IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 63 of 2014

BETWEEN	:	**SUNDRESAN PILLAY** of Lot 18, Nadera, Suva, Retired School Principal.
		Plaintiff
AND	:	**BARTON LIMITED** a Limited Liability Company, having its registered office at the office of Price Waterhouse Coopers, 52, Narara Parade, Lautoka
		Defendant
Before	:	Master U.L. Mohamed Azhar
Counsels	:	Mr. W. Pillay of *Gordon & Co.* for the Plaintiff Mr. K. Naidu of *Munro Leys* for the Defendant
Date of Ruling	:	13th July 2018

RULING

Introduction

01. The plaintiff took out the writ from this court on 16th April 2014 against the defendant company claiming special and general damages together with the interests for the injuries caused to him due to the alleged negligence of the defendant. At all material times, the plaintiff and his wife were among other the invitees for a wedding and reception held on 22nd April 2011 at the resort known as 'Sheraton' belonged to the defendant company and situated at Denarau, Nadi. The plaintiff claimed that, he was with other invitees on the beach near the wedding chapel at the resort and proceeded to use the bathroom facility located approximately 100 to 200 meters at the main entrance and foyer. Whilst he was approaching the bathroom, he tripped over an exposed/protruding tree roots along the unlit pathway and fell down. The plaintiff sustained injuries and claimed the damages based on both negligence and occupier's liability.

02. The defendant company filed the statement of defence and admitted that, it was informed to the company that the plaintiff tripped and fell down while taking a short cut through

dark and unlit area, however, denied other allegations. The defendant also pleaded that, the plaintiff was negligent in attempting to take a short cut through a dark and unlit area, whilst he was in a state of intoxication and therefore, exposed himself to the risk of sustaining personal injury. Though the statement of defence was filed on 08th May 2014, no step was taken by the plaintiff till 06th February 2015, the day he filed the Notice of Intention to Proceed. After another delay for 4 months, on 12th June 2015, the plaintiff then filed the Affidavit Verifying List of Documents. The defendant then filed the Affidavit Verifying List of Documents on 14th October 2015. Thereafter, there was no step for more than six months.

03. This court then, on its own motion, issued a notice on 23. 09. 2016, pursuant to Order 25 rule 9 of the High Court Rules, requiring the plaintiff to show cause, why his action should not be struck out for want of prosecution and abuse of the process of the court. The plaintiff filed his affidavit showing cause and the defendant too filed an affidavit sworn by its director. At the hearing of the notice, the counsels for both the plaintiff and the defendant made the oral submissions and filed their respective written submissions. The counsel for the plaintiff, before venturing into his 'show cause exercise' for the notice issued by the court, took up a preliminary objection in relation to the affidavit filed on behalf of the defendant company, and stated that, there was no evidence of the position of the deponent and authority he had to swear the affidavit. In fact, the said affidavit was sworn by a director of the defendant company, Andre Caldwell. In his affidavit, he stated that, he is a director of the defendant company and he is authorized to make the affidavit. The counsel for the plaintiff placed reliance on the decisions of High Court in **Rawlinson Jenkins Ltd v Hansons (Fiji) Ltd** [2016] FJHC 928; HBC70.2013 (17 October 2016), **Denarau Corporation Ltd v Deo** Civil Action No. HBC 32 of 2013 and **Wadigi Investment Ltd v Laqai** [2016] FJHC 821; HBC211.2015 (16 September 2016). In those three cases, the affidavits were filed on behalf of the companies and there were no written authorities attached with those affidavits. The courts rejected all those affidavits for lacking the authority.

04. The authority to swear an affidavit in civil suits has been the arguable point in several cases in Fiji, and there are several cases, where the courts have rejected some affidavits for lacking authority from the actual parties to the suits. In some instances, the courts have accepted the affidavits despite the absence of written authority from the respective parties to the actions. Therefore, two questions to be decided in relation to the preliminary objection of the plaintiff, before analyzing the reasons given by him for his inaction for more than six months. First is who can depose an affidavit in a civil suit? The second is does the deponent need a ***written authority*** from a company to swear an affidavit on its behalf?

Who can depose an affidavit?

05. This court in a recent decision in **Sharma v Prasad** [2018] FJHC 250; HBC239.2015, decided on 3rd April 2018 had discussed this question. However, for the convenience of this ruling, I reiterate the same with more detailed reasoning below. The Order 41 of the High Court Rules deals with the matters connected with the affidavits that are filed in civil suits. There is no requirement, in any of the rules under this Order, for an authority for a person, who swears an affidavit. The rule 5 of the said Order provides for the contents of an affidavit. It reads;

Contents of Affidavit (O.41, r.5)

5.-(1) Subject to Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. (Emphasis added).

06. According to the above rule, subject to the specific rules mentioned therein and paragraph 2 of the rule, a person, who is able to speak to of his own knowledge to such facts, can swear an affidavit to that effect, as emphasized above. In this sense, the affidavit is equated to the oral evidence given in court. The **Supreme Court Practice (White Book) 1999** has the same rule under Order 41. The **White Book 1999** reads;

Contents of affidavit (O.41, r.5)

5. (1) Subject to –
(a) Order 14, rule 2(2) and 4(2);
(b) Order 86, rule 2(1) and 4(1A);
(ba) Order 88, rule 5(2A);
(c) Order 113, rule 3;
(d) Paragraph (2) of this rule, and

An affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

07. The only difference between Fiji High Court Rules and the **White Book 1999** is that, the exceptions are more in the **White Book** than Fiji Rules. It means that, Fiji Rules are more flexible than the rules in White Book 1999, as the exceptions are less in Fiji Rules. The **White Book 1999**, then explains the effect of this rule as follows;

