

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

High Court Civil Appeal No. 18 of 2015
(Civil Action No: HBC 458 of 1993)

BETWEEN : A. Mitchell Gay

First Appellant
(2nd Defendant)

AND : Alan C Beall

Second Appellant
(3rd Defendant)

AND : Resolution Trust Corporation

First Respondent
(First Plaintiff)

The Cadle Company

AND : **Second Respondent**
(Second Plaintiff)

BEFORE : The Hon. Mr Justice David Alfred

Counsel : Mr H Nagin for the First and Second Appellants
Mr W Clarke for the First and Second Respondents
Ms D Gandhi holding a watching brief for the First
Defendants

Date of Hearing : 3 December 2015
Date of Judgment : 9 December 2015

JUDGMENT

1. This is an Appeal by the Appellants (the Second and Third Defendants) against the Ruling of the Master made on the 22nd May 2015 (the Ruling), striking out their Counterclaim, for want of prosecution and abuse of process of the Court.
2. The Grounds of Appeal that are relevant may be summarized as follows:
That the Master erred in law and in fact:
 - (a) When he held there was inordinate delay on the part of the 2nd and 3rd Defendants (the Appellants).
 - (b) When he did not hold that the Plaintiffs needed to move the action for trial.
 - (c) When he did not hold that the delays were caused by the Plaintiff's long periods of inactivity.
 - (d) When he failed to order a speedy trial, instead of striking out, which should only be a last resort.

The other Grounds do not concern us in the instant Appeal.

3. I note that the writ of summons dated 25 August 1993 filed by the First Plaintiff was only against the First Defendants, who filed their defence in September 1993. They are not involved in this Appeal.
4. From the Ruling, I note the following:
 - (i) The Second and Third Defendants (the Appellants) sought and obtained the leave of the Court on 27 January 1997 to join in this action as defendants.
 - (ii) The Amended Statement of Claim dated 12 September 2006 was filed by the Plaintiffs (the Respondents) and included the present Appellants and another (Fourth) Defendant as additional Defendants.
 - (iii) The said Defendants filed their Statement of Defence and Counterclaim on 22 September 2006.
 - (iv) The Plaintiffs filed their Defence to the Counterclaim on 27 October 2006.

- (v) The Plaintiffs had obtained summary judgment against the First Defendants on 31 March 2009.
5. The Appellants filed their affidavits verifying the list of documents and the minutes of the Pre-Trial Conference on 27 July 2007. Thereafter in the Master's words "the counterclaim has been in abeyance without any further steps being taken, until the Plaintiff filed this Summons for strike out".
 6. The learned Master considered the principles applicable to a striking out for want of prosecution by referring to the speech of Lord Diplock in the House of Lords in : *Birkett v James* [1978] A.C. 297 at 318.
 7. I have also perused the Supreme Court Practice 1995 (The White Book) which gives the relevant main principles. There are 2 distinct, though related, circumstances in which an action may be dismissed for want of prosecution. These are (a) where a party has been guilty of intentional and contumelious default and (b) where there has been inordinate and inexcusable delay in the prosecution of the action.
 8. Here we are concerned with (b) above as there does not appear be any evidence of default in compliance with an order of court.
 9. The requirements where inordinate and inexcusable delay are concerned are (i) there has been such aforesaid delay on the part of the plaintiff or his lawyers and (ii) such a delay will give rise to a substantial risk that it is not possible to have a fair trial or likely cause serious prejudice to the defendant.
 10. The White Book further states that (ii) above sets out 2 distinct situations and if either is established that is sufficient.

11. Since we are concerned with a Counterclaim, this means all references to the Plaintiff are to be considered as references to the Defendant (Appellants) and vice versa. Once this has been done, it becomes as plain as a pikestaff that it is the Appellants who are responsible for the delay. In my view, their Counsel's submissions of alleged delay on the part of the Respondents are untenable.
12. The Statement of Claim filed on 25 August 1993 discloses that the original defendants were only Leinani K Bortles and Larry Lynel Bortles. The Plaintiff was claiming against them only and no one else and certainly not against the Appellants.
13. In the First and Second Plaintiffs' (The Respondents) Amended Statement of Claim (after the Appellants had joined themselves in as the Second and Third Defendants), the Plaintiffs again only claimed against the First Defendants and made no claim whatsoever against the Appellants and in fact made no mention of them at all.
14. A careful perusal of the Statement of Defence and Counterclaim of the Appellants reveal that in addition to being a bare denial or non-admission of the contents of the Amended Statement of Claim, it asks that the Plaintiffs' action against them be dismissed as it does not disclose any reasonable cause of action. This is startling as there is nothing to be dismissed because in the first place the Plaintiffs did not make the Appellants Defendants and in the second place the Plaintiffs never made any claim against them at all.
15. In fact, the Plaintiffs make this crystal clear in their Defence to the Counterclaim when they state, inter alia, that the whole of the Counterclaim discloses no reasonable cause of action and ask for its dismissal with costs.

