PAPUA NEW GUINEA

[IN THE NATIONAL COURT OF JUSTICE]

WS No. 913 OF 2006

BETWEEN
RIMBUNAN HIJAU (PNG) LIMITED
First Plaintiff

AND:
WAWOI GUAVI TIMBER CO. LIMITED
Second Plaintiffs

AND:
NIUGINI LUMBER MERCHANTS LIMITED
Fourth Plaintiff

AND:
FRONTIER HOLDINGS LIMITED
Third Plaintiff

AND:
SOUTH PACIFIC POST LIMITED trading as POST COURIER
First Defendant

AND:
NATIONWIDE NEWS PTY LIMITED
Second Defendant

WAIGANI: **KANDAKASI, J.**

2010: 04th March
12th July

PRACTICE & PROCEDURE – Application for dismissal for want of prosecution – Failure to take steps to prosecute matter with due diligence – Failing to give full or adequate discovery - No adequate explanation for delay and failure to give full and

adequate discovery - Effect of – Plaintiff not having any real interest in prosecuting claim - Possible abuse of the process of the Court - Proceedings dismissed.

PRACTICE & PROCEDURE – Issuance of more than one lot of proceedings out of the same cause of action – Failing to prosecute with due diligence – Display of carelessness in attending to relevant and appropriate details in Court documents – Failing to adhere to request to take remedial actions – Requesting further and better particulars of defence after expiry of time for filing of reply without leave of the Court – Abuse of process of the Court – Court has power to protect such abuse – Proceedings dismissed.

PRACTICE & PROCEDURE – Pleadings – Reply to defence – Time for – Request for further and better particulars of defence outside time limit of filing reply – Court's leave required to do so – Abuse of process of the court to make such a request without first seeking and obtaining leave of the Court.

PRACTICE & PROCEDURE – Application for dismissal for want of prosecution – Forewarning - Need only be one forewarning giving the party being warned sufficient time to take the next step in the proceedings – Equitable principle of "coming with clean hands" concerns the need to forewarn – Not a new and additional requirement.

Cases Cited:

General Accident Fire and Life Assurance Corporation Ltd v. Ilimo Farm Products Ltd [1990] PNGLR 331.
Rabaul Shipping Ltd v. Chris Rupen (2008) N3289.
Bernard Juali v. The State (2001) SC667.
Peter Dickson Donigi v. PNBGC (2002) SC691.
Ronald Nicholas v. Commonwealth New Guinea Timbers Pty Ltd [1986] PNGLR 133.
Lepanding Singut v. Kelly Kinamum (2003) N2499.
Telikom (PNG) Ltd v. Independent Consumer and Competition Commission and Digicel (PNG) Ltd (2008) SC906.
Takoa Pastoral Co Ltd v Dr Puka Temu, Minister For Lands (2009) N3739.
Public Officers Superannuation Fund Board v. Imanakuan, (2001) SC 677.
Credit Corporation (PNG) Ltd v. Gerald Jee [1988-89] PNGLR 11.
Papua New Guinea Banking Corporation v. Jeff Tole (2002) SC694.
Obadia Buka v. Jude Baisi and Notus Investments Limited (2004) N2602.

Counsel:

J. Brooks for the Applicant/First Defendant.
M. Wilson for the Respondent/Plaintiffs.

12th July 2010

1. **KANDAKASI J:** I heard two notices of motions, one by the First Defendant, South Pacific Post Limited, trading as Post Courier (Post Courier) seeking to dismiss these proceedings for want of prosecution and another by Rimbunan Hijau (PNG) Limited and its subsidiaries which are the other Plaintiffs (RH & Co) are seeking orders for particulars of Post Courier's defence.

2. In support of its application, Post Courier points amongst others, to a failure by RH & Co to prosecute these proceedings with due diligence, failure to give full and complete discovery within a reasonable time, issuance of several other proceedings out of the same set of facts which were all dismissed for want of prosecution and filing deliberately misleading affidavits. Post Courier further argues, these actions or in actions of the RH & Co are demonstrative of their real intention in issuing these proceedings, which was to pressure and prevent Post Courier from publishing certain material of and concerning RH & Co's conduct in the forestry industry against certain established statutory framework. Hence, the issuance of these proceedings is an abuse of the process of the Court, which the Court must protect against.

3. RH & Co in support of their motion which is in response to Post Courier's motion, they argue that, nothing further could be done with their request for further and better particulars still outstanding. They say this is a

satisfactory explanation and response to the claim of want of prosecution. In relation to the claim of abuse of the process of the Court, they say they have a genuine claim and that they have done everything according to the Rules of the Court. Further or in the alternative, they argue that, what became of their other proceedings is irrelevant and are of no consequence to these proceedings.

Relevant Issues

4. From the parties arguments the issues for the Court to resolve are these:

(1) Have RH & Co failed to prosecute their claims with due diligence?

(2) Is the issuance of several other proceedings over the same subject matter and those proceedings being dismissed for want of prosecution a relevant factor for consideration in the context of Post Courier's application?

(3) Have RH & Co failed to give full and or adequate discovery?

(4) Have RH & Co issued these proceedings in abuse of the process of the Court?

(5) Have RH & Co provided a reasonable explanation for their alleged failure to prosecute with due diligence and failure to give full and complete discovery?