> ***Effect of Rule***
>
> *This rule was taken from the former O.38, r.3. Its effect is to require that save in the excepted cases, an affidavit must contain the evidence of the deponent, as to such facts only as he is able to speak to of his own knowledge, and to this extent, equating affidavit evidence to oral evidence given in Court.*
>
> *The excepted cases are:*
>
> *(1) Affidavits under O.14, rr. 2 (2) and 4(2) either by the plaintiff or by the defendant;*
> *(2) Affidavits under O.86, rr. 2 (1) and 4 (1A) either by the plaintiff or defendant;*
> *(2A) Affidavits under O.86, r.5 (2A) in support of applications by a mortgagee claiming possession or payment;*
> *(3) Affidavits under O.88, r.5(2A) in support of applications by mortgagees for possession or payment;*
> *(4) Affidavits under O.113, r.3 on behalf of the plaintiff in summary proceedings for possession of land;*
> *(5) Affidavits for use in interlocutory proceedings; and*
> *Affidavits made pursuant to an order under O.38, r.3(2) that evidence of any particular fact may be given at the trial by statement on oath of information or belief.* (Emphasis added).

08. Accordingly, the affidavits, which are equated with the oral evidence, are the way of giving evidence and the person who has privy to any information may depose an affidavit to that effect. This was affirmed by the court in **Vodafone Fiji Ltd v Pacificconnex Investment Ltd** [2010] FJHC 419; HBE097.2008 (30 August 2010) and held that;

> *Affidavits are a source of providing evidence and anyone privy to knowledge and information has a right to depose to an affidavit.*

09. The exceptions, under Fiji Rules, are the Order 14, rules 2(2) and 4(2), to Order 86, rule 2(1), Order 41 rule 5 (2) and Order 38, rule 3. Accordingly, in any application which falls under these exceptional rules, the respective parties should swear the affidavits. If the

respective parties are not able to swear such affidavits, they must authorize a person to do so. It must be noted here that, those who, generally, argue that, the authority should be given to swear an affidavit, very often cite the passage or the note that appears at page 117 of the **White Book 1967.** It states as follows;

> *'The affidavit may be made by the Plaintiff or by any person duly authorized to make it. If not made by the Plaintiff, the affidavit itself must state that the person making it is duly authorized to do so-* ***Chingwin –v- Russell*** *(1910) 27 T.L.R. 21".*

10. In fact, the above note has, frequently, been cited by the courts too, in support of the view which seeks the authority from either the plaintiff or the defendant to depose an affidavit. On the face of it, the above note makes the inference that, there must be an authority from the party, either the plaintiff or the defendant, if the affidavit is not deposed by him. However, a careful reading of the said authority **Chingwin –v- Russell** reveals that, it was decided under Order 14, which is one of the common exceptions mentioned in both High Court Rules (Order 41 rule 5) and White Book 1999 as stated above. The following dictum of **Vaughan Williams L.J.** in that case makes it crystal clear that, the courts asked for the authority only in cases of exceptions, which require the respective parties to swear the affidavits, as identified by the above rules. His Lordship **Vaughan Williams** held that;

> *"Where an affidavit in support of a summons under Order 14 is sworn by a person other than the plaintiff he should state his means of knowledge and also the* ***fact*** *that he is authorized to make the affidavit."* (Emphasis added).

11. The above dictum makes two propositions abundantly clear. Firstly, the case (**Chingwin –v- Russell**) decided under the exception (Order 14) should not, generally, be applied to all the affidavits in the civil suits. Secondly, the court did not call for a written authority to swear the affidavit in that case, but, it required the deponent to state the fact that he was authorized to do so, as emphasized above, notwithstanding the fact that, the application was under the Order 14 which requires the party himself or herself to swear the affidavit. In that case, His Lordship **Vaughan Williams** cited another case, which is **Lagos v. Grunwaldt** (1910) 1 K.B 41. That case too was decided under Order 14. In that latter case, the plaintiff, who had acted as the legal representative of the defendants during litigation in South America, sent in his bill of costs to their solicitors in England, and afterwards issued a specially indorsed writ against the defendants, claiming the professional charges and disbursements. An application for leave to sign judgment under Order XIV was supported by an affidavit made by a member of the English firm of solicitors who represented the plaintiff. This affidavit was sworn in London, and the

deponent stated that he was a member of the firm of solicitors acting for the plaintiff; that the defendants were justly truly indebted to the plaintiff in the sum claimed in the writ for professional charges; gave the history of the case; and added that it was within his own knowledge that the debt was incurred and was till owing, such knowledge being obtained from correspondence received from the plaintiff and from correspondence and conversations the deponent had had with the defendant's solicitors and that he was duly authorized by the plaintiff to make the affidavit. The Court of Appeal unanimously held that;

> *There was a liquidated demand, but that the affidavit was irregular, in as much as the deponent was not a person who could swear positively to the facts and verify the cause of action and the amount claimed within Order XIV, r.1, and his affidavit was only made on information and belief. The conditions imposed by the rule were not fulfilled, and the Court had no jurisdiction to make an order under Order XIV.* (Emphasis added).

12. In the above case, the deponent had clearly averred in the disputed affidavit that, he was duly authorized by the plaintiff to make the said affidavit. However, the court did not ask for a written authority to be attached with the said affidavit, but, went on to examine whether the deponent could have positively sworn to the facts. **Cozens-Hardy M.R** said at pages 46 and 47 that;

