IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 256 of 2007

BETWEEN : **ALVIN RAJ** of Lautoka, Businessman trading under style and name "Bunty and Bubly Show"

PLAINTIFF

A N D : **SATYA NAND** of Suva, Programme Director/Announcer, Employee of Radio Navatarang

1st DEFENDANT

A N D **NAVTARANG HINDI RADIO STATION** 231 Waimanu Rd,, Suva

2nd DEFENDANT

A N D : **COMMUNICATIONS FIJI LIMITED** a duly constituted body having its office at 231 Waimanu Rd, Suva

3rd DEFENDANT

Mr. Zoyab Shafi Mohammed for the Plaintiff
(Ms) Bhavna Geeta Narayan for the Defendants

Date of Hearing : - 01st August 2016
Date of Ruling : - 21st October 2016

RULING

(A) INTRODUCTION

(1) The Court on its own motion issued a Notice to the parties on 27th January 2016 listing the matter for parties to show cause as to why the case should not be struck out

for 'Want of Prosecution' or as an 'abuse of process of the Court' since no action was taken for a period of more than six (06) months.

(2) The Notice was issued pursuant to Order 25, rule (9) of the High Court Rules, 1988 and the inherent jurisdiction of the Court.

(3) Upon being served with Notice, the Plaintiff filed an Affidavit to show cause as to why the matter should not be struck out for want of prosecution or as an abuse of process of the Court.

(4) The Defendants filed an Affidavit to oppose the Plaintiff's Affidavit to show cause.

(B) THE FACTUAL BACKGROUND

On 16th August 2007, the Plaintiff being represented by **Messers Suresh Verma & Associates**, issued a Writ against the Defendants claiming damages for unlawful use of the name 'Bunty and Bubly Show' in violation of the Plaintiff's right as the sole lawful owner/proprietor of Business 'Bunty and Bubly show'.

The Plaintiff's proposition is that he is entitled to the exclusive right to use the name 'Bunty and Bubly show'. The Plaintiff alleges that the name 'Bunty and Bubly' has been used by the Defendants in a daily show on one of its radio stations since June 2005. Moreover, the Plaintiff alleges that the Defendants have organised and staged shows under the said name in 2007.

The Defendants deny that the Plaintiff has been carrying on show business under the name and style 'Bunty and Bubly show' and put the Plaintiff to strict proof.

The Defendants being represented by **Lateef & Lateef Lawyers** filed their Statement Defence on the 6th September 2007. The Plaintiff amended his Statement of Claim on the 18th April 2008.

The Defendants filed their Amended Statement of Defence and Counter Claim to the Amended Statement of Claim on 13th August 2008.

The Plaintiff thereafter filed his Reply to the Amended Statement of Defence and Defence to Counter Claim on the 9th September 2008. **Thereafter activity ceased.**

On 10th October 2011, the case was taken off the cause list for not taking steps to advance the litigation after 09th September 2008.

On 27th January 2016, the Court issued Notice herein pursuant to Order 25, rule 9 of the High Court Rules.

(C) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing the striking out for want of prosecution.

(2) Rather than refer in detail to the various authorities, I propose to set out very important citations, which I take to be the principles in play.

(3) Provisions relating to striking out for want of prosecution are contained in Order 25, rule 9 of the High Court Rules, 1988.

I shall quote Order 25, rule 9, which provides;

> *"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.*
> *Upon hearing the application the court may either dismiss the cause or matter on such terms as maybe just or deal with the application as if it were a summons for directions".*

(4) Order 25, rule 09 expressly gives power to the court on its own motion to list any cause or matter, where no step has been taken for at least six (06) months.

(5) The Court is allowed to strike out an action on the failure of taking of steps for six (06) months on two grounds. The first ground is for **want of prosecution** and the second is an **abuse of process of the Court.**

(6) The principles for striking out for **want of prosecution (first ground)** are well settled. Lord **"Diplock" in "Birkett v James" (1987), AC 297,** succinctly stated the principles at page 318 as follows:

> *"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; (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 it 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."

(7) The test in **"Birkett vs James"** (*supra*) has two limbs. The first limb is **"intentional and contumelious default"**. The second limb is **"inexcusable or inordinate delay and prejudice."**

(8) In, **Pratap v Chirstian Mission Fellowship, (2006) FJCA 41, and Abdul Kadeer Kuddus Hussein V Pacific Forum Line, IABU 0024/2000,** the Court of Appeal discussed the principles expounded in **Brikett v James** (*Supra*).