5. Going by the arguments of the parties, the first issue is the primary issue for determination in these proceedings. The rest of the issues can be considered

in the context of that issue. Accordingly, we start with a consideration of the first issue first and then address the rest of the issues in that context and eventually arrive at a decision whether or not to uphold the application by Post Courier.

Want of Prosecution – First Issue

(i) Relevant Facts and Background

6. Before anything else however, I consider it important that the background and history of these proceedings and the relevant facts should be considered in full in order to properly understand and determine the issues presented. This starts with RH & Co issuing these proceedings on 29th June 2006 naming Post Courier as the only defendant. The writ of summons initially amongst others, referred to an allegedly defamatory article allegedly published by Post Courier with a copy of that purportedly annexed as Schedule 1 to the Writ, without actually attaching it. In an effort to correct that discrepancy, Post Courier's lawyers, Gadens, wrote on 3rd July 2006 to RH & Co's lawyers, Warner Shand and asked for a withdrawal of the Writ. RH & Co did not respond at all to that letter.

7. Meanwhile, at the time of filing the original writ, RH & Co also filed a motion for urgent interim orders seeking a retraction of the alleged publication and a restraint against any further publication of the article by Post Courier. On 30th June 2006, RH & Co amended their notice of motion by filing an amended motion, which was returnable on 7th July 2006. The matter however, did not appear in the Court list on the return date. Nevertheless, on that date, RH & Co filed another motion, this time, seeking to join Nationwide News Pty Limited of Australia to the proceedings as second defendant and to amend the writ of summons and statement of claim. Nationwide News Pty Limited was the

publisher and proprietor of "The Australian" newspaper in Australian which originally published in Australia the whole of the article RH & Co complained of. Post Courier published only an extract of that publication.

8. Without moving on the notice of motion, RH & Co proceeded on 12th July 2006, to serve an amended statement of claim naming Nationwide News Pty Limited as the second defendant. RH & Co then indicated to Post Courier by letters dated 14th July 2006, that a special fixture should be obtained for the hearing of their motion for injunctions. Then by letter dated 17th July 2006, RH & Co requested that, they be allowed to make a further amendment to their statement of claim. Thereafter, the parties entered into discussions and RH & Co agreed to withdraw their notice of motion for injunctive orders, which was confirmed by letter from Gadens to Warner Shand Lawyers dated 7th August 2006.

9. Two days later, on 9th August 2006, Post Courier filed its defence. Almost two months later on 5th October 2006 RH & Co filed a notice of motion seeking to again amend the statement of claim. On 13th October 2006 the Court granted them leave to do so and they did so on 23rd October 2006. Four days later, on 27 October 2006, Post Courier filed an amended defence in response to the further amended statement of claim.

10. On 9th and 13th November 2006, respectively, the Post Courier filed and served on RH & Co a notice for discovery. That notice required RH & Co to give discovery with verification. Four months later on 13th March 2007, RH & Co served a list of Documents. That list of document had problems in that there was no verification of the documents by their lawyer and that the list was manifestly incomplete in its content. That attracted an immediate response from Post Courier's lawyers on the same date, who wrote to RH & Co's lawyers

pointing out these problems and asked them to have them rectified and followed up by letter the next day, 14th March 2007. In that letter, Post Courier's lawyers outlined the various documents that would be relevant for discovery given the matters in dispute.

11. On 19th March 2007, RH & Co's lawyers wrote to Post Courier's lawyers stating that a complete and certified list of documents would be served. Within two days, RH & Co served a list of documents on 21st March 2007, which was four months after the date of service of the notice for discovery on them requiring discovery within 15 days. Notwithstanding Post Courier's lawyers' letter of 14th March 2007, and the passage of four months, that list of documents' contents had not changed at all from the first. RH & Co's lawyers effectively acknowledged that problem at the time of serving the list of documents by informing Post Courier's lawyers that they were taking instructions in relation to the inadequacies and the other problems attending the list of documents as outlined in Post Courier's lawyers' letter of 14th March 2007 and undertook to address them after consulting their client. RH & Co did not follow through on that undertaking.

12. Prior to RH & Co's purported discovery as outlined above, by letter dated 15th February 2007,RH & Co threatened Post Courier with default judgment on the basis that Post Courier did not give discovery of their documents. That failed however to note that, RH & Co had not filed and served any notice for discovery on Post Courier. By letter dated 16th February 2007, Post Courier informed RH & Co of that fact and placed them on notice that any application for default judgment would be vigorously opposed. That attracted an immediate response from them which accepted Post Courier's position and indicated that there was a "*mismatch of where the respective files are at*" and told Post Courier to disregard their letter of 15 February 2007. On 19th February 2009,

Post Courier's lawyers again wrote to RH & Co's lawyers and reiterated the lack of a proper notice of discovery and no obligation to discover by reason of that.

13. Eventually on 13th March 2007, RH & Co served a notice for discovery on Post Courier's lawyers. The notice was addressed to Post Courier as well as the second defendant, Nationwide News Pty Limited. Post Courier's lawyers wrote to RH & Co's lawyers on 14th March 2007, pointing out that, they did not act for Nationwide News Pty Limited and as such they could not accept service on their behalf. Despite that, RH & Co's lawyers wrote to Post Courier's lawyers on 21st March 2007, referring to Post Courier's lawyers' letter of 19th February 2007 and asserted that, their notice for discovery had been served. Post Courier's lawyers found RH & Co's lawyers' letter incongruous, as their (Gadens) letter of 19 February 2007 had been written almost a full month before the notice for discovery was served by RH & Co. By letter dated 22nd March 2007, Post Courier's lawyers wrote to RH & Co's lawyers and pointed out this obvious anomaly.

