rd and 4th Defendants.

(12) On <u>10.9.90</u> the newly-constituted 3rd Defendant (previously the 5th Defendant) filed an amended <u>Statement of Defence</u> and the now enlarged 1st Defendant entered an appearance on 17.9.90.

(13) On <u>4.10.90</u> the plaintiffs issued an application against the 3rd Defendant for an order to produce various official records and documents for inspection and, for leave to serve interrogatories. The application was granted by Byrne J. on 2.11.90 along with an 'interim liquidated default judgment' against the 1st Defendant and 'the defendant Authority' for failure to serve a defence.

(14) On <u>26.11.90</u> the defendant Authority applied to set aside the default judgment and this was granted by Byrne J. on 3.12.90. No similar application was made by the 1st Defendants.

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(15) *On 7.1.90 the plaintiffs issued a motion for leave to appeal against the order of Byrne J. setting aside the default judgment entered against the defendant Authority. (See : 14 above)*

(16) *On 29.1.91 an officer of the 3rd Defendant filed an affidavit responding to the plaintiffs interrogatories.*

Thereafter over a period of some 15 months, the case was called on numerous occasions before the then Chief Registrar and Byrne J. to deal with various applications either pending or then filed against the 3rd Defendant and its officers until finally on 8.4.92 this Court with a view to 'expediting the trial of the matter' obtained the agreement of the plaintiffs to the withdrawal of their then pending applications for leave to appeal against the order of Byrne J. (See : 15 above) and for the appointment of a special referee. This Court also noted on that occasion the plaintiffs undertaking 'to proceed to trial' and the existence of an unexecuted liquidated default judgment against the 1st defendants. (See : 13 above)

(17) *On 21.5.92 Plaintiffs issued a 'Summons for Directions' which was granted by the Chief Registrar on 17.6.92 and which included an order:*

> *"(4) That this action be tried at Suva before a Judge alone and be set down within thirty (30) days, the estimated length of the trial being two days."*

(18) *On 14.7.92 the defendant Authority filed its affidavit verifying documents and on 28.9.92 the plaintiffs did likewise.*

Thereafter the action lay dormant for a further 2½ years until the present application was brought by 'the defendant Authority' on 16.2.95."

That was the chronology of proceedings up to 29 March 1995 the date of the judgment of *Fatiaki J.* Since then the appellants have initiated the following proceedings -

1) On 10.5.95 the appellants filed an ex parte summons for -

   a) Stay of execution;

   b) injunctive relief; and

   c) setting aside judgment.

On 12.5.95 *Fatiaki J.*

   a) dismissed the stay application as "wholly misconceived";

   b) refused the application for injunctive relief; and

   c) granted leave to appeal to the Court of Appeal.

2) A Summons for relief filed on 29 May 1996 relative to the respondents mortgage security No.254728. It is not clear whether this Summons has ever been considered.

3) On 29 May 1996 *Scott J.* fixed dates for the 1st, 2nd and 3rd Defendants to file affidavits in reply, and adjourned the Summons to strike out the action for want of prosecution referred back by the Court of Appeal to the High Court for hearing *de novo.*

On 13 September 1996 *Scott J.* gave judgment in favour of the 2nd Defendant and dismissed the appellants action against it.

4) On 30 September 1996 the appellants filed a summons -

a) to set aside the judgment of *Scott J.* delivered on 13 September 1996;

b) to forthwith discharge mortgage No.254728;

c) to set a date for hearing the claim;

d) to pay costs; and

e) to grant leave to appeal to the Court of Appeal.

5) On 19 November 1996 *Scott J.* ordered that the Summons to set aside his judgment dated 13 September 1996 he dismissed but granted leave to appeal to the Fiji Court of Appeal.

It is pursuant to that leave granted by *Scott J.* that the present appeal has come before us.

Grounds of Appeal

The grounds of appeal set out in the notice of appeal are as follows:-

> *"1) That the learned trial Judge erred in law in not taking into his consideration all the circumstances of the delay in striking out the Appellants' action for want of prosecution particularly the delay caused by the Respondent in failing to file defence and the refusal by the Court to enter judgment in default of defence the Appellants' were severely prejudiced.*
>
> *2) That the learned trial Judge erred in law in failing to take into his consideration that the Respondent was not prejudiced by the delay and the trial was fully possible.*

3) *That the learned trial Judge erred in law in taking into his considerations of irrelevant issues and failed to give proper considerations to the merits of the Appellants' case, and wrongly and arbitrarily in denial of natural justice relied on the findings of Fatiaki J. of earlier decision which was set aside on appeal by the Court of Appeal.*

4) *The Appellants further rely on the grounds stated in the affidavit of 1st Appellant sworn and filed on the 30th day of September, 1996 in the Court below."*

In detailed and comprehensive submissions the appellants conceded that "... delay is the main issue in this appeal". For that reason they requested that the issues be considered in the following order:

1) inordinate and inexcusable delay;

2) whether fair trial possible?; and

3) prejudice to the respondent if any.

