

**IN THE HIGH COURT OF FIJI
AT SUVA
ADMIRALTY JURISDICTION**

ACTION NO.: HBG 05 of 2014

**BETWEEN : HSINLONG FISHERIES LTD
PLAINTIFF**

**AND : ZHEJIANG XINLONG OCEAN FISHERIES CO.
LTD
1ST DEFENDANT**

**: SHENZHEN SHUIWAN PELAGIC FISHERIES CO.
LTD
2ND DEFENDANT**

**: MV ZHONG YANG 19
3RD DEFENDANT IN REM**

APPEARANCES/REPRESENTATION

PLAINTIFF : No Appearance [Mamlakah Lawyers]

DEFENDENTS : Mr K Jamnadas [Jamnadas & Associates]

RULING OF : Acting Master Ms Vandhana Lal

DELIVERED ON : 14 September 2018

INTERLOCUTORY RULING

[Striking Out action for want for prosecution pursuant to Order 25 rule 9 and for failure to comply with orders of the Court made on 14 February 2017 pursuant to Order 24 rule 16[1][b]]

APPLICATION

1. It is the Defendants summon dated 27 February 2018 seeking orders to strike out and/or dismiss the claim for want for prosecution as no steps have been taken by the Plaintiff in the cause for over six months.
2. Said application is made pursuant to Order 25 rule 9 and Order 24 rule 16[1][b] of the high Court Rules.

3. Despite service, the Plaintiff has failed to appear and contest the said application.

BACKGROUND

4. Via a writ of summons dated 26 September 2014, the Plaintiff through its than Counsel Lal/Patel/Bale Lawyers sought orders for warrant of arrest of vessel "MV Zhong Yang 19".

As per the affidavit to lead for warrant for arrest, the Plaintiff is incorporated under the laws of Republic of Fiji and amongst other things, supplies fish for sale to external customers and finances the constraining of commercial fishing vessel.

The first Defendant is a company incorporated according to the laws of China and was at all material times engaged in the business of long line tuna fishing in the Pacific.

The second Defendant is also a company incorporated according to the laws of China and was at all material times engaged in the business of owning fishing licenses and leasing the same for a fee.

The third Defendant is a motor vessel flagged in China for long line fishing.

The Plaintiff claims to have had advanced certain money to the first Defendant for construction of vessels.

In agreement with the Plaintiff, the first Defendant registered the vessel to the second Defendant in order to obtain the requisite fishing licenses which belonged to the second Defendant for a fee.

According to the Plaintiff, at no time did the registration reflect ownership to the second Defendant. It was merely an arrangement to allow the first Defendant and third Defendant to obtain requisite fishing license to operate.

Pursuant to the agreement, the Plaintiff directed income from fish sales to the first Defendant for the construction of the vessels.

Following sum remains outstanding to the Plaintiff:

- i. USD\$1,163,029.73; and
- ii. JPY12,270,494

The first Defendant failed to pay the Plaintiff.

The third Defendant has been placed under arrest since 7 August 2014 via Admiralty Action Number 01/14 to Wing Feng Marlin Ltd.

The Plaintiff has a claim in rem against the vessel.

5. On 29 September 2014, an order was made for warrant of arrest.
6. On 01 October 2014, an acknowledgment of service was filed by the First and Second Defendant with the third Defendant's acknowledgement of service being filed on 02 October 2014.

7. The Plaintiff filed its Statement of Claim on 15 October 2014 seeking judgment for USD\$1,163,029. 73 plus JPY12,270,494 together with interest.
8. Via its notice of motion dated 15 October 2014 the Defendants sought following orders:
 - i. *That the plaintiffs claim be struck out as it is frivolous, vexatious and an abuse of process.*
 - ii. *That the vessel "Zhong yang 19" be released;*
 - iii. *That the 1st and 2nd defendants be awarded damages for the arrest of the vessel;*
 - iv. *That the matter be transferred to the master of the high court for an assessment of damages resulting from the arrest of the vessel;*
 - v. *That the 1st, 2nd and 3rd defendants be awarded costs on an indemnity basis;*
 - vi. *Any other orders that the court deems just and equitable.*

On 06 March 2015, the court made following orders:

- i. *That the Arrest or the Vessel Zhong Yang 19 is vacated;*
- ii. *That the vessel Zhong Yang 19 is to be released from arrest;*
- iii. *That the Plaintiff is to pay the 1st Defendant costs of \$5, 000.00 assessed summarily within 21 days of this Order.*

9. On or about 09 March 2015, the Defendant made certain application seeking leave to file a statement of defence out of time. Said application was listed for hearing on 20 August 2015 and on the said date consent orders were made on the said application.
10. On or about 31 March 2015, Mamlakah Lawyers filed a notice of change of solicitors.
11. Since 17 September 2015 until 23 February 2016, Plaintiff sought time to file and serve its reply to the statement of defence and defence to counter claim.

One was filed on 26 February 2016.
12. On 2 March 2016, the matter was adjourned for normal course to take place.
13. On or about 8 April 2016 and 29 April 2016, 2 sets of notice of change of solicitors were filed by Messrs Vakaloloma and Associates.
14. On or about 10 May 2016, a Summons for Directions was filed and was adjourned for service.
15. On 27 June 2016 mater was taken off the cause list due, to non-appearance of the parties.
16. On or about 26 August 2016, the Plaintiff make application for the matter to be restored to the list.
17. Again on 6 December 2016, Mamlakah Lawyers filed a notice of change solicitors for the Plaintiff.