The Fiji Court of Appeal in **"Pratap V Chrisitian Mission Fellowship"** (*supra*) held;

*The correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution has been considered by this court on several occasions. Most recently, in **Abdul Kadeer Kuddus Hussein v Pacific Forum Line – ABU0024/2000 – FCA B/V 03/382)** the court, readopted the principles expounded in **Birkett v James [1978] A.C. 297; [1977] 2 All ER 801** and explained that:*

'The power should be exercised only where the court is satisfied either (i) 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 (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay would 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'."

(9) The question that arises for consideration is what constitutes **"intentional and contumelious default"** (First Limb). The term **"Contumely"** is defined as follows by the Court of Appeal in **Chandar Deo v Ramendra Sharma and Anor, Civil Appeal No, ABU 0041/2006,**

"1. Insolent reproach or abuse, insulting or contemptuous language or treatment; despite; scornful rudeness; now esp. such as tends to dishonour or humiliate.

2. *Disgrace; reproach."*

(10) In **Culbert v Stephen Wetwell Co. Ltd,** (1994) PIQR 5, Lord Justice Parker succinctly stated,

> *"There is however, in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice."*

Lord Justice Nourse in Choraria [Girdharimal] v Sethia (Nirmarl Kumar) Supreme Court Case No. 96/1704/B, C.A. 15.1.98 said;

> *"However great does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground."*

It has been further stated by ***Nourse J:***

> *"That is the principle on which the court must now act. Whether it is identified as being comprehended within the first limb of **Birkett v James** or as one having an independent existence appears to be a point of no importance. I have already said that it is clear that the relevant ground of decision in **Culbert** was based on the first limb of **Birkett v. James**. In other words, it was there effectively held that the plaintiff's conduct had been intentional and contumelious.*
>
> *In my view that conclusion was well justified on the facts of the case, which demonstrated not only the plaintiff's complete disregard of the rules but also his full awareness of the consequences. He had, at the least, been reckless as to the consequences of his conduct and, on general principles that was enough to establish that the defaults had been intentional and contumelious."*

(11) Therefore, the failure to comply with peremptory orders and/or flagrant disregard of the High Court Rules amounts to contumaciousness.

(12) The next question is what constitutes **"inexcusable or inordinate delay and prejudice".**

In **Owen Clive Potter v Turtle Airways LTD**, Civil Appeal No, 49/1992, the Court of Appeal held,

> *"(Inordinate)....means so long that proper justice may not be able to be done between the parties. When it is analysed, it seems to mean that the delay has made it more likely than not that the hearing and/or the result will be so unfair vis a vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties."*
>
> *And at page 4, their Lordships stated:*
>
> *"Inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It simply allows the Judge to put into the scales the Plaintiff's conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him opportunity from pursing his action or perhaps any action against the defendant."*

In **Tabeta v Hetherigton** (1983) The Times, 15-12-1983, the court observed;

> *"Inordinate delay means a delay which is materially longer that the time which is usually regarded by the courts and the profession as an acceptable period."*

(13) The Court of Appeal, in **"New India Assurance Company Ltd, V Rajesh k. Singhand Anor, Civil Appeal No, ABU 0031/1996,** defined the term "prejudice" as follows,

> *"Prejudice can be of two kinds. It can be either specific that is arising from particular event that may or may not occur during the relevant period or general, and prejudice that is implied from the extent of delay."*

(14) Lord "Woolf" in **"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,** has discussed the principles for striking out for **"Abuse of process" (Second ground in Order 25, rule 9) as follows,**

> *"This conduct on the part of the appellant constituted an abuse of process. The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

(15) The Court of Appeal in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006** affirmed the principle of **Grovit –v- Doctor** as ground for striking out a claim, in addition to, and independent of principles set out in **Brikett v James** (see paragraph 16 of the judgment). Their Lordships held:-

> *"It may be helpful to add a rider. During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in **Grovit and Ors v Doctor** [1997] 2 ALL ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in **Birkett v James** [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court"*

(16) **It seems to me perfectly plain that under "Grovit and Others v Doctor and Others" (*supra*) there is no need to show prejudice any more for it says that maintaining proceedings without a serious intention to progress them may amount to "abuse of process" which justifies for want of prosecution without having to show prejudice.**

(D) ANALYSIS

(1) As I said earlier, on 16th August 2007, the Plaintiff being represented by **Messers Suresh Verma & Associates,** issued a Writ against the Defendants claiming damages for unlawful use of the name 'Bunty and Bubly Show' in violation of the Plaintiff's right as the sole lawful owner/proprietor of Business 'Bunty and Bubly show'.

