

**THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 185 of 2014

**BETWEEN** : **DELZEV LIMITED** a limited liability company having its registered office at  
364 Fostors Road, South Purrumbete, Victoria, Australia.

**1<sup>ST</sup> PLAINTIFF**

**AND** : **FLINN SAWMILLS LIMITED** a limited liability company having its registered  
office at c/- 1<sup>st</sup> Floor, Suites 8 & 9, Queensland Insurance Centre, Victoria Parade,  
Suva in the Republic of Fiji.

**2<sup>ND</sup> PLAINTIFF**

**AND** : **WILSON INVESTMENT MANAGEMENT LIMITED** a limited liability  
company having its registered office at 5 Andrews Avenue, Wellington, New Zealand.

**DEFENDANT**

**BEFORE:** Master Vishwa Datt Sharma

**COUNSELS:** Mr. Afzal Khan for the Plaintiff  
Ms. Low for the Defendant

Date of Hearing: 14<sup>th</sup> November, 2016

Date of Ruling: 16<sup>th</sup> February, 2017

**RULING**

*[Application to strike out the Plaintiff's substantive Writ of Summons and Statement of Claim  
pursuant to Order 25 Rule 9 of the High Court Rules, 1988]*

(A) INTRODUCTION

1. The Court on its own **Motion** issued a **Notice** to the parties on 09<sup>th</sup> May, 2016, listed the matter for the parties to **show cause** why the case should not be **struck out for want of prosecution or as an abuse of the process of the Court** since no action was taken for a period of more than six (6) months.
2. This Notice was issued pursuant to *Order 25 Rule 9 of the High Court Rules, 1988*.
3. The Plaintiff filed its Affidavit to Show Cause on 16<sup>th</sup> June, 2016 and the Defendant filed his Affidavit Supporting the striking out on 26<sup>th</sup> July, 2016 and second Affidavit on 01<sup>st</sup> February, 2017.
4. The application was heard with Written Submissions on 14<sup>th</sup> November, 2016.

(B) THE LAW

5. This application is issued pursuant to *Order 25 Rule 9 of the High Court Rules 1988*, which *inter-alia* states as follows:
  - (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 basic law on *Order 25 Rule 9* has been crystallized in the leading authority of **Birkett vs James (1978 AC 297 (1977) 2 ALL ER** whereby the House of Lords held"

*"The power should be exercised only where the court is satisfied wither (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; (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 it is likely to cause or to have caused serious prejudice to the*

*defendants wither as between themselves and the plaintiff or between each other or between and a third party."*

7. In the Case of **Abdul Kaddus Hussein vs Pacific Forum Line Civil Appeal No. ABU 0024 of 2000s (30<sup>th</sup> May 2003)**, the Court of Appeal readopted the principles expounded in **Birkett vs James** (supra).
8. The test in "**Birkett vs James**" (supra) has two limbs. The first limb is "intentional and contumelious **default**". The second limb is "**inexcusable or inordinate delay and prejudice.**"
9. In **Pratap v Christian Mission Fellowship, (2006) FJCA 41**, The Court of Appeal discussed the principles expounded in **Brikett v James Fellowship**" - (supra) held

*"The correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution has been considered by this court on several occasions.*

10. While citing **Abdul Kadeer Kuddus Hussein v Pacific Forum** (supra) the court, readopted the principles expounded in **Birkett v James [1978] A.C. 297; [1977] 2 All ER 801.**

*"(7) The question that arises for consideration is what constitutes" intentional and contumelious default" (First Limb). The term "Contumely" is defined as follows by the Court of Appeal in Chandar Deo v Ramendra Sharma and Anor., Civil Appeal No, ABU 0041/2006,*

1. *Insolent reproach or abuse, insulting or contemptuous language or treatment; despite; scornful rudeness; now esp. such as dishonor or humiliate.*
2. *Disgrace; reproach."*

11. While the "**Summons**" may not seek for strike out on the **abuse of process**, the court can on its own inherent jurisdiction strike the matter out for abuse of process.

