IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 82 of 2006

BETWEEN : **DELMA CORPORATION SOUTH PACIFIC LIMITED** trading as **CHAND CONCRETE INDUSTRIES** a limited liability company having its registered office at Suva in the Republic of Fiji Islands.

PLAINTIFF

AND : **WILLIAM & GOSLING LIMITED** a limited liability company having its registered office at 82 Harris Road, Suva in the Republic of Fiji Islands.

1st DEFENDANT

AND : **PORTS TERMINAL LIMITED** a limited liability company having its registered office at Suva in the Republic of Fiji Islands.

2nd DEFENDANT

AND : **PORTS TERMINAL LIMITED** a limited liability company having its registered office at Suva in the Republic of Fiji Islands.

3rd PARTY

Appearances : Sherani for the Plaintiff

Mitchell Keil for the 1st Defendant

Patel Sharma Lawyers for the 2nd Defendant

Ruling : 15 March 2018

RULING

1. There being no movement in this matter for a period of about 2 ½ years, the Court issued a notice under Order 25 Rule 9 of the High

Court Rules, for the parties to show cause why this action should not be struck out for want of prosecution.

Chronology

2. The history of these proceedings may be summarised as follows:

- 2 March 2006 – Writ of summons and statement of claim filed
- 21 November 2011 – Trial vacated by consent, for settlement
- 13 June 2012 – New trial dates fixed for 28 – 30 January 2013 (Trial subsequently vacated as these dates fell on a public holiday)
- 11 October 2012 – Fresh trial dates fixed for 3 – 5 June 2013
- 21 May 2013 – Defendants' application to amend their defences; trial dates from 3-5 June 2013 vacated
- 11 October 2013 – Ruling on application for leave to amend statements of defence. Leave granted, Defendants to pay $1,000 costs
- 15 October 2013 – 2nd Defendant's Amended Defence filed
- 16 October 2013 – 1st Defendant's Amended Defence filed
- 14 March 2016 – Plaintiff counsel's summons for leave to withdraw
- 19 April 2016 – Summons for leave to withdraw as counsel, withdrawn
- 23 March 2016 – Court's notice under Order 25 Rule 9

The law

3. Order 25 Rule 9 (1) 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.

4. 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)

5. 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 Gates J, citing *Finnegan v Parkside Health Authority* [1997] EWCA Civ 2774; [1998] 1 All ER 595 at 604)

6. The first limb of the test in *Birkett* requires proof that the default was 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.

7. In *Deo v Sharma* [2007] FJCA 23; ABU0041U.2006S (23 March 2007) (per Ward P, Scott, McPherson JJA), 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.

Preliminary objections

8. The Plaintiff objects to the 2nd Defendant being heard on this application, saying that the latter has not paid costs of $1000 ordered against it at the hearing of the Defendants' applications for leave to amend their respective statements of defence, and is therefore in contempt.

9. Mr. Sharma for the 2nd Defendant admits that the 2nd Defendant had not paid, but says it was an oversight. They had tried to pay costs to the Plaintiff the day before the hearing, but the Plaintiff refused to accept it. There is no application for contempt before the Master, who, in any event, has no jurisdiction to deal with contempt issues.

10. It appears that while the Plaintiff says that the 2nd Defendant is in contempt for non-payment of costs, it refused to accept the 2nd Defendant's attempt to do so. Surely it cannot now complain of contempt after refusing to allow the 2nd Defendant to purge its contempt by paying costs.

11. The Plaintiff also takes issue with the Defendants seeking to rely an affidavit filed by one Leighton Turner on March 2016 (the Leighton affidavit), in support of a summons filed by the Plaintiff's solicitors seeking leave to withdraw as solicitors for the Plaintiff. Mr. Singh submits that once a summons is withdrawn, the affidavit does not have any weight. No one can use it, notwithstanding its being filed.

12. Mr. Sharma relies on Order 38 Rule 10 (2) which states:

> Without prejudice to the provisions of any enactment, every document purporting to be sealed with the seal of

> any office or department of the High Court or Court of Appeal shall be received in evidence without further proof, and any document purporting to be so sealed and to be a copy of a document filed in, or issued out of, that office or department shall be deemed to be an office copy of that document without further proof unless the contrary is shown.

13. *The Supreme Court Practice 1999* Vol 1 at 38/10/2 has this to say about the effect of the rule:

> The rule is in general terms and applies to documents sealed with the seal of "any office or department of the Supreme Court," and this would include Chancery Chambers or the Admiralty Registry of District Registries.

14. In my opinion, the affidavit filed in support of the summons for leave to withdraw as counsel falls within the scope of Order 38 Rule 10 (2), it having been issued out of the High Court Registry on 14 March 2016. I consider the Court is entitled to consider it in these proceedings.

<u>The affidavits</u>

15. In its affidavit to show cause, it is averred for the Plaintiff that its failure to proceed with the matter for 2 ½ years was because it was engaging in settlement talks with the 2nd Defendant. It is deposed that the Plaintiff did not proceed with the action in the hopes that the matter would definitely be resolved out of Court.

16. The 1st Defendant's answering affidavit avers that the Plaintiff's affidavit showing cause is inconsistent with the Leighton affidavit in support of the Plaintiff's solicitors' application to withdraw as counsel for the Plaintiff. It is averred in Leighton's affidavit that Plaintiff's solicitors had twice put the Plaintiff on notice that if he did not act, the Court might issue a notice to strike out the action. The Plaintiff did not act, resulting in his solicitors filing an application to withdraw as counsel.