The Plaintiff's proposition is that he is entitled to the exclusive right to use the name 'Bunty and Bubly show'. The Plaintiff alleges that the name 'Bunty and Bubly' has been used by the Defendants in a daily show on one of its radio stations since June 2005. Moreover, the Plaintiff alleges that the Defendants have organised and staged shows under the said name in 2007.

The Defendants deny that the Plaintiff has been carrying on show business under the name and style 'Bunty and Bubly show' and put the Plaintiff to strict proof.

The Defendants being represented by **Lateef & Lateef Lawyers** filed their Statement Defence on the 6th September 2007. The Plaintiff amended his Statement of Claim on the 18th April 2008.

The Defendants filed their Amended Statement of Defence and Counter Claim to the Amended Statement of Claim on 13th August 2008.

The Plaintiff thereafter filed his Reply to the Amended Statement of Defence and Defence to Counter Claim on the 9th September 2008. **Thereafter activity ceased.**

On 10th October 2011, the case was taken off the cause list for not taking steps to advance the litigation after 09th September 2008.

On 27th January 2016, the Court issued Notice herein pursuant to Order 25, rule 9 of the High Court Rules.

(2) The real point is whether the Plaintiff, having done nothing for a period of over 07 years, i.e. between 09th September 2008 to 27th January 2016 (after issuing the Writ), should now be allowed to revive it? An Affidavit is put in on his behalf in which he says; (Reference is made to paragraph 3, 4, 5, and 6 of the Plaintiff's Affidavit in Answer)

(3) *THAT the last solicitor on record for me was Mt. Haroon Ali Shah whose practice closed in 2012.*

(4) *THAT I tried to locate my file and was unsuccessful.*

(5) *THAT I enquire of the High Court Registry and left my contact with some officers to send any notice to me.*

(6) *THAT no notice from the High Court came to me until now.*

(3) A fine state of affairs! I must confess that I remain utterly unimpressed by the Plaintiff's explanations/excuses as to why he let his claim sleep for a period of over 07 years. To be more precise, I cannot accept those explanations and excuses due to the following reasons;

- There is no evidence to support that the Plaintiff tried to locate his file. A bare Statement is unconvincing.
  What were the attempts made by the Plaintiff? There is not a word there in the Plaintiff's affidavit in answer.

- There is no evidence to support that the Plaintiff made inquiries at the High Court Registry. A bare Statement is unconvincing.
  When did the Plaintiff make inquiries at the High Court Registry? What particular year and month? There is not a word there in the Plaintiff's affidavit in answer.

- **The Plaintiff's Solicitor was struck off the roll of Solicitors in 2012. But between 09th September 2008 and January 2012 that is for a period of over 03 years, the Plaintiff did nothing.** Even if the Plaintiff could not proceed with the claim after 2012, there was no reason why he should not have pursued it before 2012. There was no difficulty in proceeding with the action before 2012, because the Plaintiff's Solicitor was on record till 2012. The Plaintiff's solicitor was carrying on his business until 2012. **I simply cannot understand the real cause of the Plaintiff not having proceeded with the action between 09th September 2008 and January 2012.**

There is not a word there in the Plaintiff's Affidavit about not having proceeded between 09th September 2008 and January 2012.

The Plaintiff has not given a satisfactory explanation. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable. For the reasons which I have endeavoured to explain above, I completely reject the explanations and excuses presented in the Plaintiff's Affidavit in Answer.

The impression produced on my mind by the Plaintiffs reasons and excuses for his delay is that I have here the evolution of a myth, and not a gradual unfolding of real facts. I cannot resist in saying that the Plaintiff is not merely clutching at a non-existent straw but expecting to be carried by it. I regret to say that no amount of hair splitting with regard to the assertions of the Plaintiff, by counsel, will be of any avail to him. Anything more shadowy, anything more unsatisfactory, anything more unlikely to produce persuasion or conviction on the mind of the Court, I can scarcely imagine.

