IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL APPELLATE JURISDICTION

Civil Appeal No. 117 of 2014

BETWEEN : RAJESH CHANDRA as Administrator of the ESTATE OF VINAY VIKASH CHAND late of Navoli, Ba, Fiji, Welder, and in his personal capacity.

APPELLANT

A N D : THE PERMANENT SECRETARY FOR HEALTH

FIRST RESPONDENT

A N D : THE MINISTRY FOR HEALTH

SECOND RESPONDENT

A N D : THE ATTORNEY GENERAL OF FIJI

THIRD RESPONDENT

Appearances	:	**Mr. Niven Ram Padarath for the appellant**
	:	**Mr. Josefa Mainavolau for the respondents**
Hearing	:	**Monday, 20th May, 2019**
Written submissions	:	**15th and 23rd August, 2019**
Judgment	:	**Friday, 15th November, 2019**

JUDGMENT

(A) INTRODUCTION

(01) This is an appeal against the 'interlocutory ruling' of the learned Master striking out the appellant's action for want of prosecution. The leave to appeal was granted by this Court on 30.10.2018.

(02) The appeal was heard on 20.05.2019. The parties presented oral submissions to Court. In addition to oral submissions, Counsel for the appellant and the respondents filed written submissions for which I am most grateful.

(B) BACKGROUND

(1) By Writ of Summons issued out of the court on 18th July 2014, the appellant (original plaintiff) sued the Permanent Secretary for Health and the Ministry of Health (the original defendants) for damages for medical negligence.

(2) The Writ of Summons was served on the respondents on 21st August 2014 and on the same day the respondents filed an 'Acknowledgement of Service'. The respondents did not file a statement of defence and the appellant did not take steps in these proceedings since 21st August 2014. On 3rd August 2015 and 12th October 2016, a notice of intention to proceed was filed on the behalf of the appellant under Order 3, Rule 5.

(3) Nothing further was done until, on 23rd September 2016, the court of its own motion, in accordance with Order 25, Rule 9, directed the appellant to show cause why his claim should not be struck out against the respondents for want of prosecution or an abuse of process of the court.

(4) The appellant filed his affidavit showing cause on 17th May 2018. The respondents elected not to file any affidavit in response as such the only evidence before the Master was the affidavit of the appellant.

(5) The notice was heard by the learned Master on 22nd May 2017 and in a ruling delivered on 19th January 2018 the Master struck out the action.

(C) APPEAL

The appellant, whom I shall call the plaintiff, challenges the interlocutory ruling of the learned Master. The plaintiff seeks an order from this court that the interlocutory ruling of the learned Master be set aside on the following grounds;

> (1) *The Learned Master erred in Law in concluding that simply because the litigant did not have the funds to pay his lawyer to move the case forward meant that he did not have an intention to bring it to a conclusion.*

(2) *The learned Master erred in Law in holding that there was no necessity to show prejudice to the Defendant before striking out the matter.*

(3) *The learned Master erred in Law in holding that the principeles in striking out of claim for want of prosecution differs when a notice to show cause is brought about by the courts own motion.*

(4) *The learned Master erred in Law in not taking into account that the Defendants had not filed a Statement of Defence therefore could not establish any prejudice.*

(D) CONSIDERATION AND THE DETERMINATION

(01) This appeal is concerned with the circumstances and the manner in which the High Court may exercise the powers conferred upon it by Order 25, rule 9 of the High Court Rules. Before I turn to the particular grounds on which the exercise of the Learned Master's discretion is attacked in this case on behalf of the appellant, I would like to make one or two general observations about Order 25, rule 9 of the High Court Rules.

(02) Order 25, rule 9 which was added to the Rules in September 2005 [LN 47/05] is as follows;

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

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.

(03) A notable feature of Order 25, rule 9 is that it confers on the court the power to act on its own motion. The exercise of the discretion vested in the learned Master under Order 25 rule 9 is not a point of practice or procedure but an exercise of discretion which determines substantive rights of the plaintiff. To put the question in its true perspective, I think I should say that the effect of the Order of the learned Master is to put an end to the plaintiff's action so as to affect the plaintiff's substantive rights. I am of the opinion that there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determine substantive rights. There is a heavy burden on the appellant to demonstrate to this court that the Master has either failed to apply well-settled principles or, alternatively, that

his discretion can be attacked on what are colloquially known as '**Wednesbury**'[1] grounds. Moreover, the learned Master's discretion can be attacked if it is clearly wholly wrongly exercised.

(04) Bearing those considerations in mind let me now turn to the grounds of appeal.

Ground (1)

The Learned Master erred in Law in concluding that simply because the litigant did not have the funds to pay his lawyer to move the case forward meant that he did not have an intention to bring it to a conclusion.

(05) As pointed out in **Grovit v Doctor**[2], it is an abuse of the court's process to commence proceedings without the intention of prosecuting with reasonable diligence.