Lord "Woolf" in "**Grovit and Others v Doctor and Others**" (1997) 01 WLR 640, 1997 (2) ALL ER, 417, has discussed the **principles for striking out** for "**Abuse of process**" (The second ground in Order 25 Rule 9 (1)) as follows:



*"The Court had power under its inherent jurisdiction to strike out or say actions on the grounds of abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied. Accordingly, since the commencement and continuation of proceedings with no intention of bringing them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to establish want of prosecution by showing that there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant. It followed, on the facts that the deputy judge had been fully entitled to strike out the action. The appeal would therefore be dismissed."*

12. The Court of Appeal in Thomas (Fiji) Ltd v Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006 affirmed the principle of Grovit v Doctor as ground for striking out a claim, in addition to , and independent of principle set out in Birkett v James (see paragraph 16 of the judgment). Their Lordships held:

*"It may be helpful to add a rider. During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in Grovit and Ors v Doctor [1997] 2 ALL ER 417. That was an important decision and the judgment was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in Birkett v James [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court."*

13. It seems that under "Grovit and Others v Doctor and Others" (supra) there is no need to **show prejudice** any more for it says that maintaining proceedings without a serious intention to progress then may amount to "**abuse of process**" which justifies for **want of prosecution** without having to show prejudice.

(C) ANALYSIS and DETERMINATION

14. I have perused the court file in terms of the pleadings filed as required by the set down procedures and the *High Court Rules 1988* accordingly.

15. **This case was commenced by a Writ of Summons and a Statement of Claim on 12<sup>th</sup> November, 2014.**
16. The Defendant was served and accordingly filed the **Acknowledgement of Service on 20<sup>th</sup> March, 2015.**
17. The **Statement of Defence** and the **Counter- Claim** were filed on **29<sup>th</sup> May, 2015.**
18. Subsequently, on **16<sup>th</sup> June, 2015,** the Plaintiff filed his **Reply to the Statement of Defence and Counter-Claim.** Hence, the pleadings were complete in this case. The Plaintiff was then required to attend to the further cause of action in terms of filing the **Summons for Directions** and seek further directions and orders in the matter. Nothing was done after the close of pleadings on **16<sup>th</sup> June, 2015.**
19. On **09<sup>th</sup> May, 2016,** this Court on its own **Motion** issued a **Notice** to the parties to the proceedings to **show cause why the case should not be struck out for want of prosecution or as an abuse of the process of the Court** since no action was taken for a period of more than six (6) months.
20. The Plaintiff was served with the Court's Notice on **12<sup>th</sup> May, 2016** and thereafter on **17<sup>th</sup> May, 2016** filed the **Notice of Intention to Proceed.**
21. The **Plaintiff** filed its **Affidavit to show Cause** on **16<sup>th</sup> June, 2016.**
22. This Court notes from the Court record that the Plaintiff ought to have filed a Summons for Directions after the pleadings were closed on **16<sup>th</sup> June, 2015.** No action was taken by the Plaintiff until **12<sup>th</sup> May, 2016** when he filed a **Notice of Intention to Proceed.** The **Notice of Intention to Proceed** is not a cause of action in itself rather an intention expressed in the notice to proceed with the matter after an action lapses outside the **6 months' timeframe** .This was only done upon the service of the Court's Notice and after a lapse of almost **11 month's** timeframe.
23. This meant that since the last pleading was filed on **16<sup>th</sup> June, 2015,** and until the **Order 25 Rule 9** application was filed, a period of **11 month had lapsed.** In fact the Law requires that the parties to the proceedings must ensure that the pleadings in terms of the Law must be filed and served on the parties to



proceedings to complete the pleadings and allow the case to be heard and determined either before the Master or a Judge of the High Court accordingly.

24. The **onus is on the Plaintiff** to provide a **cogent and credible explanation** for not taking any steps to **advance the litigation** in this case after the **16<sup>th</sup> June, 2015**.
25. This court is therefore required to deliberate on the following **issues** in terms of the impending **Order 25 Rule 9** application to arrive at a determination whether to dismiss the cause or deal with the application as if it were a **summons for directions** accordingly:
- (i) *that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or*
  - (ii) *that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers; and*
  - (iii) *that such delay would 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."*

#### **Default is contumelious**

26. "**Contumelious**" in the context of want of prosecution refers to disobedience of any orders or directions of this court.
27. The **Plaintiff** filed the **reply** to the **Statement of Defence and Counter-Claim** as was required of him in terms of the Law and therefore the pleadings in this action were then closed. Thereafter, the parties are required to pursue the claim and act in compliance with the set down procedures and the **High Court Rules, 1988** respectively and fully comply with all cause of action until the case is ready for hearing and determination either before a Master or a Judge of the High Court.