14. On 27th March 2007, which was within 14 days of service of RH & Co's notice for discovery Post Courier filed and served its list of documents.

15. By letter dated 3rd April 2007, RH & Co's lawyers purported to respond to Post Courier's lawyers' letter of 22nd March 2007, and stated in their view that, Post Courier's defence was defective and as such they would "*stay any further action on discovery until these particulars are provided*". However, that letter did not request any specific particulars. A little over three months later, RH & Co's lawyers, by letter dated 5th July 2007 requested particulars of Post Courier's amended defence filed on 27th October 2006. By then, as Post Courier's lawyers had correctly pointed out on 16th October 2007 to RH & Co's

lawyers, pleadings had closed following which the parties had given discovery and the plaintiffs could not now revert to asking for further particulars.

16. Meanwhile, on 10 July 2007, Post Courier's lawyers received a letter from RH & Co's lawyers asking for their client's consent to RH & Co discontinuing the proceedings as against Nationwide News and enclosed a draft consent order. Upon receiving that letter, Post Courier's lawyer telephoned RH & Co's lawyers and reminded them of Gadens Lawyers not acting for Nationwide News by reason of which, they could neither consent nor oppose any the proposed withdrawal of proceedings against Nationwide News. RH & Co did not revert to Post Courier on that issue. In Court, RH & Co have not clarified what has become of their proceedings against Nationwide News.

17. From 5th July 2007, being the date on which RH & Co made their request for particulars; Post Courier heard nothing substantive from them.

18. In addition to all of the above, around the same time as RH & Co issued these proceedings, they also issued other proceedings under writs of summons references, WS 968 of 2006 and WS 969 of 2006 against several other people over the same alleged publication in these proceedings. Following successful application by the defendants in those proceedings, I ordered their dismissal on 7th December 2009 for want of prosecution. Warner Shand Lawyers also acted for RH & Co, while Gadens acted for the defendants.

19. Following a dismissal of those other proceedings, Post Courier through its lawyers issued a letter on 8th December 2009 to RH & Co's lawyers. That letter warned RH & Co that Post Courier would apply for a dismissal of these proceedings, if RH & Co continues to fail to prosecute the proceedings. That attracted a response the next day by letter dated 8th December 2009. In that

letter RH & Co said through their lawyers that, they had prepared documents to prosecute their claim but could not locate the Court file to file the documents. They then indicated that, they were enclosing a notice of motion and supporting affidavits without actually enclosing them. Post Courier's lawyers immediately informed RH & Co's lawyers of this fact and asked them to rectify it. The latter lawyers, undertook to do so the first thing the next day, being 10th December 2009. The next day, they provided unsealed copies of a notice of motion and supporting affidavits. Nothing further seems to have happened and that caused Post Courier to file its motion for dismissal for want of prosecution, the subject of this judgment. Only after Post Courier had filed and served its motion and affidavits in support, RH & Co filed and served a sealed copy of their motion seeking orders for further and better particulars.

(ii) The Law on Want of Prosecution

20. The principles governing applications for dismissal for want of prosecution are well established in our jurisdiction. In his submissions, Mr. Brooks, counsel for the Post Courier refers to nearly all of cases on point from *General Accident Fire and Life Assurance Corporation Ltd v. Ilimo Farm Products Ltd*[1] to *Rabaul Shipping Ltd v. Chris Rupen*.[2] From this long list of cases, the following principles have now become firmly established in our Jurisdiction:

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(1) Bearing in mind the public interest in finality in litigation, the power to dismiss proceedings for want of prosecution is to be

[1] [1990] PNGLR 331.
[2] (2008) N3289.

exercised where a party has failed to prosecute the proceedings with due diligence;[3]

(2) An applicant has an obligation to make out a case of want of prosecution;[4]

(3) Once a case for want of prosecution is made out, a party responding to an application for dismissal for want of prosecution, must provide reasonable explanation for the delay and must demonstrate a preparedness to take the next step in the proceedings without any unnecessary and further delay;[5]

(4) Unless, a respondent to an application to dismiss proceedings for want of prosecution provides reasonable explanation for any delay in prosecuting a matter and demonstrates preparedness to take the next step in the proceedings without any unnecessary and further delay, the proceedings may be dismissed;

(5) Matters relevant to want of due diligence include failure to attend and meet court appointments which includes any appointments at the registry, failure to explain non attendances, failure to respond to correspondence and failure to provide any explanation for dilatory conduct where an explanation is properly due and expected;[6]

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[3] General Accident Fire and Life Assurance Corporation Ltd v. Ilimo Farm Products Ltd (supra).
[4] *Bernard Juali v. The State (2001) SC667.*
[5] *Bernard Juali v. The State* (supra); *Peter Dickson Donigi v. PNBGC* (2002) SC691;
[6] *General Accident Fire and Life Assurance Corporation Ltd v. Ilimo Farm Products Ltd* (supra);