I reiterate that the Plaintiff's solicitor was on record till 2012. But between 09th September 2008 and January 2012 that is for a period of over three years, the Plaintiff did nothing. The matter was taken off the cause list in 2011 for not taking procedural steps. Despite the skilful advocacy of counsel for the Plaintiff, I am still at a substantial loss to understand;

(i) **Why was the Plaintiff unable to file a Notice of intention to proceed to terminate the delay under Order 3, rule 5 ? The Plaintiff has never done so to this day.**

(ii) **Why was the Plaintiff unable to file a Notice of Motion or Summons to reinstate the action under Order 32, rule 5 which was taken off the list on 10th October 2011 ? The Plaintiff never reinstated the action. He has never done so to this day.**

(iii) **How long would the Plaintiff have laid in abeyance, had it not been for the High Court Deputy Registrar's initiative to issue Notice pursuant to Order 25, rule 9?**

There is not a word there in the Plaintiff's Affidavit in answer. Those challenges put flesh on the bones of the Plaintiff's proposition and make plain the unfairness of it.

This is not a criminal case in which I am called upon to allow my imagination to play upon the facts and find reasonable hypothesis consistent with innocence. A balance of probability is enough. And when the greater probability is that the Plaintiff did not care at all to proceed with his action with expedition after the issue of the Writ, why should this Court hesitate to find accordingly against the Plaintiff??

It is in the public interest that, once a Writ is issued, the action should be brought to trial as quickly as possible.

The fact of more than seven years having lapsed since the last proceedings and the Plaintiff's failure to file Summons to re-instate the action and to file Notice of Intention to Proceed to terminate the delay tend to show that the Plaintiff had intentionally abandoned the prosecution of the action or there is either the inability to

pursue the claim with reasonable diligence and expedition or lack of interest in bringing it to a conclusion.

(4) As I said earlier, already seven years have elapsed since the last formal step in the proceedings. On 10th October 2011, the case was taken off the cause list for not taking steps to advance the litigation after 09th September 2008.

From 10th October 2011 to 27th January 2016, that is for a period of more than four years the Plaintiff has failed to take the following steps;

- ❖ File Summons under Order 32, rule 5 to re-instate the action.
- ❖ File a Notice of Intention to proceed to terminate the delay under Order 3, rule 5
- ❖ Proceed to Pre-Trial Conference.
- ❖ File and serve his Summons to enter action for trial.

(5) The underlying principle of Civil litigation is that the Court takes no action in it of its own motion but only on the application of one or other of the parties to the litigation, the assumption being that each will be regardful of his own interest and take whatever procedural steps are necessary to advance his cause.

The High Court Rules give to the Plaintiff the initiative in bringing his action for trial. The pace at which it proceeds through the various steps of issue and service of Writ, or pleadings, discovery, order for directions and setting down for trial is in the first instance is within his control.

The rules also provide machinery whereby the Plaintiff can compel the Defendant to take promptly those steps preparatory to the trial which call for positive action on his part and provide an effective sanction against unreasonable delay by the Defendant.

It is thus inherent in an adversary system which relies on the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the Defendant, instead of spurring the Plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the Court to dismiss the Plaintiff's action for Want of Prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

Returning back to the case before me, it is the contention of the Plaintiff that the Defendants too sat back and allowed so much time to elapse as to make a fair trial of the action impossible, and now seek to profit from this by escaping liability to the Plaintiff. This argument does not attract me. To accede to this argument would be an

encouragement to the careless and lethargic. It would mean that the Plaintiff can neglect his claim for years without any risk to himself, until a warning shot is fired.

In any event, this is a matter of little consequence because the High Court Rules give to the Plaintiff the initiative in bringing his action on trial.

It would be unrealistic to expect a Defendant in an ordinary action for damages to take steps to hasten on for trial an action in which the Plaintiff's prospect of success appears at the outset to be good.

(6) It is the totality of the delay from the time of the events to the time of the application to strike out which matters, and the ultimate question is – has the total delay from the events down to the application to strike out been such as to make a fair trial of the action between the parties impossible?

