MERIT TIMBER PRODUCTS LTD

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v

NATIVE LAND TRUST BOARD

[COURT OF APPEAL 1994 (Tikaram P, Quilliam, Ward JJ.A.), 25 November]

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Civil Jurisdiction

Practice (Civil)-dismissal for want of prosecution-relevant principles to be applied-relationship between prejudice and fair trial explained.

On appeal against the High Court's dismissal of the action for want of prosecution HELD: given the history of the matter the Defendant had been seriously prejudiced and a fair trial could not take place. No error in the exercise of the High Court's discretion had been shown.

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Cases cited:

Allen v Sir Alfred McAlpine and Sons Ltd [1968] 2 QB 229
Birkett v James [1978] AC 297
Glorea v Sokoloff [1969] 1 All ER 204
Potter v Turtle Airways Ltd (FCA Civ. App) 49/92
Zimmer Orthopaedic Ltd v Zimmer Manufacturing Co [1968] 2 All ER 309

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Appeal against dismissal of proceedings by the High Court.

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H.M. Patel for the Appellant
N. Nawaikula for the Respondent

Judgment of the Court:

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The respondent Board is responsible for the administration of all native lands on behalf of the landowners and the appellant company entered into an agreement with it to log certain areas of Naitasiri. In December 1981 the appellant issued a writ against the respondent for breach of that agreement. Twelve years later, on 10 December 1993, on the application of the respondent, Scott J dismissed the action for want of prosecution.

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The protracted history of the case is set out in the learned Judges's decision.

> "The proceedings were commenced on 17th December 1981 when a writ was issued ..... On the same day the Plaintiff issued a Summons seeking an interlocutory injunction restraining the First Defendant from determining a timber concession granted to it by the First Defendant dated 6 March

1980 and an order restraining the First Defendant from entering into the timber concession area.

The next day Kermode J refused, or at any rate did not grant, the injunction but ordered that $35,000 due and owing by Plaintiff under the concession be paid into Court. He also ordered that if the action had not been disposed of by March 1982 a further $35,000 would have to be paid into Court by the Plaintiff.

On 4 June 1982 the First Defendant issued its first summons to dismiss for want of prosecution. The First Defendant complained that the second $35,000 had not been paid into Court and that no Statement of Claim had been filed.

On 10 June the Statement of Claim was in fact filed. The summons to dismiss was rejected but the First Defendant was given costs in any event.

On 10 August 1982 a summons for directions was issued by the First Defendant. The Plaintiff did not appear on 25 August 1982, the return date, and an order in terms of the summons was made.

On 23 December 1982 a second summons to dismiss for want of prosecution was issued. The First Defendant complained that the Plaintiff had failed to comply with Orders made on 25 August. The Application was dismissed by Kermode J on 25 January after the first Defendant unsuccessfully sought to appear through an unlegally qualified officer.

On 24 February 1983 the First Defendant again issued a summons for dismissal for want of prosecution once again complaining that the Plaintiff had still failed to comply with Orders made on 25 August 1982.

On 29 March 1983 Kermode J ordered that unless the Orders made on 25 August 1982 were complied with by 12 April 1983 the action would stand dismissed and the $35000 already in Court would be paid out to the First Defendant.

I can find nothing in the file to show that Kermode J's Order was complied with. What happened next is not at all clear. The file has become somewhat untidy and disorganised over the years. So far as I can make out from the file there were then at least 4 further non-appearances by the Plaintiff on various call days and some 20 pages of evidence and argument

are recorded in manuscript having been taken before various Judges and the Chief Registrar. I can find no Orders resulting from these hearing but there is a Judgment by Kearsley J dated 16 October 1984 rejecting a claim by the Plaintiff that the matters in dispute should be referred to Arbitration. It appears that the action was set down for trial on 1 September 1986.

On 13 August 1986 the Plaintiff applied for leave to add the Second Defendant and to amend the Writ and Statement of Claim. An Order in these terms was made by consent on 15 August with costs to the First Defendant in any event. The amended Statement of Claim was filed on 18 August 1986. A defence was filed by the Second Defendant on 24 September 1986 and an amended Defence and Counter Claim was filed by the First Defendant on 30 September 1986. A reply to the Counter Claim was filed by the Plaintiff on 24 October 1986.

On 5 December 1986 the action was set down for trial to commence on 4 August 1987 being listed for three weeks duration.

On 11 March 1987 the usual orders were made on Summons for Directions. Why these directions were not sought in the normal way before the matter was set down for trial is not clear.

In July 1987 the First Defendant unsuccessfully applied to the Court seeking security for costs from the Plaintiff.

In September 1987 a re-amended Defence and Counter Claim was filed by the First Defendant: whether with or without leave is not clear.