(6) The delay or default in prosecuting the matter must be intentional and contumelious for example, disobedience to preemptory orders of the court or conduct that amounts to abuse of the process of the Court or that the delay is inordinate and inexcusable which gives rise to the substantial risk that of having a fair trial;[7]

21. To this I add that, where a party demonstrates a plain careless in taking all the steps that need to be taken with much care and attention, resulting in unnecessary delay and costs or is otherwise displaying a careless attitude resulting amendment after amendment to pleads or things like that, that should be a factor operating in favour of a dismissal of proceedings for want of prosecution. This in my view is necessary in the interest of minimizing the time it takes for the court to dispose off a matter and more importantly to minimize delay and costs of the parties. That would in turn enable the court to avoid being used or seen as an agent for denying justice through allowance of unnecessary delay to abound, resulting in no real justice being done. After all, all parties acting through a lawyer should be able to take the necessary steps carefully and in a timely manner.

(iii) Observation

22. Before proceeding further, I observe that, RH & Co through its learned lawyers have been very careless in filing their proceedings and taking the steps they have taken or should have taken. This is evident in the following:

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[7] *Ibid*; *Ronald Nicholas v. Commonwealth New Guinea Timbers Pty Ltd* [1986] PNGLR 133; *Lepanding Singut v. Kelly Kinamum* (2003) N2499.

(1) Failing to attach alleged defamatory article as Schedule 1 to writ of summons;

(2) Failing to respond to letters from Post Courier's lawyers aimed at rectifying the above defect;

(3) Filing three different motions for interim injunctions and not moving any of them;

(4) Failing to include in the original proceedings the primary publisher of the alleged defamatory material, something which was fixed by a subsequent amendment but the application for which was not drawn to Post Courier's attention;

(5) Making further amendments to the statement of claim two months after Post Courier had filed and served its defence;

(6) Four months after being served with a notice for discovery, RH & Co purported to give discovery by serving a list of documents, which had missing pages, no verification and manifestly incomplete in the documents listed;

(7) A letter aimed at getting RH & Co to correct the defective list of documents attracted an undertaking to correct the defects.

(8) Despite the passage of four months and undertaking to correct the defects, RH & Co failed to deliver on the undertaking;

(9) Despite not having filed and served any notice for discovery RH & Co threatened Post Courier at least more than once to file for default judgment;

(10) Despite being informed, RH & Co's lawyers continued to serve documents on Gadens lawyers as if those lawyers acted for the Nationwide News Limited and requiring them to give discovery and later to consent to withdrawal of proceedings against as against Nationwide News Limited;

(11) Well after the close of pleadings and after the parties have gone into discovery, RH & Co belatedly took issue with Post Courier's defence claiming that, it was defective by reason of which they indicated that, they would "*stay any further action on discovery until these particulars are provided*";

(12) Making a claim that Post Courier's defence was defective without specifying the particulars needed or what must be done to address the defects until three months later; and

(13) Filing multiple proceedings over the same alleged defamatory publication or material and failing to prosecute them with due diligence.

Relevance of Issuance and Dismissal of Other Proceedings – Second Issue

23. The last factor I have listed above has been the subject of objection and arguments from RH & Co and is issue number (2) for me to decide. RH & Co argued that, this is not a relevant factor for the purposes of Post Courier's

application seeking to dismiss the proceedings for want of prosecution. I consider however that, it is a relevant factor because it shows RH & Co's attitude and the kinds of care and attention they were giving to their own proceedings. It is also relevant because, it reveals a possible abuse of the proceedings of the Court by the issuance of multiple proceedings over the same cause. I would thus answer issue (2) in the affirmative.

Abuse of Process of the Court – Fourth Issue

24. Leading on from the above, is the question of abuse of the Court's process, which is the fourth issue for me to deal with. There can be no argument against the fact that, the Court has a wider power to protect itself from any abuse of its process.

25. In cases where there has been issuance of more than one proceeding out of one cause of action, or where the incorrect proceedings have been issued, the Court has not hesitated to dismiss them. One of the latest decision of the Supreme Court in relation to the issue of abuse of the process of the Court is its decision in *Telikom (PNG) Ltd v. Independent Consumer and Competition Commission and Digicel (PNG) Ltd.*[8] That decision had regard to previous decisions of the Court and upheld my decision in the National Court in that case to dismiss the proceedings on account of Telikom issuing more than one lot of proceedings over the same subject matter.

26. In the present case, RH & Co has issued more than one lot of proceedings over the same matter. In all of the other proceedings, they failed to prosecute them with due diligence and the Court dismissed all of them. In this particular case, RH & Co not only have they failed to prosecute but have also failed to pay

[8] (2008) SC906.

any particular care and attention to their proceedings. They therefore continued to make the even basic of mistakes such as the failure to attach the alleged defamatory material, or name the person who was responsible for its original publication. They even failed to take heed and take corrective steps suggested by Post Courier. Further, they threatened Post Courier with default judgment without having taken the correct steps themselves first to lay a proper foundation for their threats.