The Plaintiff's cause of action, if he has one, arose in June 2007. Nine years passed. At the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened nine years ago , memories grow dim, witnesses may die or disappear.

It is often during the first three or four years that witnesses die or disappear or forget what happened and that records and notes are lost or destroyed. Thus, every year that passes prejudices the fair trial. It would be impossible to have a fair trial nine years after the accrual of the cause of action. The Plaintiff has lasted so long as to turn justice sour. It would be an tolerable injustice to the Director of Navitarang Hindi Radio Station, Communications Fiji Ltd and to the staff, to have to fight this case nine years after the events. They are no doubt suffering at least some apprehension as to what may happen at the trial. Should they continue to have to suffer? It is the duty of the court to prevent its process being used to create injustice.

The chances of the Court being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard.

Just consider the position of the Plaintiff. If the claim is allowed to proceed for trial, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the Court as to what happened generally lies. At the trial itself, the lapse of time will tell more heavily against the Plaintiff than against the Defendants. Thus, there is no real possibility of prejudice to the Plaintiff by dismissing the action. The Plaintiff may be better off than if the action is allowed to continue. There can be no injustice in his bearing the consequences of his own fault.

When the trial of the action is prolonged, there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.

In the present case, the cause of action arose nearly 09 years ago. Clearly the inexcusable lapse of time for which the Plaintiff is responsible has given rise to a substantial risk that the issue whether the events happened in the way alleged by the Plaintiff cannot now be fairly tried. **The claim depends on an investigation of facts which took place nearly nine years ago. At the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened nine years ago , memories grow dim, witnesses may die or disappear.**

It is impossible to have a fair trial after so long a time. This Court should not wear blinkers. I cannot shut my eyes to the fact that the Defendants too sat back and adapted a 'blame storming' approach. Clearly no Defendant can have an action dismissed for want of prosecution if he has waived or acquiesced in the delay. However, the mere inaction on the part of the Defendants cannot in my view amount to waiver or acquiescence in the delay in which the Defendants found their right to have the action dismissed.

In all the circumstances, I think that the delay is so great as to amount to a denial of justice. The condition precedent to the Defendants right to have the action dismissed is thus fulfilled.

(7) The Plaintiff is not entitled to delay as of right for 07 years after issuing the Writ. He has no such right. The delay is inordinate and inexcusable.

Even a shorter delay after the Writ may in many circumstances be regarded as inordinate and inexcusable, and give a basis for an application to dismiss for want of prosecution. This is a stern measure; but it is within the inherent jurisdiction of the Court. So, in the present case, the delay of 07 years after the Writ is inordinate and inexcusable.

It is a serious prejudice to the Defendants to have the action hanging over their head for that time. On this simple ground, I think this action should be dismissed for want of prosecution.

Moreover, the prejudice to a Defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a Defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

This kind of prejudice is a very real prejudice to a Defendant and I find it hard to believe that this Court should be powerless to intervene to prevent such a manifest injustice.

In the context of the present case, I recall the rule of law enunciated in the following judicial decision;

> "*Prejudice can be of two kinds. It can either specific, that it is arising from particular events that may or may not have occurred during the relevant period or general, that is prejudice that is implied from the extent of the delay*"; per Hon. Sir Maurice Casey, **New India Assurance Company Ltd v Singh**, (1999) FJCA 69.
>
> *The prejudice will generally be regarded as inherent in substantial delay:* **Green v CGU Insurance Ltd** [2008] NSWCA 148; (2008) 67 ACSR 105 and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

In an era when the need to ensure the efficient use of judicial resources has become increasingly important, delay may also be significant in that regard. **Town & Fencott & Associates Pty Ltd v Eretta Pty Ltd** [1987] FCA 102; (1987) 16 FCR 497, 514, and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

> "*We now turn to consider whether prejudice should be inferred from the extent of the delay. It has long been recognized that the longer the delay the more difficult it can be for witnesses accurately to remember events that may have occurred years before. Such events may be forgotten, and there may be an increased possibility that a witness may, by virtue of the passage of time, come to believe an event or a happening that in fact did not occur, or did not occur in the manner he or she now believes.*" per Hon. Sir Maurice Casey, **New India Assurance Company Ltd v Singh**, (1999) FJCA 69.

