

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 67 of 2012

BETWEEN : **DOMINION INSURANCE LIMITED** a limited liability company
incorporated in Fiji having its registered office at 231 Waimanu Road, Suva.

PLAINTIFF

AND : **PACIFIC BUILDING SOLUTIONS** a limited liability company having its
registered office at 9 Nukuwatu Street, Lami, Suva.

DEFENDANT

BEFORE : **Acting Master Thushara Rajasinghe**

COUNSEL : **Ms. Narayan S.** for the Plaintiff
Mr. O'Driscoll for the Defendant

Date of Hearing : **13th February, 2014**

Date of Ruling : **31st March, 2014**

RULING

A. INTRODUCTION

1. This notice was issued by the court *ex mero motu* pursuant to order 25 rule 9 of the High Court rules demanding the Plaintiff and the Defendant to attend before the court and show cause why this action should not be struck out for want of prosecution or as an abuse of the process of the court since no steps have been taken in this action for six months.
2. The Plaintiff and the Defendant appeared before the court on 26th of November 2013 upon being served with this notice. The learned counsel for the Defendant sought time to file their show cause. Accordingly, directions were given to the Plaintiff to file their show

cause in an affidavit on or before 3rd of December 2013 and the Defendant to file their response in 14 days thereafter. This notice was set down for hearing on the 13th of February 2014. However, the Plaintiff failed to file their show cause, instead filed a notice of motion together with an affidavit in support just six days before the hearing of this notice, seeking an extension of time to file their show cause. The court, having heard and considered the reasons set out in the affidavit in support, refuse to grant extension of time on 13th of February 2014 and invited the parties to proceed with the hearing.

B. BACKGROUND,

3. The Plaintiff instituted this action by way of a writ of summons filed on 6th of March 2011. Upon being served with the writ, the Defendant served his statement of defence on the 14th of May 2012. Since then no steps have been taken by the Plaintiff nor did the Defendant.
4. The learned counsel for the Plaintiff submitted that the delay was not intentional as the parties had been engaged in a process of negotiation in order to settle this matter. The learned counsel for the Defendant objected that there is no evidence in affidavit to substantiate such claim, wherefore the counsel of the Plaintiff should not be allowed to provide evidence from the bar table.

C. THE LAW,

5. Order 25 rule 9 states that;

(i) 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 stuck out for want of prosecution or as an abuse of the process of the court.

(ii). *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”*

6. Lord Diplock held in **Birkett v James** (1978) A.C.297 that

“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 and his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have 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 either as between themselves and the Plaintiff or between each other or between them and a third party”.

D. ANALYSIS,

7. The Plaintiff and the Defendant have failed to take any step to proceed with this matter since the Defendant served his statement of defence on the 14th of May 2012. Despite the learned counsel’s submission during the cause of hearing that the delay was not an intentional as the parties had been engaged in a process of negotiation to settle the dispute, no further show cause was provided by the Plaintiff. On the other hand the Defendant did not specifically raise any issue of prejudice due to this delay of the Plaintiff. In fact, the Defendant has also been idling since the service of his statement of defence, I am mindful of the fact that the Defendant could not be blamed as it is the duty of the Plaintiff to prosecute his claim with due diligent and competence.

8. Order 25 r. 9 has given a discretionary power to the court to prevent inordinate and inexcusable delays in the litigation. However, this power should be exercised with caution and attentively. It should not defeat the ultimate aim of attainment of justice. Bearing in mind the reasons discussed above, I am of the view that the delay caused by

the Plaintiff in prosecuting this claim can be compensated with awarding of cost to the Defendant rather than striking out the action which undoubtedly could cause greater injustice to the Plaintiff. Accordingly, I adopt this notice issued under Order 25 r.9 as if it were a summons for direction and make following orders.

- i. The Plaintiff is granted 14 days to file and serve his Reply to the Statement of Defence, if not this writ will deem to be struck out at the expiration of 14 days from this order.

- ii. The Defendant is awarded with \$1500 cost, assessed summarily.

Dated at **Suva** this **31st** day of **March, 2014**.

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R.D.R. Thushara Rajasinghe
Acting Master of High Court, Suva