27. In the circumstances, it is clear to me that, RH & Co used these proceedings to threaten, intimidate or otherwise harass Post Courier and force them into unnecessary expenses. The failures and inactions of RH & Co are such that they seem to lend support for Post Courier's argument that, RH & Co used the proceedings not to seriously pursue a defamation suit against Post Courier. Instead, they employed these proceedings to effectively prevent and distract Post Courier from exposing certain of their conducts in the forestry industry. It seems clear to me that, all they wanted to do was to buy time so the kind of attention Post Courier was trying to give to the subject matter of their publication could be taken away, which is what they achieved and they were content with that, so much so that, they were not prepared to take any of the steps in these proceedings correctly and expeditiously. I am thus of the view that the process of the Court has been abused. Allowing these proceedings to stand will effectively allow the abuse of the Court's process to continue. I minded to dismiss the proceedings for abuse of the process of the Court.

Full and Adequate Discovery – Third Issue

28. Following on from the foregoing, it is clear that, RH & Co, were not prepared to take any of the steps in these proceedings without any seriousness and commitment. In addition to their failure to file and serve a writ of summons

that carefully named the correct defendants and set out fully with the appropriate particulars the basis for their claim, they also failed to give full and adequate discovery within the required time.

29. It is a requirement under the Rules of the Court that, unless otherwise ordered or agreed, discovery has to be given fully and completely within 15 days from the date of service. The Rules further require that, all of the documents within the custody and or control of a party served with a notice for discovery that are relevant and connected to the proceedings must be fully disclosed and give them in discovery, unless privileged. Further, the Rules require verification of the list of documents given in discovery by a responsible person or officer in the case of a company or a corporate entity or the party and certified by the party's lawyer.

30. In this case, RH & Co failed initially to give discovery within the required 15 days from the date of the service of the notice for discovery. They allowed 4 months to pass before purporting to give discovery. When they did, it was without verification and certification by their lawyer in addition to and more importantly lacking in a complete listing of all of the relevant documents. A request by Post Courier to have all these rectified fell on deaf ears, even though the request and the incompleteness of the purported discovery were acknowledged by them.

28. As I noted in my decision in the matter of *Takoa Pastoral Co Ltd v. Dr Puka Temu, Minister For Lands*,[9] the Supreme Court in *Public Officers Superannuation Fund Board v. Imanakuan*,[10] and many other authorities make it clear that:

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[9] (2009) N3739.
[10] (2001) SC 677.

"the purpose of requiring and giving discovery is not only to enable a party in any proceedings before the Court to obtain facts and information about the other's case and work out both its own and the other's case's strength and weakness but also to help identify the relevant issues for trial and or enable a fair and reasonable out of Court settlement where possible. In that way, procedural equality and fairness is allowed, the Court's limited time is spared and the parties are assisted to find a solution to their dispute promptly and save substantial costs.

31. In view of that, Woods J., correctly concluded in *Credit Corporation (PNG) Ltd v. Gerald Jee*[11] that discovery is therefore:

"... not a matter of bargaining or compromising or demanding an exact list of the documents sought. It is the obligation on a party unless privileged, to supply a list of all the documents, which might have any bearing on the subject matter in dispute."

29. I went on to express the view in *Takoa Pastoral Co Ltd v. Dr Puka Temu, Minister For Lands* (supra) that:

"Given the purpose discoveries serve it would be incumbent on the parties to voluntarily disclose all relevant and necessary documents in their possession, without waiting for a request from the other side or an order of the Court. Where that does not take place and a request for discovery is necessary in the form of a notice to give discovery and such a notice is served, the party on whom the notice is served must discharge the obligation to give discovery promptly. Where a party fails to give

[11] [1988-89] PNGLR 11.

discovery in breach of the obligation to do so, that party stands the risk of the Court ... making the appropriate order at that party's costs."

30. I further expressed the view that, such a process is necessary in our jurisdiction because as the Supreme Court said in *Papua New Guinea Banking Corporation v. Jeff Tole*[12]:

> "... our system of justice is not one of surprises but one of fair play. Reasonable opportunity must be given to each other by the parties to an action to ascertain fully the nature of the other's case so that, if need be, a defendant can make a payment into Court."

31. Given all of the above, I expressed the view that, the need to give discovery is a very important one in our system of justice and pointed out that this is emphasized in about three ways namely:

(1) There is an automatic right and or obligation to give general discovery under O.9, rr. 1 and 2. All that is required under these rules is for one of the parties to file and serve a notice for discovery on the other. When that happens, there is an immediate obligation on the party served with the notice of discovery to give discovery;

(2) Once a party serves on the other a notice for discovery or where an order for discovery is made under O. 9, and the party served with the notice or order to give discovery fails to give discovery, judgment or orders can be made against the defaulting party under O.9 r. 25; and

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[12] (2002) SC694.

(3) The attitude of the courts in almost a ready grant of orders against defaulting parties as demonstrated by many decisions of the Supreme and National Courts particularly in cases where no reasonable excuse for a failure to give discovery.

32. In this case, RH & Co failed to give proper and timely discovery, despite appropriate requests for them to do so and after they acknowledged their failures. This and the other failures of RH & Co as pointed out earlier, clearly demonstrate that, they have caused much delay in promptly prosecuting this matter in a timely manner with due diligence. Accordingly, I find that Post Courier has discharged its obligation to establish a case of want of prosecution. The remaining question for the Court to turn to before deciding whether or not to grant the application is the subject of the last and remaining issue. The Issue is, whether the RH & Co has provided a reasonable explanation for their various delays, inactions and inappropriate actions?

Reasonable explanation for the delay? – Final Issue.