Lord Denning summed up prejudice in **Biss v. Lambeth, Southwark & Lewisham Health Authority**, [1978] 2 All E.R. 125, as follows:

> *"The prejudice that might be suffered by a defendant as a result of the Plaintiff's delay was not to be found solely in the death or disappearance of witnesses, or their fading memories, or in the destruction of records,* ***but might also be found in the difficulty experienced in conducting his affairs with the prospects of an action hanging indefinitely over his head in the circumstances, by having the action suspended indefinitely over their heads,*** *the defendants have been more than minimally prejudiced by the Plaintiff's inordinate and*

inexcusable delay and contravention of rules of court as to time since the issue of the Writ, and that, added to the Plaintiff's great and prejudicial delay before the issue of the Writ, justified the court in dismissing the action for want of prosecution."

(Emphasis Added)

(8) Leave all that aside for a moment! It is not essential that the defendants demonstrate prejudice ***(Grovit v Doctor & Others* [1997] 2 ALL ER 417).** The Court still has the power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse of process irrespective of whether the classic tests enunciated in ***Birkett v James*** (supra) for dismissal for want of prosecution have been satisfied.

"The circumstances in which abuse of process can arise are varied and the kinds of circumstances in which the court has a duty to exercise its inherent jurisdiction are not limited to fixed categories. The dual principles are well settled. It is a matter of determining on the facts whether the continuation of the present proceedings will be an abuse of process of the court" **(Richardson J in the New Zealand Court of Appeal decision of *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 at page 10).**

The fact of more than 07 years having lapsed since the last proceedings tends to show that the Plaintiff had intended to abandon his claim or there is either the inability to pursue the Claim with reasonable diligence and expedition or lack of interest in bringing it to a conclusion.

I must stress here that it is an abuse of Court process if actions are commenced or maintained without the intention to pursue them with reasonable diligence and expedition.

Certainly, this case falls within the category of "abuse of process" held in ***"Grovit and Others v Doctor and Others"*** (*supra*). As earlier mentioned, it seems to me perfectly plain that under "***Grovit and Others v Doctor and Others***" (*supra*) there is no need to show prejudice any more for it says that maintaining proceedings without a serious intention to progress them may amount to "abuse of process" which justifies for want of prosecution without having to show prejudice. I echo the words of Lord "Woolf" " in "***Grovit and Others v Doctor and Others***" (*supra*)

"This conduct on the part of the appellant constituted an abuse of process. The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process.

Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in ***Birkett v James*** *[1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

It has further stated by **Lord Woolf**:

"The Court had power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied. ***Accordingly, since the commencement and continuation of proceedings with no intention of bringing them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to establish want of prosecution by showing that there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant.*** *It followed, on the facts that the deputy judge had been fully entitled to strike out the action. The appeal would therefore be dismissed."*

(Emphasis Added)

Similar sentiment was expressed in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor,** Civil Appeal No. ABU 0052/2006;

"It may be helpful to add a rider. During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in ***Grovit and Ors v Doctor*** *[1997] 2 ALL ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in* ***Birkett v James*** *[1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the*

process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court".

(E) CONCLUSION

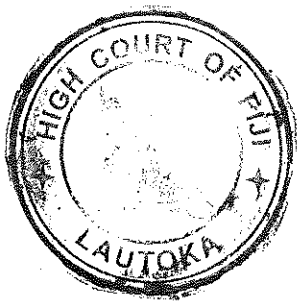
Having regard to the facts of this case, I apply the legal principles laid down in the case of **Grovit and Others v Doctor and others** (*Supra*). Accordingly, I conclude that the Plaintiff maintained the action in existence notwithstanding that he had no interest in bringing it to a conclusion.

This conduct on the part of the Plaintiff constituted an abuse of process. I cannot resist in saying that it would be an affront to justice to allow the proceedings to carry any further.
This should be made clear; the limited resources of this Court will not be used to accommodate sluggish litigation.

(F) FINAL ORDERS

(1) The Plaintiff's action against the Defendants is dismissed for Want of Prosecution and abuse of process of the Court. **Civil Action No; HBC 256 of 2007 is hereby struck out.**

(2) The Plaintiff to pay costs of $1000.00 (occasioned by this action) to the Defendants within 14 days hereof.



21/10/2016.

Jude Nanayakkara
Master.

At Lautoka

21st October 2016.