In fact, neither any further action was taken by the **Plaintiff** after the pleadings were closed nor did this Court make any directions and orders for the parties to comply.

For the above rational, the first arm of the test does not apply herein since this court at this stage of the proceedings did not make any directions rather the set down procedure in law should have been adhered to. The Plaintiff after filing the Reply to the Statement of Defence and the Counter-Claim should have filed and served a **Summons for Directions** and sought the directions and orders of this Court to move the matter further, but failed to do so and let the matter remain pending in the system till now.

### Delay

28. The test for delay is both 'intentional' and 'inordinate'.

### Intentional

For these **two elements** to be satisfied, the **Defendant** must establish that the **delay was intentional** on the part of the Plaintiff. In other words the Plaintiff has filed an action with having no intention to proceed with the same.

*The Plaintiff submitted 'that it had filed a notice of intention to proceed with the matter. The delay in progressing with this matter was due to related issues with this case which relates to the consent of the Minister for Lands to a dealing made between the First named Plaintiff and BSP Life (Fiji) Limited. Ministerial consent was being sought by the Plaintiffs to enable transfer of the property as such consent is time consuming to obtain. A letter dated 07<sup>th</sup> October, 2016 from the Ministry of Lands & Mineral Resources was sent to our office informing us that the Judgment on the property registered under CT 23022 needs to be withdrawn after which they would proceed with the Ministerial Consent application.'*

*The Defendant submitted 'that the Plaintiffs have failed to show cause and have not adequately explained or justified the extensive delay in prosecuting these proceedings. The Plaintiffs have also not taken any steps to otherwise progress with these proceedings or shown that they are ready or able to do so. Further delays will only serve to drag this matter out further and continue to prejudice the Defendant unjustifiably. Delay caused by the Plaintiff up to the time of service of Order 25 Rule 9 Notice is 11 months.'*

29. Taking into consideration the Affidavits filed herein coupled with the written submissions of both Counsels, I find that the Plaintiffs have a genuine desire and interest to proceed with this matter. The delay caused in the matter adds up to **11 months** which in the circumstances is not **materially longer** than the time usually regarded by the profession and courts as an acceptable period. The Plaintiffs have adequately explained the reasons for the delay of 11 months which was beyond the control of the Plaintiffs since the **Ministerial consent**



needed to be obtained and issued by the Ministry of Lands & Mineral Resources and the same has been confirmed as deposed in the Affidavit of Ashwini Kuar.

The question then is whether **delay** alone is sufficient for the Court to strike out an action for want of prosecution. The Court of Appeal in the case of *New India Insurance Co. Ltd -v- Rakesh Kumar Singh Civil Appeal No. ABU 0031 of 1996* emphasized '*that while inordinate and inexcusable delay might be established, these factors alone were not on their own sufficient to warrant the striking out of the action.*'

Further, the **delay** in the manner and circumstances described hereinabove was **unintentional** on the part of the Plaintiff. The Plaintiff's conduct also did not tantamount to an **abuse of the Court process** because there was no intention of the Plaintiff not to pursue this case any further and or to bring this action to a conclusion. If the Defendant thought otherwise then the Defendant should have filed an appropriate application and sought for relevant Court orders appropriate in the circumstances but failed to do so.

30. The other requirement is the 'inordinate' delay.

#### Inordinate

This relates to the **length of delay**. The word '**inordinate**' is defined in the Supreme Court Practice meaning '*materially longer than the time usually regarded by the profession and courts as an acceptable period.*'

The issue this Honorable Court is burdened with is whether the inordinate delay was so material that it gives rise to a substantial risk that it is not possible to have a fair trial of the pending issues in this action. The Plaintiff filed the Reply to the Statement of Defence and the Counter- Claim and the pleadings in this case were closed. The Plaintiff did not pursue the cause of action hereafter. The time calculated from the date of the filing of the last pleadings in terms of the Plaintiff's Reply to the Statement of Defence and the Counter-Claim, and until the issuance of the **Order 25 Rule 9** Notice on 09<sup>th</sup> May, 2016, adds up to 11 months.