33. The law as we have outlined above, is very clear that, once a case of want of prosecution is made out, the opposing party has an obligation to provide a reasonable explanation for the failure to prosecute promptly. There is a similar obligation on a party responding to an application for dismissal of proceedings or judgment for failure to give discovery, which is also an issue in these proceedings.

34. So what are RH & Co's explanations for the delays, various inactions and or careless and half hearted actions? At the hearing before me, Mr. Wilson, their counsel argued that, they could not take any step particularly in terms of properly attending to the notice of discovery because they were waiting on

further and better particulars of Post Courier's defence. Counsel makes the point that, no discovery could be undertaken unless the pleadings were properly attended to.

35. Whilst I accept that, pleadings come ahead of discovery and other interlocutories before trial, any issue on pleadings must and ought to be taken before the close of pleadings which is the most logical and appropriate thing to do to avoid unnecessary delays, costs and prejudice to all or any party in the proceedings. Order 8 r. 23 provides as to the time for close of pleadings in these terms:

> "**23. Close of pleadings. (15/22)**
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> (1) The pleadings on a statement of claim shall, unless the Court otherwise orders, be closed, as between any plaintiff and any defendant, on the date of expiry of the last of the times fixed by or under these Rules for filing a defence or reply or other pleading between those parties on the statement of claim.
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> (2) Sub-rule (1) shall have effect notwithstanding that, on the date mentioned in that Sub-rule, a request or order for particulars has been made but has not been complied with."

36. In this case, the RH & Co filed and served their original writ of summons with a statement of claim endorsed thereto in early July 2006. Allowing for the usual 30 days for the filing and serving of a defendant's notice of intention to defend and defence within the required 14 days[13] period thereafter and a reply to the defence within the also required 14 days period from the date of service of the defence,[14] pleadings in this case closed in early September 2006. If however,

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[13] O. 8 r. 4 (1) (a) of the National Court Rules.
[14] O. 8 r. 5(1) of the National Court Rules.

that did not happen on account of the RH & Co not getting their pleadings in order until the latest of their amended statement of claim which was served on 23rd October 2006, the pleadings closed on or about 6th November 2006.[15] Hence, Post Courier correctly filed on 9th and served on 13th November its notice of discovery on RH & Co.

37. Following, the service of Post Courier's notice for discovery, the parties spent the ensuing period up to 03rd April 2007 on the need for RH & Co to correct the defects in their discovery of documents in satisfaction of the notice for discovery and the various follow up notices served on them. Without satisfactorily addressing and resolving that issue, RH & Co gave notice on 03rd April 2007, that they will stay any further discovery until further and better particulars of Post Courier's defence were provided.

38. In the particular circumstances of what transpired between the parties as outlined above, I am of the view that, the request for further and better particulars of Post Courier's defence, even if that request had merit was improper and well passed the appropriate time to make such a request. Relevantly, O. 8 r.5 of the Rules of the Court provides:

> "(1) Where a defendant serves a defence on a plaintiff and a reply is needed for compliance with Rule 14 or Rule 87 (defamation), the plaintiff shall file and serve the reply in Form 17 before the expiry of 14 days after the date of service on him of the defence."

39. Post Courier filed and served its defence to RH & Co's latest amended statement of claim on 27th October 2006. RH & Co had until 10th November to file and serve their reply. They did not do that and Post Courier was entitled to

[15] O. 8 r.51(2)(b)

treat the pleadings as closed and correctly proceeded with the discovery process. RH & Co had no right to request the further and better particulars outside the required time limits. They could do so only with leave of the Court. It was thus incumbent upon them to apply for leave of the Court to require Post Courier to supply the kind of particulars they required. Instead, they proceeded as if they had a legal right to do so as of right.

40. Further, I find that RH & Co's belated claim for particulars of Post Courier's defence was a knee jerk reaction to the legitimate insistence by Post Courier for them to give proper and complete discovery. Their belated request for further and better particulars was aimed at diverting if not avoid giving proper and full discovery of their documents. Clearly, this was evasive and an abuse of the process of the Court to frustrate a legitimate process and request.

Conclusion

41. There is an obvious conclusion to be draw from all of the foregoing. RH & Co has adopted a careless attitude to detail and proper process and compliance of the requirements of the Rules relating to issuance and pursuance of proceedings before the Court. They have also failed to attend to reasonable and proper requests by Post Courier which was aimed at correcting defects in RH & Co's writ of summons and list of documents, which were all aimed at expediting the process. Further, they filed various motions and failed to pursue any one of them. Some of the steps they took were clearly in abuse of the process of the Court.

42. No doubt, all of R H & Co's actions and inactions lead to a considerable and unnecessary delay of more than two and half years after the pleadings had closed more than three years ago. They were required to but they did not

provide any satisfactory explanation for these lengthy delays despite clear warnings that an application would be made to dismiss the proceedings. The end result of this is that, a case of want of prosecution has been clearly made out against them in addition to demonstrating also instances of abuse of the process of the Court.

Additional Points

43. Before arriving at the final decision in this matter, I turn to two important points counsel for Post Courier strongly argued against. The first of these points is the appearance of a requirement for a defendant applying for dismissal of proceedings for want of prosecution to "come with clean hands". The second is Mr. Wilson counsel for RH & Co filing a deliberately misleading or if not, false affidavit.