16. I have perused the authorities cited by the Appellants. The decision of the Fiji Court of Appeal in: *Bhawis Pratap ... Appellant* and *Christian Mission Fellowship ... Respondent* (Civil Appeal No. ABU 0093 of 2005 shows the correct approach is laid down in : *Abdul Kadeer Kuddus Hussein v Pacific Forum Line* and clearly stated in the New Zealand case of : *Lovie v Medical Assurance Society Limited* [1992] 2 NZ LR at 248 where Eichelbaum CJ explained that for an application to strike out for want of prosecution to succeed the Applicant must show that the Plaintiff was guilty of inordinate delay, that such delay is inexcusable and that it has seriously prejudiced the Defendants. I find the Master has taken the correct approach.
17. The Respondents have no claim against the Appellants and once they had obtained summary judgment against the First Defendants could in normal circumstances have considered the matter as over. But they are still here today in court purely and simply because of the Counterclaim against them, which brings me to the nub of the matter.
18. The Appellants as the Defendants who have brought a Counterclaim against the Plaintiffs (the Respondents) are now in the position of a Plaintiff. This is because in a Counterclaim it is the Defendant who has placed on him all the responsibilities of a Plaintiff. It is the Defendant who now has exclusive carriage of the proceedings. It is the Defendant who is enjoined to prosecute his claim or suffer the consequences of his dilatoriness.
19. Therefore when I peruse the written submission of Counsel for the Appellants, I find it is incorrect for Counsel to say that the Plaintiffs have the carriage of the action and to ask the Court to determine whether the delay was that of the Respondents or the Appellants, thus conceding there is indeed a delay.

20. In my opinion, it is the sole responsibility of the Appellants' lawyers to ensure that their clients' Counterclaim proceed to trial. It can never be shifted away to the Plaintiffs (the Respondents).
21. Therefore to answer the question posed in paragraph 2.9 of the Appellants' Submission, I say that I find the delay was that of the Appellants. There was no basis in law or in fact for the Appellants to rely on the Respondents to take the matter to trial and to file the Order 34 Summons. The Appellants having the sole conduct of their Counterclaim, it behove them to take all the necessary action for the speedy trial of their Counterclaim.
22. Instead from the Pre-Trial Conference on 27 July 2007 the Appellants engaged in masterly inaction, only filling the Order 34 Summons, to set down their Counterclaim for trial, on 3 June 2014.
23. I agree with what the Master said in para 17 of the Ruling that the onus is on the (Appellants) "to take necessary steps to take their counterclaim to a conclusion", in light of Order 25 rule 1 and Order 34 rule 1, which in my view, *mutatis mutandis*, apply exclusively to the Appellants here.
24. I also agree with the Master when he states in para 19 of the Ruling that the Defendants (Appellants) have not given any explanation for the delay of nearly seven years, apart from their Counsel's misconceived submission that the protracted delay was due to the failure of the Plaintiffs (Respondents).
25. Once the Appellants started their Counterclaim it was their duty to prosecute it with diligence (see *Birkett v James*). Their delay (and inactivity) was inordinate in that it was materially longer than the time the Courts and the Barristers would consider as acceptable.

26. I turn finally to consider whether this inordinate delay on the part of the Appellants has caused prejudice to the Respondents. It bears reminding that as far as the Plaintiffs are concerned, closure should have come with their summary judgment on 31 March 2009, against the only defendants they had claimed against i.e. the First Defendants. Instead until today a full 6 years and 8 months later they are still in a litigation which is not of their own doing.
27. I find this is a cause of serious prejudice to the Respondents and I do not need to repeat in this judgment the reasons given by the Master in the Ruling for finding the existence of serious prejudice to the Respondents if the Counterclaim were to be continued.
28. I will apply the maxim of public policy which in Latin is expressed as "*interest reipublicae ut sit finis litium*" which is defined by Osborn's Concise Law Dictionary (7th edition) as "It concerns the State that lawsuits be not protracted.
29. I find and I so hold there is inordinate and inexcusable delay on the part of the Appellants or their lawyers in the prosecution of their Counterclaim and that such protracted delay has caused serious prejudice to the Respondents.
30. I therefore uphold the Master's Ruling and Orders made and dismiss the Appeal with costs, which I summarily assess at \$2,000.00 to be paid by the Appellants to the Respondents.

Dated at Suva this 9th day of December 2015



.....
David Alfred
JUDGE
High Court of Fiji, Suva