The matter then went to sleep for nearly 4 years but was awoken albeit briefly by Notice of Intention to Proceed filed by the Plaintiff under the provisions of Order 3 rule 5 on 2 July 1991. On 3 July an amended Defence to the re-amended Counter Claim was filed by the Defendant but the matter then went back to sleep again until 6 October 1993 when the First Defendant issued its 4th summons to Dismiss for Want for Prosecution. It is this summons which is now before me for decision. The First Defendant complains that the Plaintiff has failed to comply with the Orders made on 11 March 1987 and has generally failed to prosecute the action with due despatch."

At the hearing of the appeal, Mr. Patel for the appellant produced a list of documents that had been filed by the appellant on 12 April 1983 so it is clear the "unless" order made on 29 March 1993 had been complied with. A

In a carefully reasoned judgment, the learned Judge concluded there had been inordinate and inexcusable delay that had both prejudiced the respondent and placed the chances of a fair trial substantially at risk.

The appellant seeks to set aside the decision on the following grounds:- B

> "1. THE Learned Trial Judge erred in law in dismissing the action when the pleadings were all complete and the action was ready for trial.
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> 2. THE Learned Trial Judge erred in law in dismissing the action when there was no time limit fixed by the High Court on the Summons for Directions dated the 19th of February 1987 for the setting down of the action for trial. C
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> 3. THE Learned Trial Judge erred in law and fact in dismissing the action because on the 13th of February 1985 then Chief Registrar of the High Court of Fiji heard and recorded the evidence of one John Salmond and therefore the action was a part-heard matter for a date to be fixed by the Court for continuation of the remainder of the trial. D
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> 4. THE Learned Trial Judge had erred in law and completely misdirected himself by dismissing the action when in such Chamber hearing the evidence is restricted to affidavits only and Order 38 Rule 20 of the High Court Rules do not make any statement of fact admissible which is otherwise not admissible. E
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> 5. THE learned Trial Judge erred in law in wrongly accepting hearsay evidence given by the Solicitor for the First Defendant (a) that many of the persons involved in negotiating the concession left Fiji or died and (b) that the First Defendant had been unable to deal with the land since the commencement of the action in 1981 when in no way this sort of evidence could be tested by cross examination and therefore these facts should have been completely ignored and further these were merely superficial allegations made by the Solicitor for the First Defendant in his submissions without any details on which any competent Court could act and decide properly in the interest of justice. F G
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> 6. THE Learned Trial Judge was wrong in law when he

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> decided that the effective delay was from September 1987 to October 1993 and at the sametime agreed that the real period for delay was from 1991 to 1993 (three years) and therefore on the principles enunciated in Birkett v James and other cases there was insufficient evidence of inordinate and inexcusable with prejudicial effects to warrant a dismissal of action.

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> 7. THAT the Learned Trial Judge misdirected himself on the question of fair trial by accepting the hearsay evidence of the Solicitor for the First Defendant and/or did not consider the fact that the Concession Agreement dated the 8th March 1980 was for a period of 30 years and in any case if anybody who was seriously affected for the non compliance of the said Agreement was the Appellant."

C At the appeal, counsel for the appellant argued them as three grounds, 1-3, 4, 5 & 7 and 6.

Grounds 1-3 raise two issues that may be considered first and which appear not to have been raised before Scott J.

D Ground 2 is based on the provisions of Order 34 rule 1:-

> "1. - (1) Every order made in an action which provides for trial before a judge shall, wherever, the trial is to take place, fix a period within which the plaintiff is to set down the action for trial.

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> (2) Where the plaintiff does not, within the period fixed under paragraph (1), set the action down for trial, the defendant may set the action down for trial or may apply to the Court to dismiss the action for want of prosecution and, on the hearing of any such application, the Court may order the action to be dismissed accordingly or may make such order as it thinks

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> just."

The appellant's point is shortly made. The terms of the rule are mandatory and the Judge should have fixed a period within which the plaintiff must apply to set the case down. Until and unless this is done, the provisions of sub-rule (2) do not come into effect.

G The plaintiff filed a summons for directions on 19 February 1987 and included an application to set the trial down within three weeks but the order of the Chief Registrar included no such provision. It would appear such an application was unnecessary because, as may be seen from the Judges' chronology, a trial date in August 1987 had already been fixed in December 1986. Indeed a previous date had been fixed in September 1986 and was presumably vacated

because of the plaintiff's application to join a second defendant. There is no merit in this ground.

The complaint raised in ground 3 is equally unmeritorious. In 1985, evidence was taken before the Chief Registrar from an expatriate officer of the respondent who was due to leave the country. By chance, Scott J was the Chief Registrar in 1985. The appellant suggests that means the case is part heard before Scott J and so the onus has been, all this time, on the Court to fix a date. It is only necessary to glance at the subsequent amendments of the parties and the pleadings to see the lack of substance in this ground. It is not apparent from the record how this evidence came to be taken but it was presumably the result of an application under Order 39. The record shows both parties were in agreement but, having not been taken as a deposition, it is difficult to see how it would have been admissible at the trial except for the coincidence that the same officer was later to become the trial Judge.