44. Addressing the first issue first, Mr. Brooks, counsel for Post Courier submits that the concept of "clean hands" expressly found its way into the requirements a defendant applying for dismissal of proceedings for want of prosecution must meet in the case of *Obadia Buka v. Jude Baisi and Notus Investments Limited*[16] by Lay J as he then was. My reading of that decision demonstrates otherwise. Instead, that concept is subscribed to Davani J in *Mali Pyali & Ors, and Jim Kaiya & Ors, v. Chief Inspector Leo Kabilo, and The Independent State Of Papua New Guinea*,[17] in the following passage:

> "In fact, the Applicants former lawyers took no steps at all since their filing of a Reply on 23.12.97. Lawyers must come to court with clean hands. If they both did not conduct the matter in an efficient manner,

[16] (2004) N2602.
[17] N2492.

then they both cannot say the other did not do anything but sit on the file...."

45. Lay J., found this statement apposite in the context of the duties of a defendant in a case where a plaintiff is failing to prosecute the matter with due diligence. His Honour expressed the view that, if a party becomes concerned with lack of progress in a matter, the first thing that party should do is to communicate with the defaulting party first by telephone with a view to getting the defaulting party to take the next step. If that fails to cause the defaulting party to take the next step then, the next step should be a forewarning letter. Such communication must allow for a reasonable period within which the other party must act.

46. As far as I know, the concept of "come clean hands" is not a new requirement that has found its way into the requirements that must be met in application for dismissal for want of prosecution. The decision of Woods J., alluded to this need in his decision in the case of *Ronald Nicholas v. Commonwealth New Guinea Timbers Limited.*[18] There are good reasons for this requirement. Woods J, gave some in his decision in this terms:

"There is no doubt that the defendant can sit and do nothing when faced with a writ of summons and relative inaction. He may let sleeping dogs lie hoping that the dog may die a natural death. However, one must not forget that once an action has been started there is a remedy for any delay on the part of the plaintiff by the defendant coming to court and taking steps under the rules to compel the plaintiff to comply with the timetable of procedural requirements preliminary to having a matter set down. And the defendant himself could set it down if the plaintiff failed to do so. If a

[18] (Supra).

defendant does not do any of these things can he be said to have acquiesced in the delay or alternatively can he be said to have shown no concern or interest in the delay. When a defendant after many years suddenly shows concern and if the plaintiff has shown some action or has some excuse then the defendant should be prepared to accept the court saying that although the plaintiff may have delayed for many years, as you are both anxious that these proceedings be concluded, come to the court and litigate without any further delay."

47. It is obvious therefore that, as much as a plaintiff is obliged to take every step in the proceedings expeditiously, it is also in the interest of a defendant to ensure that the plaintiff is taking all the steps that must be taken. This is necessary to ensure that there is an expedited outcome as opposed to unnecessary delays. Delays can and do result in the death or loss of witnesses, memories fading for witnesses, costs and interest components of a claim can escalate and other circumstances and or reasons for issuance of proceedings can change with the passage of time so much so that the purpose of litigation may be lost. Hence, if the parties by their conduct show no interest in an expedited outcome in the proceedings and have allowed it to lie without any real step being taken to prosecute or otherwise dispose of the matter, it would be unfair for a plaintiff to be suddenly faced with an application for dismissal for want of prosecution. It would thus be only fair and reasonable that, a plaintiff should be forewarned of a defendant's desire to apply for a dismissal on account of want of prosecution. The purpose of the forewarning should be to prompt the plaintiff to take the next step in the proceedings within a reasonable period. What is a reasonable period would dependant and be reflective of how long a matter as not seen any activity and how much time it would take the plaintiff to instruct his or her lawyer and take the next step in the proceedings. The notice should not be a mere formality but is one that is intended to cause a plaintiff to

take the next step in the proceedings which specifies sufficient and or meaningful time for the necessary steps to be taken.

48. On proper consideration, a further good a forewarning letter serves is to cause a plaintiff to withdraw or abandon the proceedings say due to lack of interest in pursing the matter, which could be achieved by a notice to that effect. That could avoid the costs and time that could be taken to prepare and proceed with a formal application for dismissal. A forewarning is also necessary to confirm with and give more meaning to the established law in our jurisdiction that the Court must aim to do justice on the substantive merits of a case and avoid allowing a party to succeed only on technicalities. I hasten to add however, that I do not agree with the suggestion by Lay J., (as he then was) that there should first be a forewarning by telephone and failing any action that should be followed by a formal forewarning. Only this was a new addition to the requirements a party applying of dismissal of proceedings for want of prosecution must meet.

49. Going by the Lay J., suggestion would mean two rounds of costs in forewarning and delay and would also result in an undermining of the obligation that always remains with plaintiffs to prosecute their claims with due diligence and promptly. Hence, only one forewarning would suffice.

50. In view of the foregoing considerations, I am of the view that the requirement for a defendant forewarning a defaulting plaintiff before applying for a dismissal of proceedings for want of prosecution is an important requirement. Accordingly it should be maintained and enforced. The only thing clarified in this judgment if not already done is the need to allow for sufficient and reasonable time for a plaintiff to take the next step. Further, there need only be one forewarning before applying for a dismissal of proceedings for want

of prosecution. Engaging in more than one forewarning without any intervening action in response would be unnecessary and waste of time costs.