> *He says, "I verily believe that there is no defence to this action," and then, "It is within my own knowledge that the said debt was incurred and is still due and owing, such knowledge being obtained from correspondence received from the plaintiff and also from correspondence and conversations I have had with Messers. Pritchard, Englefield & Co. I am duly authorized by the plaintiff to make this affidavit." In my opinion it is impossible to say that this is an affidavit made by a person who can swear positively to the facts. It is obviously nothing more than a statement made on his information and belief, that information being derived from his own client, the plaintiff, who tells him this is due – and that obviously will not be enough to enable him to make the affidavit – and from further statements made by Pritchard, Englefield & Co., who, beyond all doubt, were not the solicitors for the defendant Grunwaldt at the time when those statements were made. Is it possible that the deponent can swear positively to the facts as to the stamped paper for forty-three documents, which is the first item in the bill which is given here? Is it possible that he can swear this sum was paid? I might go through all the items. Is it possible that he can swear that the fees charged by Dr. Lagos and another*

attorney, amounting to 1,500l in all, were due? It seems to me we should be giving an irrational and improper extension to Order XIV, r.1, if we said that such an affidavit as that, made in aid of the plaintiff, was sufficient to bring his claim within the peculiar provisions of Order XIV. In my opinion on that ground there was no jurisdiction under Order XIV, to make the order which was made. We might as well say that the plaintiff's solicitor in every case could make an affidavit to satisfy Order XIV, and that would be dangerous beyond anything. There may be cases (I do not wish to be misunderstood on this point) in which the plaintiff's solicitor or the plaintiff's solicitor's clerk may be perfectly competent to make an affidavit satisfying the conditions of Order XIV, r.1. There are no conditions here which justify us in saying that the plaintiff's solicitor could make the affidavit and swear positively to the facts, and swear positively verifying the amount claimed. (Emphasis added)

13. It follows from the above decisions that, the authority to swear an affidavit should be required only in those circumstances exempted by the Order 41 rule 5, and the authority alone cannot make an affidavit admissible, but the court is still under duty to examine, whether the deponent can positively swear to the facts contained in the affidavits. A deponent can be disqualified from positively swearing to the facts, even though he or she was authorized to do so, as described by the above decision. The Fiji Court of Appeal in **Pacific Agencies (Fiji) Ltd v Spurling** [2008] FJCA 49; Civil Appeal Miscellaneous 10 of 2008S (22 August 2008), was of the view that, the person, who is able of his own knowledge to prove, should have sworn the affidavit and Hickie JA stated that it could have been sworn by the solicitor who knew the issues. Though, the Supreme Court, in the same case (**Pacific Agencies (Fiji) Ltd v Spurling** [2008] FJSC 27; CBV0007.2008S decided on 17 October 2008) had some concerns on the view of Hickie JA in relation to the sole knowledge of solicitors and swearing affidavits by the solicitors as stated by Hickie JA, it did not reverse the rationale that, the deponent should be able of his own knowledge to prove facts (see: both the judgment of Hickie JA in Court of Appeal and the judgment of Supreme Court as cited above).

14. The above analysis on the rules of the court and the decided cases supports the conclusion that, the general rule is that, save in the excepted cases, an affidavit must contain the evidence of the deponent, as to such facts only as he is able to speak to, of his own knowledge to prove. The exceptions are the applications under Order 14 rules 2(2) and 4(2), Order 86 rule 2(1) and the affidavits falling under paragraph 2 of Order 41 rule 5. For the applications under Order 14 rules 2(2) and 4(2), Order 86 rule 2(1) rules, the respective parties to swear an affidavit. If not, the deponent should have been authorized to do so. However, there is no requirement for a ***written authority*** to be attached with the

affidavit under those circumstances, but the deponent should state the fact that, he was authorized to make affidavit as held by His Lordship **Vaughan Williams** in **Chingwin – v- Russell** (supra). The main factor, in deciding the admissibility of an affidavit, is whether the deponent is able of his own knowledge to prove the facts contained in a particular affidavit or whether the deponent can positively swear to those facts. The affidavit, which is equated to oral evidence given in court, may contain other facts and information and even the hearsay. Hence, like the court analyses the oral evidence in court, the affidavit too should be analyzed, and the court should consider which averments to be accepted, which to be rejected, and what weight should be given to that affidavit, bearing in mind the fact that, the averments in the said affidavit is not tested by cross examination. Without this judicial exercise, a court cannot declare an affidavit as irregular or defective and reject it, merely on the basis that, the letter of authority is not attached with the particular affidavit. Now I turn to discuss the second question whether a deponent needs a **written authority** from a company to swear an affidavit on its behalf?

Affidavit of a company – whether written authority needed?

15. The first and foremost remark that should be made at this point is that neither the High Court Rules nor the Companies Act contains a rule or a provision, which requires a written or an ostensible authority from a company for a deponent who deposes an affidavit filed on behalf of that company. Though the new Companies Act was recently passed, the legislature, in its wisdom, did not consider it necessary to incorporate a provision to that effect. The section 53 of the New Companies Act provides for execution of documents by the company including the deeds of the company. However, it does not include the affidavits of the company. In fact, there is no necessity for the Companies Act to make a separate provision in this regard, because affidavit, which is equated to oral evidence, is the form of giving evidence on oaths, whether it is filed by a legal person (company) or a natural person. The relevant rules of the court shall apply for both affidavits. The only rule that applies to the affidavits of both the natural persons and the legal persons is the Order 41 rule 5 of the High Court Rules as discussed above.

16. Secondly, under the company law, the authority of a company will, generally, be required when a person enters into a contract or an agreement or transacts on behalf of the company with another person or a company. This requirement is to ensure that, the company is liable for such contract or agreement or transaction and to protect the interest of the members of the company from any of ultra-virus acts or conducts of the contracting persons, employees or even directors. This process of authorization is, generally, done through passing of resolutions by the company. However, the Companies Act provides in section 54 to make some assumptions in relation the conducts of its directors or other person acting on behalf of the company. The said section reads;

Entitlement to make assumptions

54.—(1) A person is entitled to make the following assumptions in relation to dealings with a Company —

(a) a person may assume that the Company's Articles of Association and any provisions of this Act that apply to the Company , have been complied with;

(b) a person may assume that any person who appears, from information provided by the Company that is available to the public from the Registrar, to be a Director or a company secretary of the Company —

(i) has been duly appointed; and

(ii) has authority to exercise the powers and perform the duties customarily exercised or performed by a Director or company secretary of a similar Company ;

(c) a person may assume that any person who is held out by the Company to be an Officer or agent of the Company —

(i) has been duly appointed; and

(ii) has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of Officer or agent of a similar Company ;

(d) a person may assume that the Officers and agents of the Company properly perform their duties to the Company ;

(e) a person may assume that a document has been duly executed by the Company if the document has been signed in accordance with section 53;

(f) for the purposes of making the assumption, a person may also assume that any person who states next to their signature that they are the sole Director and sole Company secretary of the Company occupies both offices; and

(g) a person may assume that an Officer or agent of the Company who has authority to issue a document or a certified copy of a document on its behalf also has authority to warrant that the document is genuine or is a true copy.