The remaining grounds of appeal all relate to the exercise of the power of the Court to dismiss for want of prosecution.

Since the effective revival of this remedy in 1967 and its subsequent growth in England a line of authorities has established settled guidelines in particular Allen v Sir Alfred McAlpine and Sons Ltd [1968] 2 QB 229 and Birkett v James [1978] AC 297. This Court has adopted those principles with the reservations most recently expressed in Potter v Turtle Airways Ltd and Minhas Civil Appeal 49/92.

The principles were set out by Diplock LJ in Allen's case at p. 259:-

> "What then are the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution upon a defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. it should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default had been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is

> satisfied will depend upon the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend upon the recollection of witnesses of events which happened long ago."

The same conclusions are reached by Salmon LJ at p. 268 and bear repeating:-

> "A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows:- In order for such an application to succeed, the defendant must show:
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> (1) that there has been inordinate delay .....
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> (2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
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> (3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

Those grounds were affirmed and expanded by the House of Lords in Birkett v James.

In Potter's case, Helsham P and Kapi J disagreed with the additional suggestion of Russell LJ in Glorea v Sokoloff [1969] 1 All ER 204 at 207 that prejudice to the plaintiff is not a fact to be taken into account. Whilst cases may arise where prejudice to the plaintiff is relevant, as occurred in Potter's case, in general terms where the Court has found good reason to dismiss the action for want of prosecution, it is unlikely possible prejudice to the plaintiff will be relevant to the Court's decision. The plaintiff brings the case and as a result has control of the conduct of the action. If he fails to prosecute it with reasonable expedition, it must be very rarely that he can then complain if the result of that lack of expedition prejudices him.

In the present case, counsel for the appellant suggests the defendant could, under O.34 r.1 (2), have avoided or reduced any prejudice by applying to set the case down for trial. We do not accept that affects the question here. As was stated in Zimmer Orthopaedic Ltd v Zimmer Manufacturing Co [1968] 2 All ER 309 at 311:-

> "The essence of the matter, as I understand it, is this. It is for the plaintiff and his legal advisers to get on with the action and to see that it is brought to trial with reasonable despatch. The defendant is normally under no duty to stimulate him into action, and the plaintiff cannot complain that he gave him no warning before applying to have the action dismissed for want of prosecution."

Counsel for the appellant complains that, whilst Scott J applied the proper tests, he erred in two ways.

1. The Delay

The delay in this case plainly ran from September 1987 to the issue of the summons to dismiss in October 1993. That period was only interrupted by the brief stirring of the plaintiff in July 1991 when it filed notice of intention to proceed and a long delayed defence to the re-amended counter claim filed in September 1987.

Counsel for the appellant suggests the delay was really only from the notice of intention to proceed in July 1991. In his affidavit in reply, the resident director of the plaintiff deposed that the judiciary was not functioning normally for a long time as a result of the military coups in 1987.

Scott J had little difficulty with that suggestion:

> "The excuses offered by the Plaintiff do not bear examination. In 1993 the events of 1987 are becoming a tiresome excuse. While they are relevant to the years 1987 to 1989 they have no relevance to the last three years during which the High Court has been fully manned and fully operational. Indeed, not a week passes without Judges handling down judgments in actions commenced in 1991, 1992 and 1993."

We see no reason to disagree. Allowance has been and should be made for the effect of the coups but in this case they do not bear scrutiny. By the time the second coup occurred, this case had been twice set down for trial. In each

case, the date was vacated and the pleadings amended but it is clear the case must have been nearly ready for trial. However inconvenient and difficult the delays caused by the coups were to the plaintiff, it should have been in a position to act as soon as the courts were functioning again. In fact nothing happened until July 1991, four years later. That delay in itself was considerable but far more significant is the fact that, having revived the case in 1991, the plaintiff then did nothing whatsoever until spurred on by the defendant's summons over two years later. Whether or not part of this period was the result of the coups, the fact remains that memories were fading over the whole period and so the need to act promptly once the Courts were functioning again, was all the greater. Even allowing generous time for the coups, the remaining period before and after the filing of the notice of intention to proceed is both inordinate and inexcusable.

We find no merit in this complaint.

2. The Evidence

The application to dismiss was supported by an affidavit, sworn by the Secretary of the respondent, described very generously by Scott J as "somewhat brief". The reasons for the application are set out entirely in paragraph 7:

"7. THAT the Plaintiff's prolonged delay is inexcusable and had not only caused injustice to the Defendant but has continued to prejudice our "business" interest on behalf of the native owners while the ongoing court action is considered an "abuse of process"."