The learned Master's explanation for finding that *"the applicant commenced proceedings without the intention of prosecuting with reasonable diligence"* was that; Reference is made to paragraph (16) and (17) of the ruling (so far as is relevant)

> *(16)* .....
> *Explaining his reason for delay, the plaintiff in paragraph 9, 10 and 11 states as follows;*
>
> *9.* ***I do not have sufficient fund to pay my lawyers and asked them if they could do it for me and then collect any sum payable if judgment was entered in my favor.***
>
> *10.* ***My lawyers advised me that they will need to consider this because as a rule they do not conduct matters on a no-win-no-fee basis.***
>
> *11.* *For these reasons, the matter was on hold for a little while.*
>
> *(17)* *This clearly indicate that, the plaintiff intentionally failed to take any steps for 2 years and one month, because he knew that was not doing so due to his financial constraints and just left it idle.* ***It seems from his conduct as described above that, he did not have any intention to bring it to conclusion.***
>
> (Emphasis added)

[1] Associated Provincial Houses Ltd v Wednesbury Corp (1947) 2 All. ER 680 (1968) 1 & B 223
[2] (1997) 2 All ER 417

With respect, I find that reasoning unconvincing. In my view, it was contrary both to the affidavit material before him and the law that he was bound to administer.

From the material referred to, such an absence of intention was not made out and accordingly the learned Master erred in the exercise of his discretion.

It is apparent from the affidavit sworn by the plaintiff that his inactivity in the medical negligence action for a period of two years and one month was due to his financial constraints. It was not open to the learned Master to come to the conclusion that the plaintiff maintained the action in existence notwithstanding that he had no interest in having it heard **merely because** of plaintiff's financial constraints.

(06) **Ground (2)**

The learned Master erred in Law in holding that there was no necessity to show prejudice to the Defendant before striking out the matter.

Ground 3

The learned Master erred in Law in holding that the principeles in striking out of claim for want of prosecution differs when a notice to show cause is brought about by the courts own motion.

Ground 4

The learned Master erred in Law in not taking into account that the Defendants had not filed a Statement of Defence therefore could not establish any prejudice.

(7) The ground (2), (3) and (4) are interconnected and concerned 'procedure 'and 'prejudice'. I now turn to the topic of "**procedure**" and "**prejudice**".

The learned Master observed at paragraph (23) and (24) of his ruling;

> 23. *However, the situation would differ when it comes to the court's own motion.* ***If the court issues a notice, it would require the party, most likely the plaintiff, to show*** *cause why his or her action should not be struck out under this rule for want of prosecution. In such a situation,* ***it is the duty of the plaintiff to show*** *the cause to the satisfaction of the court and to negatively establish that, there has been no intentional or contumelious default, there has been no inordinate and inexcusable delay and* ***no prejudice is caused to the***

defendant. *This is the burden of negative proof.* ***In this case the court issued the notice on its own motion and the defendant does not, even, need to participate in this proceeding. He or she can simply say that, he or she is supporting court's motion and keep quiet,*** *allowing the plaintiff to show cause to the satisfaction of the court not to strike out his cause. Even in the absence of the defendant, the court can require the plaintiff to show cause and if the court is satisfied that the cause should not be struck out, it can consider it were a summons for directions and give necessary directions to the parties. In that event, the plaintiff would be required to serve such directions to the defendant and to take further steps as per the rules of the court.*

24. *Generally, when the notice is issued by the court, it will require the Defendant to file an affidavit supporting the prejudice and other factors etc. However, this will not relieve the plaintiff from discharging his or her duty to show cause why his or her action should not be struck out. In the instant case, it was the notice issued by the court on its own motion.* ***Thus, the plaintiff has burden of negative proof that no prejudice would be caused to the defendant*** *and or to show cause why his action should not be struck out for want of prosecution or abuse of the process of the court. In fact, the argument of plaintiff's counsel tries to get the plaintiff relieved from showing cause, by putting the burden on the defendant, which cannot be accepted. If this argument is accepted, it would lead to the proposition that, the court should depend on the defendant for the proof of inordinate and inexcusable delay and prejudice, even though it acted on its own motion. As a result, the purpose of granting special power to the court, to act on its own motion to agitate sluggish litigation, will be lost. For these reasons, I am unable to agree with the argument of plaintiff's counsel.*

(Emphasis added)

I do not agree with the statement made by the learned Master. It is a proposition I would not be prepared to countenance.

The Master's proposition misses the point. The fundamental point which this court is concerned to underline is that the only fresh power given to the High Court under Order 25, rule 9 is to strike out or to give directions of its own motion. Whilst this power may very valuably be employed to agitate sluggish litigation, it does not in my opinion confer any additional or wider jurisdiction on the court to dismiss or strike out on the grounds which differ

from those already established by authority. I cannot find that the clear and well established authorities binding on the court leave any room for such a blunt approach. I do not deny for a moment that Order 25, rule 9 confers on the Court the power to act on its own motion. **All I am saying is that there do not exsist special or unusual circumstances justifying a departure from the established precedent in authority**.