18. Subsequently on 7 February 2017 a Summons for Direction was filed and Orders were made on 14 February 2017. Since then the matter was adjourned on following occasions for Plaintiff to file its affidavit verifying list of documents: 29 May 2017; 25 July 2017; 13 September 2017; 5 October 2017; 14 November 2017; 15 November 2017; 15 November 2017; 29 November 2017 and 28 February 2017.

LAW

19. Order 25 Rule 9 of the High Court Rules reads:

- (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.*

20. Whilst Order 24 Rule 16 (1) (b) reads:

If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1),-

- (a) *that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and*
- (b) *the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.*

21. In the case of **Gaffar Ahmed & Others v. Ligairi & Others a Suva High Court Civil Action HBC 100 of 2003**, Winter J dealt with an application by the 5th and 6th Defendants for an order that the Plaintiff's statement of claim be struck out on the grounds that it is an abuse of process of the court.

In paragraph 8 to 14 he described what the law is when dealing such application:

[8] The rule of law requires the existence of courts for the determination of disputes and that litigants have a right to use the court for this purpose. Courts must also, however, be alert to their processes being used in a way that results in an oppression or injustice that would bring the administration of justice into disrepute. This is because "the courts authority possessed neither by the purse or the sword ultimately rests on some sustained public confidence in its moral sanction" (Justice Felix Frankfurter in Baker v Carr, 369 US 186267 [1962]).

- [9] *In exercising this jurisdiction the court is then protecting its ability to function as a court of law in the case before it as much as in the future (cf Reid v NZ Trotting Conference [1984] 1 NZLR 8 at page 9 per Richardson J).*
- [10] *While there is a caution to be exercised when the court considers strike out applications and the jurisdiction should be sparingly exercised only in exceptional circumstances there comes a point in time when it should be exercised and in those plain and obvious cases the court should not hesitate to strike out for an abuse of process.*
- [11] *Deliberate and inexcusable non-compliance with a preemptory court order can be justification for striking out proceedings (cf Birkett v James [1978] AC 297, although dealing with dismissal for want of prosecution the principles are relevant).*
- [12] *This disobedience to preemptory orders may be treated as indicative of contumelious conduct (cf Tolley v Morris [1979] 1 WLR 592, 603 per Diplock LJ).*
- [13] *The basis of the principle establishes that orders of the court must be obeyed and a litigant who deliberately and without proper excuse disobeys such orders cannot be allowed to proceed with his claim. Accordingly, while courts exist for the determination of disputes and litigants have a right to use the courts for that purpose those rights are not absolute as they cast on the litigant the responsibility of diligently pursuing his claim and obeying the court's orders.*
- [14] *As observed by my brother Justice Coventry in NBF Asset Management Bank v Adi Sainimili Tuivanuavou, Civil Action No. 174 of 2000:*
"There has been a sea change in the approach to delay in most if not all common law jurisdictions. Further, a new and important factor has entered the equation. That factor is the use of the court's time and resources. The more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition, and want their cases heard within a reasonable time. Courts now expect plaintiffs, at the time of issue of process, to be ready and willing to pursue their actions with reasonable diligence and expedition. There will, in unusual circumstances, be exceptions. The days of commencing an action, taking a few steps and then leaving it in abeyance for years are gone. If there are genuine settlement talks in train or matters are extremely complicated then time will of course be given. However, the courts cannot now contemplate the circumstance where a plaintiff commences an action, takes a few steps and then lets it sleep for months or years. Only to

take a few more steps and then let it go to sleep again. The general public would be surprised and understandably incredulous if it were widely known that cases can be commenced, then left to lie for years yet still be able to be pursued, unless it would be shown it was not possible to have a fair trial or there was serious prejudice to the defendant."

DETERMINATION

22. The progress of the Claim has been lamentably slow. Plaintiff have breached the time for filing its affidavit verifying list of documents.
23. In addition there has been no appearances by the Plaintiff or it's Counsel since 08 May 2017 and no reason has been provided for their non –appearance.
24. The Defendants have made numerous appearances and have incurred costs. It claims to suffer prejudice as the witness crucial to the case has left the company and searches undertaken by the Defendant has been unsuccessful.
25. The Plaintiff's conduct only shows that there is blatant disobedience of the Court's order for the past one year and some 04 months.
26. Hence exercising my jurisdiction under Order 25 rule 9(2) and Order 24 rule 16(1) (b), I strike out the Plaintiff's statement of claim and reply to defence and defence to counter claim.
27. Further I summarily assess costs on the said application at \$2,000 to be paid by the Plaintiff to the Defendants in 21 days.
28. The Defendants may proceed to enter judgment against the Plaintiff on its counter claim.
29. A sealed copy of the order is to be served on the Plaintiff and its counsel in 14 days.
30. Mention on 30 October 2018 to check on actions if any taken by the Defendants on their counter claim.



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Vandhana Lal [Ms]
 Acting Master
 At Suva.