That submission relied on the principles of striking out enunciated by the House of Lords in Department of Transport v. Clinir Smaller Ltd (1989) 1 A.C. 1197 at page 1203 viz:-

> *"The power should be exercised only where the Court is satisfied ...*
>
> *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 defendant..."*

We agree with Mr Charan's submissions as to the three issues to be considered and accept his suggestion as to the order in which they should be considered.

Inordinate and inexcusable delay

From the 31 March 1988 to 13 September 1996 the date of the judgment now appealed from 8½ years have elapsed. In that time the Court below has had to consider a plethora of interlocutory applications without at any time addressing the substantive pleadings. That 8½ years should have elapsed without the claim ever being really considered, in our opinion requires serious explanation by the appellants. It is true that they have over the years actively pursued various interlocutory processes with persistent regularity; what is not clear, however, is why they have invariably continued to promote such applications which have been rejected by the Court with such monotonous regularity . The Court below has regarded as unmeritorious this persistent attention to procedural side issues. We cannot even speculate as to why such issues should take precedence over, and delay the hearing of, the substantive issues set out in the applicants' statement of claim.

By way of explanation Mr Charan in his submissions to us has referred once again to the alleged failure of the respondent to file a defence. But the respondent did file its defence as far back as 12 May 1988. Admittedly it has not filed a further defence to the appellants amended statement of claim. In its submissions on appeal the respondent submits it is not required to and relies upon Order 20 rule 3(6) of the High Court Rules. Mr Charan does not challenge that submission.

Rather with a fixation on "service of defence" and "defence must be served" he again submits in paras 1.05 and 1.06 that "... failure by the Respondent to comply with the Order of the Court ... has caused serious injustice to the appellants".

For that submission Mr Charan relied on Anson v. Trump a Court of Appeal decision reported in the Times on 8 May 1998; and Wearsmart Textiles Limited v General Machinery Hire Limited & Another a decision of this Court dated 29 May 1998.

However, Mr Maharaj in the course of his submissions referred us to the affidavit of service on the Court file dated 4 December 1990 and which Mr Charan claimed had never been filed. This affidavit confirmed that personal service had been effected on the appellants on 3 December 1990, the very day that *Byrne J.* directed that this be done. Mr Charan however refused to accept or acknowledge that affidavit.

The issue that we must address is not whether the respondent has filed an affidavit of service but whether there has been inordinate and inexcusable delay. A plaintiff's responsibility in this regard was considered in Zimmer Orthopaedic Ltd v Zimmer Manufacturing Coy (1968) 2 All E.R. 309 where it was stated that -

> ***"The essence of the matter, as I understand it is this. It is for the plaintiff ... 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."***

When one considers the length of the delay involved from when all the pleadings were completed; orders as to directions made and discovery finalised the appellants have indeed failed "... to get on with the action and to see that it is brought to trial with reasonable dispatch."

The appellants have failed to satisfactorily explain or excuse this unacceptable delay. For those reasons we are satisfied that the delay is both "inexcusable and inordinate".

Whether Fair Trial Possible?

The appellants have submitted that a fair trial is indeed possible because the affidavit initially filed by the 1st Appellant on 12 April 1988 sets out in detail the plans specifications and coloured photographs of the house the subject of the dispute and as well details of engineer's reports, witnesses' statements etc. etc. But even conceding those details, the appellants have failed to appreciate that the issues in dispute are alleged short comings and defects in the building of the appellants house back in 1987; that the house has been wanted since completion and as a result the state of the defects alleged and any subsequent deterioration cannot after 11 years be assessed with any certainty. Of course the real difficulty confronting the appellants in the 1987 "Certificate of Completion" issued by the 3rd Defendant the Suva Rural Local Authority. To add further to the appellants difficulties we are now told that the property has been sold and the purchasers are in possession. However, the purchasers have not been able to take title because of the appellants' refusal to deliver a signed transfer.

The appellants claim in these proceedings defective workmanship in the building of their house in 1987 which has subsequently been tenanted and now sold. But these proceedings despite being issued on 31 March 1988 have still not been the subject of a substantive hearing; there would be as a consequence difficulties in assessing damages; and a real problem of

quantifying any resultant award. This would be seriously prejudicial to the respondent who has not been responsible for this delay. We are satisfied that it is just not possible for a fair trial to be undertaken after this inordinate length of time.