In "**Bhawis Pratap v Christian Mission Fellowship**"[3] the Fiji Court of Appeal reviewed the authorities and explained that mere delay without prejudice to the other parties is not ordinarily a sufficient ground for striking out an action for want of prosecution.

(08) In both **Allen v McAlpine & Sons Ltd**[4] and **Birkett v James**[5] reference is made both to the risk that there could not be a fair trial of the action and of prejudice to the defendants which one would suppose was intended to mean some prejudice other than mere inability to have a fair trial.

(09) In the exercise of a judicial discretion to applications to strike out, it is necessary to consider two issues;

- a plaintiff's ordinary but fundamental right of access to the Court to have his claim adjudicated; and
- the need or desirability of expedition in the administration of justice.

(10) As I said earlier, a notable feature of Order 25, rule 9 is that it confers on the Court the power to strike out on its own motion. To remove the requirement for proof of prejudice by the defendant would be to adopt a policy that accords so great an importance to expedition as to override a person's right to a trial where, despite his delay, the issue could still be fairly tried. Any such policy would be impracticable and unfair.

(11) Bearing that in mind, I now refer to what the learned Master did say; Reference is made to paragraph (24) of the ruling (so far as is relevant)

> ***In the instant case, it was the notice issued by the court on its own motion. Thus, the plaintiff has burden of negative proof that no prejudice would be caused to the defendant*** *and or to show cause why this action should not be struck out for want of*

[3] (Civ App ABU 93/05 – 14 July 2006)
[4] (1968) 2 Q.B. 229
[5] (1978) A.C. 297

prosecution or abuse of the process of the court."

(Emphasis added)

It is a proposition I would not be prepared to countenance. It would put an unrealistic burden on the plaintiff. The plaintiff will not know the defendants' difficulties in meeting the case, such as availability of witnesses and documents nor will the plaintiff know of other collateral matters that may have prejudiced the defendant such as the effect of delay on the defendants' medical service activities.

The authorities clearly establish that prejudice may be of varying kinds and it is not confined to prejudice affecting the actual conduct of the trial. The thrust of the jurisprudence does acknowledge collateral type of prejudice (which is unknown to the plaintiff) as sufficient to justify the striking out of an action. The defendants, on the other hand, have no difficulty in explaining its position to the Court and establishing prejudice if it has in fact suffered.

This is only the tip of the iceberg.

(12) A more fundamental difficulty for the respondents in this case is that the learned Master failed to make any finding at all on the question to be asked when applying the "**Birkett v James**"[6] principles namely; "**In view of the delay which have occurred, is a fair trial now possible**?" The basis upon which the discretion to strike out proceedings for want of prosecution should be exercised is well established. I need only to refer to the decision of the House of Lords in **Birkett v James**[7] and in particular the statement by Lord Diplock ;

> ***The power should be exercised only where the Court 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.***

[6] (1978) A.C. 297
[7] [1978] AC 297 at 318

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**[8] 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 His Lordship 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. His Lordship 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.

(13) So I return to the case before me. The learned Master has failed to make any decision as to whether the passage of time has prejudiced the (respondents') case concerning the availability and reliability of recollection of witnesses. In the absence of any consideration of this essential question it is clear to me that the learned Master erred in the exercise of his discretion. There is no suggestion that there cannot be a fair trial of the issues. The delay may be a very significant feature where the resolution of the dispute depends on the memories of witnesses who are going to give oral evidence of an event that happened in a moment of time such as accident litigation whether it is arising out of a road accident or an industrial accident. It may also be a very important factor in cases where the particular terms of a contract turn on contents of an oral conversation many years before. **This is not such a case.** Then, delay should not bar the appellant (plaintiff) from the door of the court. Indeed, counsel for the respondents did not seek to persuade the Master by way of an affidavit that there could not be a fair trial of the action. What would be the purpose of striking out an action if there can be a fair trial and the defendants have suffered no prejudice? Any action is bound to cause anxiety, but it would as a general rule be an exceptional case where that sort of anxiety alone would found a sufficient ground for striking out in the absence of evidence of any particular prejudice. **This is not such an exceptional case.**

Of course, I acknowledge the need or desirability of expedition in the administration of justice. But to extend that principle purely to punish the plaintiff in the illusory hope of transforming the habits of other plaintiffs would, in my view, be an unjustified way of attacking a very intractable problem.

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[8] [1989] All ER 897

ORDERS

(1) Appeal is allowed.

(2) The interlocutory ruling of the learned Master dated 19.01.2018 is set aside.

(3) The action is reinstated.

(3) There will be no order as to costs.

15/11/2019

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Jude Nanayakkara
Judge

HIGH COURT OF FIJI
LAUTOKA

At Lautoka,
Friday, 15th November, 2019