51. In the present case, the issue of forewarning is not an issue between the parties. Indeed Post Courier has met the requirement. Before that, as we have already noted, Post Courier has consistently picked up various errors and omissions of RH & Co and requested them to take the corrective steps but RH & Co, consistently failed to promptly heed and only slowly got to getting only some of them right.

52. Turning to the second issue, Mr. Brooks refers to his affidavit sworn on 10th December 2009, which annexes an earlier affidavit he deposed to as well as another affidavit deposed to by Mr. Wilson under WS 968 of 2006. This is one of the proceedings by RH & Co, I dismissed on 7th December 2009 for want of prosecution and failure to give discovery.

53. The main issue before me in those proceedings was an issue of discovery by RH & Co. Mr. Wilson's submission in those proceedings in the main was that he did not receive any notice from Gadens that a List of Documents had not been served by his clients but later Gadens had written to him and informed him that discovery had been given which confused him.

54. In paragraph 3 (xix) of Mr Wilson's affidavit filed in proceedings WS 968 of 2006 where he deposes that he has "no record of receiving annexure "JMB 8", was a letter dated 16th February 2007 from Gadens to Warner Shand indicating that Gadens had no record of being served with any List of Documents. Mr. Wilson denied receiving that letter and argued that, his client had no notice that it had not served a List of Documents.

55. In the same paragraph Mr Wilson relies on a letter from Gadens, being annexure "JMB 12" to Mr Brooks' affidavit, which is a letter from Gadens to Warner Shand dated 16 October 2007. The same letter is annexed to Mr Wilson's affidavit as part of his annexure "F". In Mr Wilson's affidavit the letter from Gadens is clearly marked as "received" by Warner Shand on 17th October 2007 at 4.43 pm. Mr Wilson relied on this letter in WS 968 of 2006 because as he states in his affidavit, Gadens had said that "*all parties have now filed Lists of Documents*". As a result, argued Mr Wilson, he was under the impression that his client had given discovery and that was why in proceedings WS 968 of 2006 he submitted his clients claim should not be dismissed for failure to give discovery.

56. The point to be made about this is this: In WS 968 of 2006 Mr Wilson filed an affidavit and made submissions that clearly stated that Warner Shand lawyers did not receive Gadens' letter of 16 February 2007 and further that Warner Shand lawyers did receive Gadens' letter of 16 October 2007. Mr Wilson's affidavit in WS 968 of 2006 was sworn on 2 December 2009 and the hearing of that matter was before me on 7th December 2009.

57. In these proceedings, Mr Wilson filed an affidavit sworn on 3rd December 2009, which was a day after his affidavit sworn and filed in proceedings WS 968 of 2006. At paragraph 3 of his affidavit Mr. Wilson deposes that, he requested particulars by letter dated 5 July 2007 and goes onto say that the defendants did not respond to the request for particulars. However, if we go back to annexure "JMB 12" and "F" respectively in the affidavits of Mr Brooks and Mr Wilson in WS 968 of 2006, it is clear that, this letter upon which Mr Wilson relied in WS 968 of 2006 and is the very letter responding to the request for particulars in this matter.

58. Further, in Mr. Wilson's affidavit in these proceedings, per annexure "C" Mr. Wilson relies on the letter from Gadens Lawyers dated 16 February 2007, which forms part of the chain of correspondence that shows Post Courier the first defendant did not respond to the request for particulars. This is the letter Mr. Wilson swore in his affidavit in respect of WS 968 of 2006 he did not receive. In short, in proceedings WS 913 of 2006 Mr Wilson has deposed that Warner Shand lawyers, who are the lawyers of RH & Co did not receive Gadens' letter dated 16 October 2007 but did receive Gadens' letter of 16 February 2007, which according to his affidavit shows clearly that it was received on 16 February 2007 by fax.

59. What is clear beyond argument is the fact that, in affidavits sworn one day apart, RH & Co's lawyers have filed affidavit evidence completely contrary to each other and indeed showing each affidavit to be a deliberate design aimed at providing evidence which defies the truth with intend to mislead the Court. Not only that, I think Mr. Wilson's conduct borders on perjury and a breach of the lawyers professional conduct rules. Mr. Wilson did not provide any satisfactory explanation for this, which is consistent with the approach taken by RH & Co in these and their other proceedings previously dismissed. This calls for appropriate action so that this kind of behavior or conduct is not repeated in the future for the protection and upholding the due process of the law, its practice and integrity particularly before the Courts. I propose to make provision for this in the final orders I will make.

60. Having regard to all of the above I make the following orders:

(1) The Proceedings herein be dismissed for want of prosecution, abuse of the process of the Court and for failure to give discovery.

(2) Mr. Michael Wilson be referred to the Lawyers Statutory Committee for the Committee to enquire into and appropriately deal with him in relation to his conduct in respect of deposing to, filing and using two clearly conflicting affidavits in this proceedings and proceedings under WS 913 of 2006.

(3) Subject to carrying out the relevant, necessary and appropriate investigations, Mr. Wilson be charged with perjury in relation his deposing to, filing and using two clearly conflicting affidavits in this proceedings and proceedings under WS 913 of 2006 .

(4) The Plaintiffs shall pay the Defendants costs of the proceedings which shall be agreed if not taxed.

Gadens Lawyers: *Lawyers for the First Applicant/Defendant*

Warner Shand Lawyers: *Lawyers for the Respondents/Plaintiffs*