(2)The Company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions is incorrect.

(3)A person is entitled to make the assumptions in subsection (1) in relation to dealings with another person who has, or purports to have, directly or indirectly acquired title to Property from a Company.

(4)The Company and the other person are not entitled to assert in proceedings in relation to the dealings that any of the assumptions is incorrect.

(5)The assumptions may be made even if an Officer or agent of the Company acts fraudulently, or forges a document, in connection with the dealings.
(6)A person is not entitled to make an assumption in subsection (1) if at the time of the dealings they knew or suspected that the assumption was incorrect.
(7)Without limiting the generality of this section, the assumptions that may be made under this section apply for the purposes of this section.
(8)Except, for a change registered under this Act, a person is not taken to have information about a Company merely because the information is available to the public from the Registrar.

17. The analogy that follows from the examination of the above section is that, if the assumptions are to be made as per the requirement of above section in relation to the contracts and/or the agreements which require the sanction of the company, why the court cannot assume that a director or a responsible person of a company, who swears an affidavit on behalf it, has proper authority to do so, even in the absence of any written authority?

18. Thirdly, the court in **Total (Fiji) Ltd v Khan** [2010] FJHC 206; HBC023.2008 (11 June 2010) concluded that, the two officers, who held relatively senior management positions of the company had the authority to swear the affidavits even though there was no written authority from the company. For the above reasons, I am fortified in my view that, it is the Order 41 rule 5 of the High Court Rules that applies to the contents of both affidavits sworn by a natural person or filed on behalf of a legal person (company). The reading of Order 41 rule 5 together with the relevant provisions of the Companies Act comes to the conclusion that, if an affidavit is sworn by a director or an employee of a company, it is presumed that, such person has authority to swear the said affidavit and there is no necessity to call for a ***written authority*** for them, it is stated that, the particular person has the authority to make the affidavit. If it is a director of the company he or she would, definitely, have the knowledge of the facts contained in the said affidavit and if it is an employee, the court may have to examine, depending on the position of that person int the company, whether he or she is able of his or her own knowledge to prove the facts averred in the affidavit as per the requirement off Order 41 rule 5 of the High Court Rules.

19. I now turn to discuss the three main cases cited by the counsel for the plaintiff in support of his contention that, written authority needed for an affidavit sworn on behalf of a company. Those three cases are namely, **Rawlinson Jenkins Ltd v Hansons (Fiji) Ltd**, **Denarau Corporation Ltd v Deo** and **Wadigi Investment Ltd v Laqai**. The first

case followed reasoning of the second case and the third case stands alone for its decision to reject the affidavit filed in that case.

20. In **Denarau Corporation Ltd v Deo** the court relied on section 40 of the Companies Act Cap 247 when it rejected the affidavit filed on behalf of the company. In that case, the counsel for the defendant, citing the section 40 of the Companies Act Cap 247, which has now been repealed, argued that, the impugned affidavit did not contain the authority to swear an affidavit on behalf of the company. The court stated in paragraphs 11 to 13 that;

> *[11] Firstly, the Defendant objects to the Plaintiff's application and submits that the Application be dismissed as the Affidavits of Rupeni Fonmanu should not be received in evidence to support the application as there is no authority for Mr Rupeni to swear affidavit on behalf of the plaintiff company. He relies upon s.40 of the Companies Act (C A). That section provides that:*
>
> ***"A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company, and need not be under its common seal."***
>
> *[12] Mr. AK Narayan, counsel for the defendant submits that, Affidavit is irregular as there is no authority attached to show that the deponent is authorised to swear affidavit on behalf of the company.*
>
> *[13] Rupeni's affidavit of 14 February and 31 March 2014 state that, 'I am the Chief Executive Officer of the plaintiff and have its authority to swear this affidavit. In term of s.40 of CA a document or proceeding may be signed by a director, secretary or other authorised officer. Mr Rupeni merely states that he is authorised to swear affidavit on behalf of the plaintiff, a company. A company being an artificial person cannot act by itself. It should act through agent. That agent must have proper authority to act on behalf of the company. Merely stating that the deponent is Chief Executive Officer of the plaintiff and has authority to swear affidavit on behalf of the plaintiff company is not sufficient. He must state the person who gave that authority, whether it is a director or secretary or other authorised officer of the company. In the absence of this the deponent will lack authority to swear affidavit on behalf of the company. Counsel for the plaintiff argues that, provisions of the HCR do not require any authority to be annexed by the deponent swearing an affidavit in a professional, business or other professional capacity. For my part, I would say it is preferable to show authority when a deponent swear an affidavit on behalf of a company because the deponent is giving evidence by affidavit. The court cannot take judicial notice in this regard. The deponent must show*

that he has proper authority to swear affidavit on behalf of the plaintiff which he has failed to do so.

