COLIN TEKAHA .V. ATTORNEY GENERAL AND KEITHIE SAUNDERS

High Court of Solomon Islands
(Palmer CJ.)

Civil Case Number 197 of 2004

Date of Hearing: 23 August 2005
Date of Judgment: 10 October 2005

Mrs. A.N. Tongarutu for the Plaintiff
F. Waleanisia for the first Defendant
No appearance by the second Defendant.

Palmer CJ.: There are two applications before this court for hearing. (i) This is a Notice of Intention to Proceed ("**the Notice**") filed 22 July 2005 pursuant to Order 64 rule 9 of the High Court (Civil Procedure) Rules, 1964 ("**the Rules**"). (ii) This is a Summons by the Registrar of High Court issued 2 August 2005 directed to the Plaintiff under Order 62 of rule 1 of the Rules to show cause why the action should not be struck out for want of prosecution. A period of one year had lapsed since the last proceeding in the matter.

Mrs. Tongarutu for the Plaintiff relied on her affidavit filed 19 August 2005 and a second affidavit of Silva Dunge filed 22 July 2005 in support of her application. She deposed that she had written to the Commissioner of Lands directly copied to the Registrar of High Court on 24 September 2005 to initiate negotiations for possible settlement of the dispute. Nothing further was done until some 10 months later when she lodged a caveat against the property (the Perpetual Estate in parcel number 191-011-97) on 22 July 2005 and registered on 29 July 2005. On or about the same time she lodged application for Notice of Intention to Proceed. It appears service of the Notice was not done until 19 August 2005. Order 64 rule 9 requires a months notice to be given to the other party before the application can be listed for hearing; that obviously has not been the case here when the matter came for hearing on 23 August 2005, only four days after service.

In the meantime, by letter dated 29 June 2005 the Solicitor General had requested that the Registrar of High Court issues a summons to show cause why the action should not be struck out for want of prosecution, under Order 62 rule 1 of the Rules, which was done on 2 August 2005, for hearing on 23 August 2005.

The first Defendant represented by Mr. Waleanisia objects to the hearing of the Notice because it did not comply with the one months notice to his Office. Secondly learned Counsel says his Office was not served with a copy of the affidavit of Silva Dunge filed 22 July 2005.

I do not think any argument to the contrary can be raised against learned Counsel's objections to Notice on those two grounds. The rule stipulates one months notice period, unless application is made under the Rules for enlargement of time[1].

[1] Order 64 rule 5 of the Rules.

The third objection raised by Mr. Waleanisia relates to the failure of Counsel for the Plaintiff in informing the Attorney-General's Office of the negotiation arrangements between the Plaintiff and the Commissioner of Lands. Rule 21(3) of the Legal Practitioner (Professional Conduct) Rules, forbids any direct communications by Counsel with the Commissioner of Lands without notifying the Attorney-General as a matter of professional courtesy. Whilst the Registrar of High Court has been copied, that is not sufficient. It is improper to make direct communications with the Commissioner of Lands without informing the Attorney General of this. Counsel must maintain professional courtesies and fairness at all times.

The fourth objection raised is that this court should not consider the affidavit material filed by Mrs. Tongarutu and Silva Dunge on the grounds that the Plaintiff had not complied with the 30 days notice. The flaw in this argument is that having established that the thirty days notice had not been complied with and therefore the Plaintiff's Notice cannot be heard, that still leaves the question of the Summons to show cause to be dealt with, whether this action should be struck out for want of prosecution.

Respectfully, I do not agree with the submission that this court should not consider the affidavits that have been filed in support of the Plaintiff as relevant material on which this court could exercise its discretion to strike out or not. In **Lo Shiu Tang v. John Lo** per Daly CJ (Civil Case No. 8/81) and **South Pacific Marketing (NZ) Ltd v. Daniel Maile** SILR 1987, 81 per Ward CJ, both adopted the principles on striking out set out by Lord Diplock in **Birkett v. James** [1977] 3 WLR 38:

> *"The power should be exercised only where the court is satisfied either –*
>
> *(1) that the default has been intentional and contumelious, eg. 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."*

Those principles were considered in **Allen v. McAlpine** [1968] 1 All. E. R. 543 and a further matter raised in relation to the relevance of the limitation period where it had not expired at the time of application to dismiss for want of prosecution. It was held by Lord Diplock at pages 48 and 49 that where the limitation period had not expired and dismissal of an action for want of prosecution may result in the plaintiff issuing a fresh writ for the same cause of action, the effect which can only be to prolong the time which must elapse before the trial can take place, this will only aggravate the prejudice which the defendant will experience from delay and therefore the court should be hesitant to have the action struck out.

In this instance, the time limit has not yet expired and so the effect of striking out now will merely be to prolong the delay where it is clear the defendant is determined to have his day in court.

I am not satisfied the default here has been contumelious or intentional. There is material which indicates that there may have been positive indications from the Office of the Commissioner of Lands which may have raised the expectations of the Plaintiff giving rise to the default for a period of almost 10 months.

On the question of inordinate and inexcusable delay I am not satisfied that is the case here. There has been lengthy delay but I cannot accept it can be described as inordinate or inexcusable and or prejudicing the fair trial of this case if not struck out, especially where the time limit has not yet expired.

In the circumstances, I am satisfied the summons to strike out for want of prosecution should be dismissed. Costs to be in the cause.

The Court.