IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 299 of 2011

BETWEEN : **BIKASHNI DEVI**of Suva, Businesswoman.

PLAINTIFF

AND : **SUVA PRIVATE HOSPITAL**having its registered office at 120 Amy Street, Toorak.

1stDEFENDANT

AND : **DR. LITIANA BROWNE** of Suva, Medical Practitioner.

2nd DEFENDANT

Appearances : Vakaloloma & Associates for the Plaintiff
Haniff Tuitoga for the 1st Defendant
Howards Lawyers for the 2nd Defendant

Before : Acting Master S. F. Bull

Ruling : 23 December 2016

RULING

1. This is the Court's own motion pursuant to Order 25 Rule 9 of the High Court Rules, for the Plaintiff to show cause why this matter ought not to be struck out for want of prosecution.

2. The history of these proceedings can be summarized as follows:
   - 23 September 2011 - Writ of summons
   - 3 October 2011 - Acknowledgement of service by the first defendant.

- 27 October 2011 - Default judgment entered against both defendants for failure to file a statement of defence; summons for assessment of damages.
- 3 November 2011 - Acknowledgement of service by second defendant
- 14 November 2011- 1st Defendant's application to set aside default judgment.
- 17 November 2011 - By consent, the default judgment against the first defendant set aside.
- 30 November 2011 - Notice of change of solicitors for the second defendant.
- 6 December 2011 - 1st Defendant's defence filed.
- 13 January 2012 - 2nd Defendant's summons to set aside default judgment.
- 7 February 2012 - By consent, default judgment against 2nd Defendant set aside.
- 13 March 2012 - 2nd Defendant's defence filed.
- 5 April 2012 - Reply to defence filed.
- 25 May 2012 - Summons for directions filed
- 18 June 2012 - 1st Defendant's application for further and better particulars.
- 28 June 2012 - Plaintiff ordered to, within 28 days, serve the first defendant with further and better particulars.
- 22 August 2012 - 1st Defendant's affidavit verifying list of documents.
- 10 September 2012 - Order on summons for directions
- 17 July 2013 - Notice of change of solicitors for 1st defendant.

- 5 February 2014 - Notice of change of solicitors for the plaintiff.
- 24 October 2014 - Court's notice under Order 25 Rule 9.

The affidavits

3. The affidavit showing cause was sworn by an executive legal for the plaintiff's solicitors, who says she deposes the said affidavit for the defendants. I am sure she means plaintiff. She attributes the delay to an oversight when receiving instructions after suspension of the plaintiff's previous solicitor's practicing certificate. She avers that the plaintiff's files had been locked in her former solicitor's office and when finally retrieved, "came in pieces with documents lost from files." The delay was unintentional and the action should not be struck out. In any event, the Court's notice is defective and irregular since the High Court Rules 1988 "does not have an applicable clause as per Order 25 Rule 9."

4. Both defendants filed affidavits supporting the striking out of the plaintiff's action, citing inordinate and inexcusable delay, non-compliance with Court orders amounting to abuse of process of the Court, length of delay and resulting prejudice.

The law

5. Order 25 Rule 9 provides:

Strike out for want of prosecution (O.25, r.9)

(1) 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 struck out for want of prosecution or as an abuse of the process of the Court.

> (2) 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. The principles to be applied by the Court in applications to strike out for want of prosecution are settled. The Court's power to strike out is to be exercised only if it 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 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 defendants either as between themselves and the plaintiff or between each other or between them and a third party. (*Birkett v. James* [1978] A.C. 297, 318F-G, per Lord Diplock)

7. There is no doubt that the Court has inherent jurisdiction to "allow the Plaintiff to proceed with his claim even if it concludes that there has been excessive delay." (*Harakh v Fiji Public Service Association* [2000] FJHC 262; [2000] 1 FLR 78 (5 May 2000) per Gages J, citing *Finnegan v Parkside Health Authority* [1997] EWCA Civ 2774; [1998] 1 All ER 595 at 604)