21. Some important, but necessary facts to be noted in respect of the above decision in that **Denarau Corporation Ltd v Deo**. Firstly, the above decision, as stated therein, is based on the section 40 of the repealed Companies Act Cap 247. The same section 40 attracted the attention of the court in respect of a similar argument of irregularity of an affidavit in the case of **Vodafone Fiji Ltd v Pacificconnex Investment Ltd** [2010] FJHC 419; HBE097.2008 (30 August 2010). In this latter case, the court had a view different from that of **Denarau Corporation Ltd v Deo** in respect of the said section 40 of the repealed Companies Act. The court held that, the section 40 does not necessarily apply when deposing an affidavit on behalf of a company. The paragraphs 28 to 30 read as follows;

> *[28] The Counsel of the Petitioner strongly argued that the Affidavit in Opposition can only be signed by persons stated in section 40 of the Act.*
>
> *[29] Section 40 of the Companies Act reads as follows.*
>
> ***"A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorized officer of the company, and need not be under its common seal"***
>
> *[30] **I am of the view that this section applies when attesting company documents for the purpose of authentication only and does not necessarily apply when deposing affidavits. Affidavits are a source of providing evidence and anyone privy to knowledge and information has a right to depose to an affidavit.*** (Emphasis added).

22. Accordingly, there are two different and conflicting views in relation to the application of section 40 of the repealed Companies Act to the affidavits sworn on behalf of the companies. Both cases are from the high courts and stand on the same footing.

23. Secondly, the above section 40 of the repealed Companies Act is in Division 10 of Part II of the said Companies Act. The said Division 10, which contains the sections from 36 to 40, deals with the contracts of the companies, such as Form of contracts (section 36), Bills of exchange and Promissory Notes (section 37), Execution of Deeds abroad (section 38, Power of the company to have a common seal for use abroad (section 39) and finally authentication of documents in section 40. Any section of any of the statute or the law should not be interpreted in isolation from the other connected sections. There should, always, be *a contextual interpretation* of the relevant sections, because the *context* may throw a different light to the meaning of phrase or sentence, which can eventually help

the court to come to correct meaning intended by the legislature (see: **Carr v The State of Western Australia [2007] HCA 47; "Statutory Interpretation: The Meaning of Meaning", Kirby, Michael, [2011] MelbULawRw 3; (2011) 35(1) Melbourne University Law Review 113).**

24. Thus, the contextual reading of these sections clearly indicates that, section 40, which requires the authentication of documents, relates to the contracts of a company signed in home and abroad and does not mean and include the affidavits executed on behalf of the company. Accordingly, the contextual interpretation of that section 40 favours the decision of **Vodafone Fiji Ltd v Pacificconnex Investment Ltd** and does not support the view taken in **Denarau Corporation Ltd v Deo**.

25. Thirdly, the same section 40 of the repealed Companies Act was cited in court in **Total (Fiji) Ltd v Khan** [2010] FJHC 206; HBC023.2008 (11 June 2010) and the counsel for the defendant adduced the same argument on lack of authority against two affidavits sworn by two persons holding the senior management positions of the plaintiff company. The court took the view different from what of **Denarau Corporation Ltd v Deo** and held that, the fact that, both of them were holding very senior management positons of the plaintiff company led to the conclusion that, they were duly authorized to swear the affidavits on behalf of the company.

26. Fourthly, the counsel for the plaintiff failed to recognize the fundamental difference between that case (**Denarau Corporation Ltd v Deo**) and the case in hand. In that case, the impugned affidavit was sworn by the Chief Executive Officer of the company. However, in the instant case the deponent is the director of the company. The Order 41 rule 5 (1) provides that, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. Affidavits are a source of providing evidence and anyone privy to knowledge and information has a right to depose to an affidavit (**Vodafone Fiji Ltd v Pacificconnex Investment Ltd**). The director of a company is the person who is appointed under and by virtue of the articles of the company and the Companies Act. He is the person who runs the business of the company and knows the affairs of the company. Therefore, he does not need any authority to swear an affidavit on behalf of the company. Furthermore, in the same case (**Denarau Corporation Ltd v Deo**) cited by the counsel for the plaintiff, the court held that, the director can give authority. Thus, the court recognized that the authority can be given by a director. If the director can give an authority to someone to swear an affidavit, why the director himself or herself cannot swear the same affidavit. Therefore, the case cited by the counsel himself speaks against his contention.

27. Fifthly, even we accept that the section 40 requires an authority, as held in **Denarau Corporation Ltd v Deo**, this requirement cannot be available more, since the whole Companies Act Cap 247 has, now, been repealed by the new Companies Act 2015. There is no provision in the new Act, similar to section 40 of old Act. For the above reasons, I distinguish **Denarau Corporation Ltd v Deo.** Even I am mistaken in distinguishing the above decision, my above reasoning is good enough for not to follow the same in the instant case, and to follow other two cases, namely, **Vodafone Fiji Ltd v Pacificconnex Investment Ltd(supra)** and **Total (Fiji) Ltd v Khan(supra)**. As a result the decision of **Rawlinson Jenkins Ltd v Hansons (Fiji) Ltd (Supra)** which followed **Denarau Corporation Ltd v Deo** too is distinguished for the same reasons.

28. The third case, on which the counsel for the plaintiff relied, is **Wadigi Investment Ltd v Laqai (supra)**. In that case, the court held that, since the plaintiff was the limited liability company, the ostensible authority authorizing the deponent to swear an affidavit on behalf of the company. The court found that, the deponent of the affidavit in that case was not named as a director of the company, as exhibited by the company search document tendered to the court. Therefore, the court rejected his affidavit. The fundamental difference between that case and the instant case before me is that, in the first case, the deponent was not the director. In contrast, in the latter case, it is an undisputed fact that the deponent is the director of the defendant company. Accordingly, the **Wadigi Investment Ltd v Laqai (supra)** is easily distinguishable from the instant case before me. Other two cases, namely **Raingold Investment Ltd v Courts (Fiji) Ltd** [2016] FJHC 292; HBC41.2013 (18 April 2016) and **Bulileka Hire Services Ltd v Housing Authority** [2016] FJHC 322; HBC57.2011 (25 April 2016) are, also distinguished on the reasons given for distinguishing **Denarau Corporation Ltd v Deo** and **Rawlinson Jenkins Ltd v Hansons (Fiji) Ltd** respectively.