17. Mr. Prasad says that post May 2013, the Plaintiff's solicitors did not have instructions from the Plaintiff who was the CEO of the Plaintiff company and knew that his company had instituted these proceedings. This is a clear case of abuse he says, the matter not having moved for more than 2 years.

18. Mr. Prasad invites the Court to follow the approach taken in *Grovitt v Doctor* (The Times April 25, 1977; [1977] 1 WLR 640)

19. Mr. Sharma for the 2nd Defendant says that the Leighton affidavit sheds light on the state of mind of the Plaintiff and his solicitors. The Leighton affidavit, coming from the Plaintiff's own solicitors, is evidence of intention. The Plaintiff received the notices and did nothing about them. This, Mr. Sharma says, is evidence of wilful intent not to progress the action.

20. Mr. Sharma also invites the Court to follow *Grovitt* (supra), where there is no longer a need to show prejudice and that it was sufficient if it be shown that proceedings were instituted with no intention of bringing them to a conclusion, this amounting to abuse of process. He condemns Plaintiff's solicitors claim of attending to settlement at a time when, according to the Leighton affidavit, they did not have instructions.

Analysis

21. It is not disputed that at the time the Court issued its notice under Order 25 rule 9, the matter had not progressed for more than six months.

22. The issues for the Court to decide are whether to:

- strike out this matter for want of prosecution, or as an abuse of the process of the Court.

23. I keep in mind that the test is whether the default has been intentional and contumelious, or that there has been inordinate and inexcusable delay on the part of the plaintiff such that a fair trial is no longer possible, or such that serious prejudice is likely or has been caused to the Defendants.

Inordinate and inexcusable delay

24. 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)

25. 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)

26. 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.

27. In *Harakh* (supra), the Court, referring to the observations of Bingham MR in *Costellow v. Somerset County Council* [1993] 1 All ER 952 at 959h, stated that

> There can be no mechanistic approach to what amounts to "inordinate" delay.

28. In the circumstances of this case, I have no hesitation in finding the delay of 27 months in progressing the matter to be both inordinate and inexcusable. Attending to settlement talks is no excuse for the failure to move the matter in compliance with the rules of the Court.

Risk of an unfair trial or serious prejudice to the defendant

29. 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.

30. 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)

31. Neither Defendant persuades me that the delay has caused, or will cause them prejudice. Mr. Prasad refers to *Ramswarup v Snow* Civil Action No. HBC 446 of 2007 at [23] where the Court, referring to *Allen v Sir Alfred McAlpine & Sons, Ltd* [1968] 1 All E.R.543, stated:

> The English Court of Appeal in that case, said when delay in the conduct of an action is prolonged or inordinate and is inexcusable (as is, per Salmon, L.J., the natural inference in the absence of a credible excuse), and there is substantial risk by reason of the delay that a fair trial of the issues will no longer be possible or that grave injustice will be done to one party or the other or to both parties, the court may in its discretion dismiss the action straight away, without giving the plaintiff opportunity to remedy the default, but leaving him to his remedy against his solicitor for negligence.

32. Here, neither Defendant has adduced evidence to show either that a fair trial of the issues in this action is no longer possible, or that there will be grave injustice to either of them owing to the delay. In *Merit Timber Products Limited v Native Land Trust Board* Civil Appeal No. CBV0008 of 1994, the Court stated that specific instances of prejudice need to be included in the affidavit. The Defendants have not done that here.

33. Both however invite the Court to follow *Grovitt* (supra) on the basis that the Plaintiff had been notified by his solicitors of the need to take action in this matter, but failed to do so. This, they say, amounts to abuse of process as his failure to take action shows a wilful intention

not to progress the matter. I am afraid the evidence before the Court does not convince me that this is the case.

34. Nor can I ignore the fact that prior to the matter coming to a standstill following the amendment of the statements of defence, the matter had been set for trial thrice. All the parties appear to have been ready but for various reasons, the trials did not proceed. With the exception of the first adjournment when parties indicated the likelihood of settlement, the Plaintiff cannot be said to have been responsible for the other adjournments. The second trial was erroneously fixed on a public holiday while the third trial could not proceed owing to applications by the Defendants shortly before the trial, for leave to amend their defences.

35. Furthermore, the Defendants could have brought an application to strike out for want of prosecution, but they too sat on their hands until the Court's notice.

Conclusion

36. In light of all of the above, I am of the view that though there has been inordinate and inexcusable delay, prejudice has not been shown such as to warrant a dismissal of this action. In addition, I am not satisfied that the failure of the Plaintiff to respond to his solicitors' notices to take action, of its own and without more, constitutes abuse of process such as to warrant a dismissal under the principles enunciated in *Grovitt*.

37. I am convinced that the interests of justice require that the Plaintiff be given time to progress this matter immediately in all diligence and without further delay.

38. Order 25 Rule 9 (2) provides:

> 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.

39. In light of my findings above, I deal with the Court's notice under Order 25 Rule 9 as if it were a summons for directions.

40. <u>The orders of the Court therefore are:</u>

1. The Plaintiff is to file and serve a reply if necessary, to the Defendants' amended defence, on or before 30 March 2018.
2. Case adjourned to 3 April 2018 at 9am for further directions.
3. Costs for each of the Defendants in the sum of $1,500, to be paid within 14 days of this Ruling.

S.F. Bull
Master