8. The first limb of the test in *Birkett* requires proof 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.

In *Deo v Sharma* [2007] FJCA 23; ABU0041U.2006S (23 March 2007) (per Ward P, Scott JA, McPherson JA), the Court, at [12], referred to the Shorter Oxford Dictionary definition of contumely as

> 1. Insolent reproach or abuse, insulting or contemptuous language or treatment; despite; scornful rudeness; now *esp.* such as tends to dishonour or humiliate.
>
> 2. Disgrace; reproach

Analysis

9. There can be no doubt that the Court has jurisdiction to, of its own motion, require the parties to show cause as to why a cause or matter ought not to be struck out for want of prosecution. Order 25 Rule 9 makes this clear.

10. In its affidavit showing cause, the Plaintiffdenies that the delay was intentional, saying that it was due to the suspension of the plaintiff's previous solicitor's practicing certificate, and difficulties faced by the plaintiff in accessing documents from her file.

11. I note that Annexure DQ 1 of the first defendant's affidavit shows that the plaintiff's previous counsel was sentenced on 5 October 2012, with the sentence being, amongst other things, suspension of practicing certificate. He was allowed 21 days thereafter to remain in practice for the purpose of handing over his matters, though not allowed to appear in Court or accept new instructions from existing or new clients.

12. The last step in the substantive matter was the order on the summons for directions, made on 10 September 2012. Thereafter, the first defendant on 17 July 2013 and the plaintiff, on 5 February 2014, filed notices indicating a change of solicitors.

13. The plaintiff has neither complied with the order of 28 June 2012 to serve the first defendant with further and better particulars, nor with the order of 10 September 2012 on the summons for directions, requiring it, amongst other things, to serve on the defendants a list of documents and an affidavit verifying the said list.

14. Having considered the affidavits, the reasons given by the Plaintiff for the delay, as well as counsel's submissions, I am not satisfied that the delay on the part of the Plaintiff was intentional or contumelious.

Inordinate and inexcusable delay

15. Inordinate delay is delay which is :

> ...materially longer than the time which is usually regarded by the courts and the profession as an acceptable period. (*Birkett*, supra)

16. Inexcusable delay

> ... ought to be looked at primarily from the defendant's point of view or, at least, objectively; some reasonable allowance, for illness and accident may, be made. But the best excuse is usually the agreement of the defendant or difficulties created by him. (The Supreme Court Practice 1999 at 25/L/6)

17. In *New India Assurance Company Ltd v Singh* [1999] FJCA 69; Abu0031u.96s (26 November 1999), the Fiji Court of Appeal (per Casey JA, Savage JA, and Tompkins JA) considered it neither helpful nor necessary to analyse the meaning of the words 'inordinate' and 'inexcusable', saying these had their ordinary meaning. The Court stated:

> Whether a delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case.

18. In the circumstances of this case, I have no hesitation in holding that the delay in serving further and better particulars on the first defendant for a period of 29 months, and in complying with the order on the summons for directions, for a period of about 26 months, is inordinate. Indeed, the failure of the plaintiff to take any active step in the cause for more than two years is certainly "...materially longer than the time which is usually regarded by the courts and the profession as an acceptable period," (*Birkett*, supra) and is therefore inordinate.

19. I next consider whether the delay is inexcusable. The affidavit showing cause attributes the delay to an oversight when receiving instructions, the suspension of the previous solicitor's practicing certificate, the locking of the plaintiff's files inside the said solicitor's office, and problems with missing documents when the files were finally retrieved. It is not clear what the "oversight" was. Further, a search of the Court file could have easily informed counsel and/or plaintiff of the status of the case. As it is, the Court's notice under Order 25 Rule 9 was issued more than a year from when the plaintiff's last counsel was suspended, about 8 months from when current solicitors came on record, and more than 2 years since the plaintiff did anything to progress the matter.

20. While I am prepared to accept that there may have been initial difficulties with obtaining the plaintiff's file after suspension of his previous counsel's practice, I am of the view that the inactivity of more than a year thereafter was inexcusable.