29. In the instant case, the affidavit was sworn by the director of the defendant company and filed on its behalf. The director of a company is the person, who is appointed under and by virtue of the articles of the company and the Companies Act. He or she is the person who runs the business of the company and knows the affairs of the company. Accordingly, the director is not only authorized to act on behalf of the company, but also is able of his or her own knowledge to prove the facts averred in the affidavit. Therefore, I reject the preliminary objection raised by the counsel for the plaintiff, in relation to the affidavit sworn and filed by the director of the defendant company, and hold that, the said affidavit is in compliance with both the High Court Rules and the Companies Act 2015.

Order 25 rule 9.

30. The substantive issue is whether this action should be struck out under Order 25 rule 9 of the High Court Rules or not. The Order 25 rule 9 provides for the jurisdiction of the court to strike out any cause or matter for want of prosecution or as an abuse of process of the court if no step has been taken for six months. The said rule reads;

> *"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 may be just or deal with the application as if it were a summons for directions".*

31. The court's power under the above rule has been discussed in many cases and the law, on striking out an action under this rule, is well settled now. This, therefore, does not warrant a lengthy discussion. However, for the benefit of the discussion in the instant case, I briefly point out the law as this court held in some other cases before. The grounds provided in the above rule are firstly, want of prosecution and secondly, abuse of process of the court. This rule was introduced to the High Court Rules for the case management purpose and is effective from 19 September 2005. The main characteristic of this rule is that, the court is conferred with power to act on its own motion in order to agitate the sluggish litigation (**see: Trade Air Engineering (West) Ltd v Taga** [2007] FJCA 9; ABU0062J.2006 (9 March 2007). Even before the introduction of this rule, the courts in Fiji exercised this power to strike out the cause for want prosecution following the leading English authorities such as **Allen v. McAlpine** [1968] 2 QB 229;[1968] 1 All ER 543 and **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801. Justice Scott, striking out plaintiff's action in **Hussein v Pacific Forum Line Ltd** [2000] Fiji Law Report 24; [2000] 1 FLR 46 (6 March 2000), stated that;

> *"The principles governing the exercise of the Court's jurisdiction to strike out for want of prosecution are well settled. The leading English authorities are **Allen v. McAlpine** [1968] 2 QB 229;[1968] 1 All ER 543 and **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801 and these have been followed in Fiji in, for example, **Merit Timber Products Ltd v. NLTB** (FCA Reps 94/609) and **Owen Potter v. Turtle Airways Ltd** (FCA Reps 93/205)".*

32. The Court of Appeal of Fiji in **Trade Air Engineering (West) Ltd v Taga** (supra) reiterated that, the new rule (Or 25 r 9) does not confer any additional or wider power to the court except the power to act on its own motion. It was held in that case that;

"In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation, it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority".

33. The above decision of the Court of Appeal made it abundantly clear that the principles set out in **Allen v. McAlpine** (supra) and **Birkett v. James** (supra) are still applicable to strike out any cause where no step is taken for six months, despite the introduction of new rule (Or 25 r 9). Lord Diplock, whilst articulating the principles for striking out the actions for want of prosecution and abuse of the court process in **Birkett v. James** (supra), explained the emerging trend of English courts in exercising the inherent jurisdiction for want of prosecution. His Lordship held that;

"Although the rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for direction and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution except upon disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.

To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in Reggentin vs Beecholme Bakeries Ltd (Note) [1968] 2 Q.B. 276 (reported in a note to Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229) and Fitzpatrick v Batger & Co Ltd [1967] 1 W.L.R. 706

The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer to as Allen v McAlpine [1968] 2 Q.B. 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to

R.S.C, Ord. 25, R. 1 in the current Supreme Court Practice (1976). ***The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party***".(emphasis added)

34. As Lord Diplock clearly explained in his judgment, the above principles were set out in the notes to Order 25 rule 1 of Rules of Supreme Court 1976 which is equivalent to our Order 25 rule 1 (4) under the Summons for Directions. However those principles of prophesy had caused to the development of the new rule such as Order 25 Rule 9. The first limb in the above case is ***the intentional and contumelious default.*** Lord Diplock in his wisdom did not leave the first limb unexplained, but, His Lordship gave two examples for that first limb. One is ***disobedience to a peremptory order of the court*** and the other is ***conduct amounting to an abuse of the process of the court.*** Thus the second ground provided in Order 25 Rule 9, which is 'abuse of the process of the court', is a good example for '***the intentional and contumelious default'*** as illustrated by Lord Diplock in **Birkett v. James** (supra). According to Lord Diplock abuse of the process of the court falls under broad category of '***the intentional and contumelious default'*** However, Lord Diplock did not explain what act does exactly amount to an abuse of the process of the court.

35. There is a latest judgment by the House of Lords in **Grovit and Others v Doctor and Others** (1997) 01 WLR 640, 1997 (2) ALL ER, 417, where Lord Woolf held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. His Lordship stated as follows;

> *"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".*

36. The Fiji Court of Appeal in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor,** Civil Appeal No. ABU 0052/2006 followed the principles of **Grovit and Others v Doctor and Others** (supra) and held that;

> *"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"*

37. Both, the **The Grovit** case and **Thomas (Fiji) Ltd** (supra) which follows the former, go on the basis that, *"abuse of the process of the court"* is a ground for striking out, which is independent from what had been articulated by Lord Diplock in **Birkett v James** (supra). However, it is my considered view that, this ground of *"abuse of the process of the court"* is part of ***'the intentional and contumelious default'***, the first limb expounded by Lord Diplock. The reason being that, this was clearly illustrated by Lord Diplock in **Birkett v. James** (supra). For the convenience and easy reference I reproduce the dictum of Lord Diplock which states that; "...***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...***" (Emphasis added). According to Lord Diplock, the abuse of the process of the court, with its all forms, falls under broad category of ***'the intentional and contumelious default'***. In fact, if a plaintiff commences an action and has no intention to bring it to conclusion it is an abuse of the process of the court. Thus the default of a plaintiff intending not to bring it to conclusion would be intentional and contumelious. Accordingly, it will fall under the first limb of the principles expounded in **Birkett v. James** (supra). This view is further supported by the dictum of Lord Justice Parker who held in **Culbert v Stephen Wetwell Co. Ltd,** (1994) PIQR 5 as follows;

"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."