When dealing with that in his decision the learned Judge added:

> "At the hearing before me on 1 December 1993 Mr. Nawaikula enlarged on the prejudice allegedly suffered in his address to me from the Bar table. The matters complained of should have been incorporated into the affidavit but Mr. Patel did not object. I was told that the main prejudice suffered was (a) that many of the persons involved in negotiating the concession which the Plaintiff alleges the First Defendant to be in breach of had, since the events complained of, left Fiji or died and (b) that the First Defendant had been unable to deal with the land since the commencement of the action in 1981. This had led to great resentment and difficulty with the landowners who not unnaturally wanted their land to be put to profitable use."

The second paragraph of the judgment of Helsham P and Kapi J in Potter's case might be read as suggesting an affidavit in support of an application to dismiss for want of prosecution may not be necessary. We do not think that is what the learned Judges intended. In such an application, the applicant must prove prejudice. In order to do so, an affidavit in support is essential and must include the basis of the suggestion of prejudice. This would apply even in cases where, as Diplock LJ says in Allen's case, the length of the delay may of itself suffice.

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The Court can only base its decision in what is proved and the plaintiff must have an opportunity to challenge the defendant's allegation; if necessary by cross examination of the deponent. Unless agreed by the parties, statements of fact from the bar table are not evidence, have no value and should be discouraged and, if made, disregarded. Although the learned Judge recorded the lack of objection by counsel for the plaintiff, it was clear counsel was not admitting those matters and they should have had no part in the decision.

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The appellant suggests they played a significant part in the Judges' decision. That is clearly correct. In support of his view that a fair trial could no longer be possible, he stated: "Many of the first defendant's witnesses have died or left the country. Some will now be untraceable." Those matters were wrongly included and we must therefore reconsider his decision having excluded them.

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In Birkett v James at p. 317 Diplock LJ explained:-

> ".....an appellate court ought not to substitute its own "discretion" for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which they had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases... where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account;"

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This is such a case. we accept the learned Judges' finding that the delay was inordinate and inexcusable. What is the position with regard to the prejudice?

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Whilst Scott J did consider the unproved matters he did not base his decision on them alone.

> "Next, have the delays been prejudicial to the First Defendant? In my judgment they certainly have. As was always known to the Plaintiff, the

> First Defendant was most anxious to have the action disposed of as soon as possible - hence its numerous applications to dismiss. The land in question has now lain fallow for 12 years. The First Defendant has been debarred from dealing with the land for the benefit of the owners for all this time. What clearer case of prejudice could there be?"

Whilst the last matters were also referred to by counsel from the bar table, we consider they are inferences that may properly be drawn from the pleadings themselves. Similarly, when delay is of the length that occurred in this case, the Court is entitled to conclude witnesses are likely to have gone away and memories of relevant matters may have faded or have been clouded by subsequent events.

The learned Judge adopted the comments of Diplock LJ in Allen's case:

> "Where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they can recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the Courts being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard."

Counsel for the appellant suggested to the lower Court that the present case would not suffer in this way because it largely involved the interpretation of a written agreement. Such a case will clearly be affected less by delay than a case resolved entirely on findings of fact.

However, the learned Judge correctly gave little weight to the suggestion the case would turn on the interpretation of the agreement. Counsel for the plaintiff informed the Court he intended to call 12 or 13 witnesses and the length of trial was estimated in weeks rather than days. The pleadings also show there are considerable areas of dispute over alleged interference by the landowners who are represented by the respondent hampering the appellant's attempts to perform the agreement and whether they are sufficient to justify the appellant's failure or refusal to pay. The resolution of those would require evidence of events that occurred more than ten years ago.

The filling of this claim has clearly prevented the defendant and the landowners it represented from dealing with the land or timber during its pendency. Scott J correctly considered prejudice to the defendant could include economic prejudice which would continue until the conclusion of the trial.

We note the learned Judge considered the questions of prejudice and the likelihood of a fair trial as separate issues. No doubt he was affected by the apparent separation of those issued by Diplock LJ when he restated the principles in Birkett v James at 318:

> " ... 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....."

Whilst a case may arise where there is sufficiently serious prejudice to allow the Court to dismiss a claim without the likelihood of a fair trial being put at risk, the main line of authorities has established that an impaired likelihood of fair trial forms part of prejudice; as was accepted by this Court in Potter's case.

Having excluded the matters improperly admitted, we find ample grounds on which the learned Judge could base his finding that the defendant is seriously prejudiced by the delay.

The appeal is dismissed with costs to the respondent.

(Appeal dismissed.)

(Editor's note: a further appeal to the Supreme Court was dismissed on 24 November 1995.)