21. In *New India Assurance Company Ltd v Singh*[1999] FJCA 69; Abu0031u.96s (26 November 1999)(per Sir Maurice Casey, Mr Justice Savage, Sir David Tompkins), the Court stated:

> Where principle (2) is relied on, both grounds need to be established before an action is struck out. There must be both delay of the kind described and a risk of an unfair

trial or serious prejudice to the defendants. In *Department of Transport v Smaller (Transport) Limited*[1989] 1 All ER 897 the House of Lords did not accept a submission that the decision in *Birkett* should be reviewed by holding that where there had been inordinate and inexcusable delay, the action should be struck out, even if there can still be a fair trial of the issues and even if the defendant has suffered no prejudice as a result of the delay. Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ delay will either make a fair trial impossible or prejudice the defendant. He went on to affirm the principle that the burden is on the defendant to establish that serious prejudice would be caused to it by the delay. (Emphasis mine)

Risk of an unfair trial or serious prejudice to the defendant

22. The final consideration is whether there is risk of an unfair trial, or serious prejudice to the defendant. The onus of proving prejudice lies with the defendants. Thus in *Department of Transport v Chris Smaller Ltd*[1989] 1 A11 ER 897 at 904, Lord Griffiths stated:

> [Counsel] for the defendants submits that at least the burden should be on the plaintiff guilty of inordinate post-writ delay to prove that the defendant will not suffer prejudice as a result of the delay. I regard this as a wholly impractical suggestion. It would put an unrealistic burden on the plaintiff. The plaintiff will not know the defendant's difficulties in meeting the case, such as the availability of witnesses and documents nor will the plaintiff know of other collateral matters that may have prejudiced the defendant......The defendant, on the other hand, has no difficulty in explaining his position to the Court and establishing prejudice if he has in fact suffered it. I must, therefore, reject this second limb of the argument of counsel for the defendants.

23. In arguing prejudice, both defendants have focussed mainly on prejudice to their respective cases. The Court in *Harakh v Fiji Public Service*

Association [2000] 1 FLR 78per Gates J (as then was) referred to this as the first category of prejudice to be considered, though the prejudice could apply in the same way to the case of any of the litigants.

24. The Court in *New India Assurance Company Ltd v Singh* (supra) said that prejudice can be

> ...either specific, that is arising from particular events that may or may not have occurred during the relevant period, or general, that is prejudice that is implied from the extent of the delay.

25. Specific instances of prejudice need to be included in the affidavit. (*Merit Timber Products Limited v Native Land Trust Board*Civil Appeal No. CBV0008 of 1994)

26. The events the subject of these proceedings occurred in 2009. The first defendant says that with the passage of time, the memory and recollection of witnesses will be severely affected, resulting in a substantial risk that a fair trial will not be possible. The action is far from ready for trial and it will be some time before it is. Clearly, the first defendant is citing general prejudice.

27. The second defendant says that she has seen many patients since she saw the plaintiff in 2009. She will have to recall the events which took place at the Suva Private Hospital at the material times, in addition to that which is recorded in the medical folder. She also says that she was assisted at the Hospital by a number of paramedics and other administration staff whose whereabouts she is not aware of, and that she will suffer substantial prejudice if she does not find out where they are, or if they are not available as witnesses for trial. She also says that this case has affected her mentally and psychologically.The second defendant relies on both specific and general prejudice.

28. I deal with specific prejudice first. Though the second defendant has cited potential difficulties with locating witnesses and doubts as to whether they will be available for trial, the evidence is not sufficient to establish prejudice. No mention is made of who the witnesses are, or what the nature of their evidence is. The reference to availability of witnesses for trial is, at best, speculation. There is nothing to say that any attempt has been made to locate or even contact them. On the material that is before the Court, I am not satisfied that specific prejudice has been made out.

29. I turn now to general prejudice. The first defendant says that the passage of time since the occurrence in 2009 of events the subject of these proceedings will severely affect the memory and recollection of witnesses, resulting in a substantial risk that a fair trial will not be possible.