38. Sometimes, it is argued that, **Birkett v. James** (supra) deals with the ground of 'want of prosecution' only and not the ground of abuse of the process of the court. However, it is evident from the illustrations given in that case that, it deals with both the grounds of 'abuse of the process of the court' and 'want of prosecution' as well. In any event, the defendant is under no duty to establish the prejudice in order to strike out an action if he can prove the abuse of the process of the court. Suffice to establish plaintiff's inactivity coupled with the complete disregard of the Rules of the Court with the full awareness of the consequences.

39. The second limb of the **Birkett v. James** (supra) is (a) that there has been inordinate and inexcusable delay on 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. In short, it is inordinate and inexcusable delay, which makes the fair trial impossible, or which is likely to cause or has caused prejudice to the parties.

40. Their Lordships the Justices of Fiji Court of Appeal in **New India Assurance Company Ltd v Singh** [1999] FJCA 69; Abu0031u.96s (26 November 1999) unanimously held that, *"We do not consider it either helpful or necessary to analyse what is meant by the words 'inordinate' and 'inexcusable'. They have their ordinary meaning. Whether a delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case"*. However, in ***Deo v Fiji Times Ltd [2008] FJCA 63; AAU0054.2007S (3 November 2008)*** the Fiji Court of Appeal cited the meaning considered by the court in an unreported case. It was held that;

*"The meaning of "inordinate and inexcusable delay" was considered by the Court of Appeal in **Owen Clive Potter v Turtle Airways Limited v***

Anor *Civil Appeal No. 49 of 1992 (unreported) where the Court held that inordinate meant "so long that proper justice may not be able to be done between the parties" and "inexcusable" meant that there was no reasonable excuse for it, so that some blame for the delay attached to the plaintiff".*

41. According to Order 25 Rule 9, the acceptable and or tolerable maximum period for inaction could be six months. The threshold is six months as per the plain language of the rule. It follows that, any period after six months would be inordinate and inexcusable so long that proper justice may not be able to be done between the parties and no reasonable excuse is shown for it. Therefore, whether a delay can be described as inordinate or inexcusable is a matter of fact, which to be determined in the circumstances of each and every case. As established by courts delay of itself, without being shown that the delay is seriously prejudicial to the defendant, is not sufficient to strike out of an action under the second limb of the **Birkett v. James** (supra). The Fiji Court of Appeal in **New India Assurance Company Ltd v Singh** [1999] FJCA 69; Abu0031u.96s (26 November 1999) has reaffirmed the burden of the defendant to establish that serious prejudice would be caused to it by the delay. It was held that;

> *"Where principle (2) is relied on, both grounds need to be established before an action is struck out. There must be both delay of the kind described and a risk of an unfair trial or serious prejudice to the defendants. In Department of Transport v Smaller (Transport) Limited [1989] 1 All ER 897 the House of Lords did not accept a submission that the decision in Birkett should be reviewed by holding that where there had been inordinate and inexcusable delay, the action should be struck out, even if there can still be a fair trial of the issues and even if the defendant has suffered no prejudice as a result of the delay. Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ delay will either make a fair trial impossible or prejudice the defendant. He went on to affirm the principle that the burden is on the defendant to establish that serious prejudice would be caused to it by the delay".*

42. In **Pratap v Christian Mission Fellowship** [2006] FJCA 41; ABU0093J.2005 (14 July 2006) the Fiji Court of Appeal cited the dictum of Eichelbaum CJ in Lovie v. Medical Assurance Society Limited [1992] 2 NZLR 244. It was held in that case at page 248 by Eichelbaum CJ that;

"The applicant must show that the Plaintiff has been guilty of inordinate delay, that such delay is inexcusable and that it has seriously prejudiced the defendants. Although these considerations are not necessarily exclusive and at the end one must always stand back and have regards to the interests of justice. In this country, ever since NZ Industrial Gases Limited v. Andersons Limited [1970] NZLR 58 it has been accepted that if the application is to be successful the Applicant must commence by proving the three factors listed."

43. The above analysis of law on striking out of an action clearly shows that, the courts in Fiji had, before the introduction of Order 25 rule 9, exercised the jurisdiction to strike out following the principles expounded in **Allen v. McAlpine** (supra) and **Birkett v. James** (supra). Even after the introduction of the above rule the same principles apply, as confirmed by the superior courts. The ground of '*abuse of the process of the court* advanced by the recent case of **Grovit v. Doctor** (supra) too comfortably falls into the first limb of **Birkett v. James** as Lord Diplock cited *'the abuse of the process of the court'* as one of the two examples for the first limb expounded by him. The rationale is that, commencing an action without the intention of bringing it to conclusion amounts to an abuse of the process of the court and in turn it is an intentional and contumelious default. A series of separate, inordinate and inexcusable delays in complete disregard of the Rules of the Court, together with full awareness of the consequences can be regarded as contumelious conduct or an abuse of the process of the court under the second limb of Order 25 rule 9. On the other hand the inordinate and inexcusable delay together with the impossibility of fair trial or prejudice should be established in order to succeed in an application under first limb of Order 25 rule 9.

Analysis.