If the Defendant encountered any delay on the part of the Plaintiff in pursuing with the cause of action, then the Defendant as parties to the proceedings should have filed and proceeded with an appropriate application for Court to



decide rather than wait and only act once the court issued and served the **Order 25 Rule 9 Application**.

In the above circumstances, I am of the finding that both, the Plaintiff as well as the Defendant are to be blamed for contributing to this delay. The reason being that if the Plaintiff did not pursue or prosecuted his case any further, the Defendant could have moved the court further, forcing the Plaintiff to file and serve the respective consequent pleadings to complete the pleadings and the cause. If the Plaintiff still failed, then the Defendants should have taken the alternative steps provided for in the Rules, rather than wait for the Plaintiff to pursue his case further. This was also not done. It is the duty of the Plaintiff to prosecute his case diligently and in the interest of his client in terms of the set down rules and procedures of the Court and bring the litigation of the case to its conclusion as expeditiously as can be done.

*The delay by the Plaintiffs is neither intentional nor contumelious. Further, the delay is not inordinate and is excusable taking into consideration the reasons and the explanation provided to this Court. I do not find any reason or risk that it is not possible to have a fair trial of the issues in this action at its earliest. In addition, the conduct of the Plaintiffs does not constitute an abuse of the process of this court.*

Taking into consideration the Plaintiffs affidavit showing cause together with the written submission, I find that the Plaintiffs have satisfactorily explained their delay which is not inordinate but excusable in the given circumstances and therefore is acceptable to this court.

Factors relating to inordinate and inexcusable delay on their own are therefore insufficient to warrant the striking out of this action in terms of Order 25 Rule 9 application.

### Prejudice

31. It is trite law that the Defendant must establish that they are prejudiced by the delay.

The Counsel for the Defendant submitted that **'further delays will only serve to drag this matter out further and continue to prejudice the Defendant unjustifiably. The Defendant has stated the prejudice it has been**

*encountering in paragraphs 26-28 of its affidavit in support of the notice. The Defendant has estimated that the cost of the damage to the Plant and Machineries during the recent cyclone Winston as circa \$200,000 apart from the costs of defending this action thus far, in the sum of \$6,500.'*

*The Plaintiff submitted that 'the Defendant had filed and served his Statement of Defence and Counter-Claim after a delayed time frame of 2 months and 9 days. Added that the Defendant did not encounter any prejudice as they had removed the Plants and the Machineries from the said property which was given out to the third party on a short term lease agreement. The Plaintiffs have been informed that much of the Planetary and Machinery have been sold by the Defendant which has not been fully disclosed by the Defendant to this Court. The Plaintiffs are willing and able and have been ready to perform the covenants and obligations under the sale and purchase agreement. The Plaintiffs are the one who are prejudiced by the Defendant's action. The Defendant has already obtained the deposit and enriched himself by purportedly selling the machinery to the third parties and is therefore in no way prejudiced.'*

I have taken into consideration the submissions and the case authorities in terms of Prejudice.

*The Plaintiffs filed the Writ of Summons together with the Statement of Claim on 07<sup>th</sup> July, 2014 claiming that the 1<sup>st</sup> Plaintiff and the Defendant on or about the 03<sup>rd</sup> April, 2013 entered into a Sale & Purchase Agreement where the Defendant as the Vendor had agreed to sell to the 1<sup>st</sup> Plaintiff, as purchaser, the Plant and Machinery as described in the Sale & Purchase Agreement for the sum of FJD \$250,000 pursuant to the terms and conditions therein free of all mortgages, charges and encumbrances whatsoever. That the Defendant breached the Sale & Purchase Agreement and gave a cancellation notice to the 1<sup>st</sup> Plaintiff and in breach of the Agreement purported to sell/or part with possession of Plants and Machinery to third party.*

*The pleadings were closed once the Plaintiffs filed their Reply to the Statement of Defence and the Counter-Claim on 16<sup>th</sup> June, 2015. No further action or cause was taken by the Plaintiffs until this Court issued and served a Notice in terms of Order 25 Rule 9 of the High Court Rules, 1988. The delay in pursuing the case any further was for a period of*



*over 11 months, which in the circumstances is not materially longer than the time usually regarded by the profession and courts as an unacceptable period. I have also taken on board what the Defendant had to state at paragraphs 26-28 of the Affidavit filed on 26<sup>th</sup> July, 2016. Bearing in mind the nature of the substantive claim and that the Action was commenced in July, 2014, I am of the view that this Court ought to make further directions in terms of directing the Plaintiff to file and serve the Summons For Directions and parties to the proceedings expeditiously completing the requirement and pleadings thereafter so that the matter can be heard and determined for once and for all.*

Therefore, I find that the Defendant has not suffered any real or substantial prejudice since the substantive matter is yet to be heard and determined by the Court.