30. In *New India Assurance Ltd* (supra), the Court stated:

> It has long been recognised that the longer the delay the more difficult it can be for witnesses accurately to remember events that may have occurred years before. Such events may be forgotten, and there may be an increased possibility that a witness may, by virtue of the passage of time, come to believe an event or a happening that in fact did not occur, or did not occur in the manner he or she now believes. These considerations are also relevant to whether it is possible to have a fair trial of the issues in the action.

31. From the pleadings, the main issues seem to be whether the first defendant is vicariously liable for the actions of the second defendant; whether the medical procedure (caesarian operation) performed by the second defendant on the plaintiff was competently carried out, and; whether there was a breach of contract and duty of care on the part of the defendants, as a result of whichthe plaintiff suffered damages.

32. Given the issues above, it is reasonable to assume that much reliance will be placed on documentary evidence related to the second defendant's employment at the Suva Private Hospital, as well as information contained in the plaintiff's medical folder with the first defendant. Information contained in these documents will enable witnesses to refresh their memories and therefore be of great assistance in resolving the problem of recollecting events with the passage of time.

33. I note that the plaintiff's claim also alleges that the defendants had given "explanations, suggestions and pre-operative briefings concerning the said medical procedure..." and "assurances by the first or second defendants that the procedure would be performed competently and that she would not need to have any anxiety pre and post operation" and of a "complete recovery...without any complications." (Paragraphs 12 and 13 of statement of claim) Reliance on oral evidence and the need for witnesses to accurately recall events and what was said, is therefore very important.

34. The plaintiff's allegations above are denied by the second defendant in paragraphs 10 and 11 of her defence, where she states that the plaintiff had attended the Suva Private Hospital after initial consultations at the caesarian section of the CWM Hospital, and that it was the plaintiff who had insisted on caesarian delivery contrary to the advice given her by the second defendant. This suggests not only that at the time of filing of her defence, the second defendant was able to recollect the events, but also that she would have likely recorded the events for trial purposes. If recorded, the document would be an aid to refreshing the memories of the second defendant and her witnesses, enabling them to give reliable evidence. If not, it may well be difficult for them to do so, apart from that which is contained in the second defendant's defence. The second defendant's affidavit does not contain evidence either way.

35. I am not satisfied that the Defendants have shown that the delay, though inordinate and inexcusable, will seriously prejudice either of them in their defence.

36. I ought to comment on the failure of the plaintiff to comply with the Court's orders for further and better particulars, and on the summons for directions. I have considered whether I ought to strike out the action on this ground. In doing so, I bear in mind the views of the High Court of Australia in *State of Queensland and another -v- J.L Holdings Pty Ltd*[1997] HCA 1; (1997) 189 CLR 146 at 154, where the Court stated:

> ...case management is not an end itself. It is an important and useful aid for ensuring for prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times that the ultimate aim of a court is attainment of justice and no principle of case management can be allowed to supplant that aim.

37. Indeed, in*Costellow -v- Somerset Country Council*(1993) IWLR 256, Lord Justice Thomas Bingham MR stated at 264:

> Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs.

Conclusion

38. Having considered the law, the material before the Court, counsel's submissions on the non-compliance of the plaintiff with orders of the Court, the length of the delay, prejudice, and whether a fair trial can still be had,I come to the conclusion that though there has been inordinate and inexcusable delay, I am not satisfied that a fair trial is not possible or that exceptional circumstances exist such as to warrant the striking

out of this matter. Indeed, I am of the opinion that justice requires that the plaintiff be given further time to comply with the orders of the Court, and to now progress this matter with due diligence and without further delay. I am satisfied a peremptory order is justified in the circumstances.

39. Orders

1. Unless the Plaintiff complies with all of the following orders by 30 January 2017, the statement of claim and writ of summons will be wholly struck out with costs to both defendants to be assessed:
    i. Serve on the first defendant further and better particulars;
    ii. Serve on the defendants a list of documents, and file and serve an affidavit verifying such list.
2. Case adjourned to 31 January 2017 for mention.

S.F. Bull
Acting Master