44. As mentioned above, this is the claim for damages for the personal injuries. The alleged incident took place on 22.04.2011 and the plaintiff filed the action at the eleventh hour on 16th April 2014, just few days before limitation period expired. Again after 9 months from the date of filling statement of defence by the defendant, the plaintiff filed a Notice of Intention to Proceed. It took another 4 months for the plaintiff to file his affidavit verifying list of documents. Thereafter another 11 months of inaction was noticed by the court. It should be noted that, both pre-writ delay and post-writ delay are critical when the court considers the inordinate delay. Lord Griffiths delivering the unanimous judgment of House of Lords in Department of Transport v. Chris Smaller Ltd [1989] A.C. 1197 held at page 1208 that;

"Furthermore, it should not be forgotten that long delay before issue of the writ will have the effect of any post writ delay being looked at

critically by the court and more readily being regarded as inordinate and inexcusable than would be the case if the action had been commenced soon after the accrual of the cause of action".

45. In **Birkett v. James** (supra), Lord Diplock noted at page 322 that;

> *"....A late start makes it the more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner may be inexcusable in the light of the time that has already passed before the writ was issued".*

46. Since the plaintiff was the late starter and he further delayed the matter as mentioned above, this court issued the notice on its own motion on 23rd September 2016 under Order 25 rule 9. The plaintiff then immediately filed his second Notice of Intention to Proceed on 28.09.2016. However, filling the notice of intention to proceed will not buy any immunity as it was settled by the Fiji Court of Appeal in **Singh v Singh** [2008] FJCA 27; ABU0044.2006S (8 July 2008). The court stated that;

> *For the avoidance of doubt, the fact that there was a Notice of Intention to Proceed under Order 3 Rule 5 of the Rules of the High Court does not prevent an application to dismiss a case for want of prosecution. It buys no immunity from the exercise of the Court's inherent powers. The application of this rule could not be used for the perpetration of an action where such a perpetration was, as here, an abuse. Further,* ***Order 25*** *Rule 9 does not prevent such a course from being taken.* ***Order 25*** *Rule 9(1) 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.*
>
> *The only step that was taken was the filing of the Notice of Intention to Proceed. That predated the application to dismiss a case for want of prosecution by a few days. We do not think that* ***Order 25*** *Rule 9 provides the only circumstances in which the High Court could use its inherent powers. In the exercise of the discretion of the court, the inactive period which predated the filing of the Notice of Intention to Proceed was available for the Court to consider. In any event, well over the minimum 6 months had elapsed. It could not seriously be contended that the*

Respondents would have had to wait for another 6 months after the filing of the Notice of Intention to Proceed upon the basis that this was a step taken within the meaning of ***Order 25*** *Rule 9.*

47. The plaintiff in his affidavit has attached copies of five letters, marked as **"B"**, **"C"**, **"D"**, **"E"** and **"F"** for the proof of communication between his solicitors and the solicitors for the defendants. The letter **B** is the covering letter dated 18.06.2015 and sent by the plaintiff's solicitors with the bundle of documents to the defendant's solicitors. The letter **C** is the reply dated 12.01.2016 and sent by the defendant's solicitors to another letter dated 19.10.2015 sent by the plaintiff's solicitors regarding the discoveries. The letter **D** dated 15.06.2016 was sent by plaintiff's solicitors with the Pre-Trial Conference Draft Minutes to the defendant's solicitors. The letter **E** is another letter by plaintiff's solicitors on 15.07.2016 to follow up the draft minutes of Pre- Trial Conference. Finally, the letter **F** is the reply dated 18.07.2016 and sent by the defendant's solicitors seeking the documents sought in their earlier letter **C** and confirming to have the Pre-Trial Conference on 22.07.2016 in Lautoka. The defendant did not dispute this correspondence.

48. The above correspondence clearly shows that, the solicitors for both the plaintiff and the defendant were in touch and communication regarding this matter, though the court was not informed of this development in this case. The main reason for the court being not informed is that, there was no summons for directions and the parties were acting on automatic directions, as this is a personal injury claim. I do understand that, there has been some delay on part of the plaintiff in prosecuting this matter, however, cannot hold that, there was no step taken for six months as the rule requires. The plaintiff was at a snail's space in taking the necessary steps.

49. On the other hand, the counsel for the defendant supported the court's motion and argued that, there was an initial delay after filling the defence and further delay after the affidavit verifying list of documents was filed. The delay in both occasions was considered and the court issued the notice on its own motion. The question is whether the plaintiff took any steps within this period in order to take the case forward to the trial. The communication between the solicitors regarding the discoveries and the Pre-Trail Conference minutes shows that, the plaintiff has been taking steps, though the court was not aware of them. In fact, the defendant too, by the conduct of his solicitors calling for further discovering, induced the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay. In **Allen v. McAlpine** (supra), Lord Diplock stated at page 260 that,

But also, if after the plaintiff has been guilty of unreasonable delay the defendant so conducts himself as to induce the plaintiff to incur further

costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay, he cannot obtain dismissal of the action unless the plaintiff has thereafter been guilty of further unreasonable delay.

50. The last communication by the solicitors for the defendant was on 18th July 20016 and as such, the defendant cannot complain of delay till that date. If there was any delay after that date lasting for six months or more without any action by the plaintiff, then the defendant can complain of it. However, the court issued the notice in September 2016. Had the court known this development between the parties, it would not have issued the notice. Therefore, it cannot be said the there was no step for six months in this case. As the result, the court should deal with the notice as if it was a summons for directions in terms of paragraph 2 of Order 25 rule 9. Since this matter was filed in 2014, I direct the plaintiff to strictly comply with the directions in relation to the Pre-Trail Conference minutes and Copy Pleadings.

51. In result, the final orders are;

a. The Notice issued by this court should be considered as it was a summons for direction,

b. The plaintiff to file the Pre-Trial Conference Minutes within 14 days, and

c. The parties to bear their own cost.

U.L. Mohamed Azhar
Master of High Court

At Lautoka
13/07/2018