IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 152of 2010

BETWEEN : **FIJI DEVELOPMENT BANK** a corporate body having its Head Office at 360 Victoria Parade, Suva, Fiji

Plaintiff

AND : **UNITED LANDOWNERS COMPANY LIMITED** a limited liability company having its registered office at the Fiji Pine Commission, Drasa Avenue, Lautoka

1st Defendant

AND : **OSEA NAIQAMU aka OEA NAIQAMU aka OSEA NAIQAMA, ESALA NAKALEVU, NASOGO ILIVASI aka ILIVASI NASOQO. VIVITA NACEWA, MARIKA SENIBUA, LEMEKI NAITAU, FILIPE NACEWA AND SOLOMONE NAREBA** all of Simla, Lautoka Fiji, Company Directors.

2nd 3rd 4th 5th 6th 7th 8th and 9th Defendants

Before : Master U.L. Mohamed Azhar

Counsel : Ms. J. Naidu (on instructions) for the Plaintiff
The Defendants were absent and unrepresented

Date of Ruling: 13th September 2019

RULING

(On striking out under Or 25 r 9)

Introduction

01. The plaintiff, pursuant to several loan agreements entered into between the periods from 25.07.1991 to 26.01.2009, granted loan facilities to the first defendant. The first defendant on the other hand provided securities in the form of bills of sale over vehicles Registration Numbers ULCL 01, EH 786, EC 098 and DD 076, assignment over Cartage Proceeds with Pine Landowner Company Limited and adequate insurance cover to secure the loans so granted by the plaintiff bank. There were variations on securities as per the agreement entered by the plaintiff and the first defendant. The plaintiff, for the purpose of

further securing the loans advanced to the first defendant, obtained Deeds of Guarantees executed by the second to ninth defendants to this action. The first defendant defaulted in repayment of loan which resulted in the plaintiff exercising its rights under the securities and selling the items under the Bills of Sale. Though the sale proceeds were credited to the loan account of the first defendant, there was a remaining balance of $ 116, 293.30 and the plaintiff sued the first defendant and the other defendants – the guarantors to recover the said balance amount together with the interest at the rate of 10.01 per annum from 01.06.2010 and cost.

02. Some defendants failed to file the notice of intention to defend, whilst some others defaulted in pleading. As a result, the plaintiff sealed the default judgment against them. In the meantime, the plaintiff's action was struck out on 19.05.2011 under Order 25 rule 9 as it appears from the minutes made on that day. However, the matter was re-instated and the parties filed their respective pleadings and filed the affidavits verifying their lists of documents. The matter was then adjourned for the parties to complete the discoveries and to finalize the Pre-Trial Conference Minutes. It was also informed to the court on 16.07.2013 that, the ninth defendant passed away in 1995 about 15 years before filing this action and the first defendant company was wound up. The court then adjourned the matter for finalizing the Pre- Trial Conference Minutes. However, the plaintiff neither appeared thereafter nor did he file the minutes of the Pre- Trial Conference. As a result, the then Master of the High Court took the matter off the cause list on 27.09.2013.

03. After about three months, the plaintiff, on 08.01.2014 filed a notice requesting a Pre-Trial Conference pursuant to Order 34 rule 2 of the High Court Rules. However, nothing was materialized and the court, having waited for another three years issued the notice on 23.01.2017, on its own motion on the plaintiff company, pursuant to Order 25 rule 9 of the High Court Rules requesting it to show cause why this matter should not be struck out. The plaintiff company filed the affidavit showing cause for inaction. Though the notice issued on the plaintiff company was served on the defendants' solicitors, they did not take part in this proceeding. At the hearing the counsel for the plaintiff filed his legal submission and moved the court to make the ruling based on the affidavit and his legal submission.

Law

04. The law on striking out under Order 25 rule 9 is well settled and there is number of cases decided by both the high court and the appellate courts. Thus this does not need much deliberation. However, it is necessary to brief the law for the purpose of this ruling. The Order 25 rule 9 provides for 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".

05. 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 299;[1968] 1 All ER 543 and **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801. Justice Scott, striking out of 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 299;[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)".*

06. 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".