Prejudice to the respondent if any

If it is not possible to have a fair trial of the issues in dispute then it follows that the respondent must be seriously prejudiced. In the same way, if there has been inordinate and inexcusable delay in bringing the appellants proceedings to trial again it must be seriously prejudicial to the respondent, as is now claimed.

Obviously there are degrees of prejudicial consequences arising from an infinite variety of situations. For example a delay of from 3 to 5 years may in some instances be justifiably regarded as inordinate; on the other hand a delay of 11½ years was not so regarded for the reasons stated by this Court in Potter v Turtle Airways Limited & Anor No.49 of 1992.

We are of the view that the extent of the prejudice to the respondent in this case has resulted 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 (1978) AC 297 at 318).

Reliance on Judgment of Fatiaki J.

In the appellants reply to the respondents "skeletal" arguments Mr Charan submitted-

> ***"I reiterate the contents of the Appellants' submission of 9.7.98 and repeat that Scott J. erred in law in relying on the decision of Fatiaki J. which in law does not exist. The Court of Appeal set Fatiaki J. decision aside.***
>
> ***"It is humbly submitted that a Judge is required to give reasons for his decision. Scott J. had failed to give reasons for his decision. Fatiaki J. decision does not exist."***

That submission is misconceived, when it suggests that the Judgment of *Fatiaki J.* "in law does not exist". The issues before this Court on 20 February 1996 were by the consent of Mr Charan and counsel for the respondent remitted back to the High Court to be heard *de novo*. The merits of the appeal and its background were not considered. There is therefore no justification to suggest now that the Judgment of *Fatiaki J.* "does not exist". We have already justified adopting in this Judgment the contents of the chronology that he included in his Judgment because they accord with the material on the court record. Likewise we can see no objection to the approach adopted by *Scott J.* when he explained the basis on which he examined all the evidence available to him in order to prepare his own judgment -

> ***"Given that the Judgment itself was not found to be wanting to any extent it was clear to me that the right approach to adopt was to examine the fresh evidence now filed, to take into account the fresh submissions made and to decide whether, in their light, there was anything which, had it been placed before Fatiaki J, would have in any way altered the outcome of his Judgment."***

Conclusion

The energy expended by Mr Charan on behalf of his wife and himself as appellants has sadly been both misdirected and misconceived. However there must come a time when with all the goodwill available to those who choose to act as their own counsel and

advisors, the Court must give consideration to the other parties to the litigation involved.

An examination of the chronology earlier set out identifies the inconsequential side issues which have so consumed Mr Charan's attention to the detriment of resolving the main purpose of initiating his litigation. If we take but one example set out in the judgment of *Fatiaki J:*

> ***"Thereafter over a period of some 15 months, the case was called on numerous occasions before the then Chief Registrar and Byrne J, to deal with various applications either pending or then filed against the 3rd defendant and its officers until finally on 8.4.92 this Court with a view to 'expediting the trial of the matter' obtained the agreement of the plaintiffs to the withdrawal of their then pending applications for leave to appeal against the order of Byrne J. (See : 15 above) and for the appointment of a special referee. This Court also noted on that occasion the plaintiffs undertaking 'to proceed to trial' and the existence of an unexecuted liquidated default judgment against the 1st defendants. (See : 13 above)"***

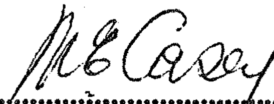
The appointment of a referee to mediate in a building dispute is widely recognized and accepted as the best and some say the only way to satisfactorily resolve what are, with some justification, labelled as "unresolvable disputes". This suggestion of determining the dispute by a special referee was proposed as far back as 8 April 1992. For reasons unknown, the proposal was never acted upon.

Mr Charan is a regular and experienced litigant in Person in Fiji courts. He is clearly well versed with court process and procedures. Therefore there can be no excuse for the inordinate and quite unreasonable delays that he has caused over such a long period. Those delays in turn have precluded the respondent having a fair trial and as a result being seriously prejudiced.

For those reasons the appeal is dismissed.

Mr Charan suggested that whatever the outcome of his appeal the question of costs could be decided later by the President in chambers. We see no reason why we cannot in the normal way include costs in this judgment so as to bring finality to this prolonged litigation. There will of course be no costs awarded for the hearing before *Fatiaki J.* and the subsequent appeal. We assess costs on the hearing before *Scott J.* on 3 September 1996 and on this appeal as all inclusive of chamber and/or interlocutory applications associated with these proceedings from their inception. We fix costs in favour of the respondent at $1,500 to include disbursements.

....
Sir Moti Tikaram
President



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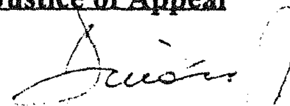
Sir Maurice Casey
Justice of Appeal



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Justice J.D. Dillon
Justice of Appeal

Solicitors:

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