#### Interest of Justice

32. The Plaintiffs instituted the proceedings in July, 2014. The substantive matter remains impending in the system with an interlocutory **Order 25 Rule 9 application to be determined currently** due to the inaction of the Plaintiffs. The Plaintiffs should have filed and served a Summons for Directions and sought for Court orders to move the matter further and bring the litigation to its conclusion supposedly the earlier the better in the interest of all the parties rather than playing a wait and see game.
33. Therefore, it has become appropriate that the courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible, even if the Defendant satisfies the requirements in **Birkett v James**. The Court of Appeal in Chandar Deo v Ramendra Sharma and anor: Civil Appeal No. ABU 0041 of (23 March 2007) (Unrep) stated as follows:-

*[15] A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the Birkett v. James principles namely: 'In view of the delays which have occurred, is a fair trial now possible?' (Also case of Department of Transport v, Chris Smaller (Transport Limited [1989] AC 1197 refers.*

34. In **Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244 at 248**. Eichelbaum CJ reviewed the authorities and concluded:

*'The applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.'*

35. Even the courts are reluctant to strike-out any matter summarily which has certain merits in it on the grounds of abuse of process. In **Dey v. Victorian Railway Commissioners** (1949) 78 CLR 62, at 91 Dixon J said:-

*'26. This principle was restated by the Court of Appeal of Fiji in Pratap v Kristian Mission Fellowship [2006] FJCA 41. Also refer to; New India Assurance Co Ltd v Singh [1999] FJCA 69.*

*The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include; Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210; Dey v. Victorian Railway Commissioners (1949) HCA 1; (1949) 78 CLR 62; Birkett v James [1978] AC 297; Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244; Agar v Hyde (2000) 201 CLR 552. Indeed the passage from Abdul Kadeer Kuddus Hussein v Pacific Forum Line reflects closely Birkett v James (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'*

36. I have carefully perused the substantive application, affidavit evidence, pleadings filed so far, written and oral submissions coupled with the applicable laws and the case authorities and therefore find as follows:-

- (i) *The delay is neither inordinate nor intentional;*
- (ii) *Both cogent and credible explanation has been provided to the Court by the Plaintiff for the delay as such the Plaintiff has successfully overcome the factor of inexcusable;*
- (iii) *The default is not contumelious since no orders or directions were made by this Court that the Plaintiff has disobeyed;*
- (iv) *The Defendant has not suffered any real or substantial prejudice to any extent; and*



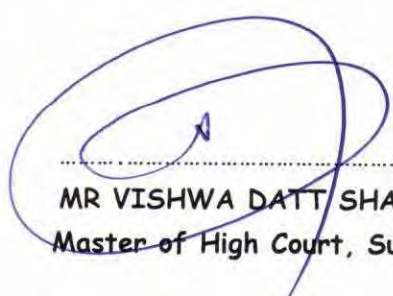
- (v) *In the interest of justice, a fair trial is still possible in the circumstances.*

37. For the aforesaid rational, I make the following orders:-

- (a) The Plaintiff's Substantive action remains intact.
- (b) The Order 25 Rule 9 Notice is hereby converted into a Summons For Directions accordingly;
- (c) The Plaintiff to take immediate necessary steps to move the matter further within 7 days in terms of the High Court Rules, 1988;
- (d) An unless Order is invoked and will be activated upon striking out the Plaintiff's Substantive Action if the Plaintiff fails to comply with the Order at (b) and (c) hereinabove.
- (e) There will be no order as to costs at the discretion of this Court.

Dated at Suva this 16<sup>th</sup> Day of February, 2017



  
.....  
MR VISHWA DATT SHARMA  
Master of High Court, Suva

cc: Khan & Company, Suva.  
Howards Lawyers, Suva.