07. The above decision of the Court of Appeal made it abundantly clear that the principles set out in **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 to strike out matters 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)

08. As Lord Diplock clearly explained in his judgment, the above principles were set out in the note to Ord 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.

09. Lord Woolf delivering the judgment of the House of Lords in **Grovit and Others v Doctor and Others** (1997) 01 WLR 640, 1997 (2) ALL ER, 417 held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. His Lordship expounded that:

> *"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".*

10. 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"

11. 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 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."*

12. Though it is traditionally understood that, **Birkett v. James** (supra) deals with the ground of 'want of prosecution' only, it is evident from the illustrations given in that case that, it deals 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.

13. The second limb of the **Birkett v. James** (supra) is (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. In short, inordinate and inexcusable delay which 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 likely to cause or to have caused serious prejudice to the parties.

14. 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".*

15. The Order 25 Rule 9 by its plain meaning empowers the court to strike out any cause either on its own motion or an application by the defendant if no steps taken for six months. 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 excusable 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, the delay itself, without being shown that the delay is seriously prejudicial to the defendant, is not sufficient to strike out of an action. 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".

16. 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."*

17. 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 action for want of prosecution and followed the principles expounded in **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, 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 Or 25 r 9. On the other hand the inordinate and inexcusable delay which causes prejudice or makes fair trial impossible should be established in order to succeed in an application under first limb of Or 25 r 9.

Analysis

18. Since the notice was issued by this court on its own motion pursuant to Or 25 r 9, it is the duty of the plaintiff company to show cause why its action should not be struck out under that rule. The affidavit filed on behalf of the plaintiff company attributes blame for delay to the solicitors of the defendant and states that, the solicitors of the defendants failed to comment on the draft pre-trial conference minutes. Apart from that reason, there is no

other reason given in the said affidavit for the long delay or inaction. It is necessary at this point to mention the duty casted on the plaintiff in this case now, as the court issued the notice on its own motion under Order 25 rule 9.

19. According to the plain meaning of this rule (Or 25 r 9), the proceedings for striking out any cause for abuse of the process of the court or want of prosecution can be initiated by two ways. One is initiated by an application of any party and the other is initiated by the court on its own motion. When any party makes such an application, that party has to show to the court either of the grounds that, there is want of prosecution or it is an abuse of the process of the court. This is the positive burden on the party who moves for the court to exercise its power to strike out any particular cause. That is to say the applicant, most likely the defendant, has to positively establish ***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.*** In that event, the other party probably, the plaintiff has to rebut what is established by the defendant in order to get opponent's motion or application dismissed. There are several authorities which explain the burden of each party in this situation (see: Pratap v. Christian Mission Fellowship (supra), Lovie v. Medical Assurance Society Limited (supra) and New India Assurance Company Ltd v. Singh (supra).

20. However, the situation would differ when the court initiates the striking out proceeding by acting on its own motion and issuing notice on the plaintiff or other party who fails to prosecute their claim. If the court issues a notice, it would require the party, mostly the plaintiff, to show cause why his or her action should not be struck out under this rule. In such a situation, it is the duty of the plaintiff to show to the court negatively, i.e. there has been no intentional or contumelious default, there has been no inordinate and inexcusable delay and no prejudice is caused to the defendant. I would call this burden as 'the burden of negative proof'. Accordingly, if the court issues notice, the defendant does not, even, need to participate in this proceeding. He or she can simply say that, he or she is supporting court's motion and keep quiet, allowing the plaintiff to show cause to the satisfaction of the court not to strike out his cause. Even in the absence of the defendant, the court can require the plaintiff to show cause and if the court is satisfied that the cause should not be struck out, it can give necessary directions to the parties. Generally, when the notice is issued by the court, it may require the defendant to file an affidavit supporting the prejudice and other factors etc. The defendant may or may not file an affidavit in support of court's motion. However, failure of any defendant to file an affidavit will not relieve the plaintiff from discharging his or her duty to show cause why his or her action should not be struck out.

21. If the proposition, that the defendant is obliged to prove both grounds in all the cases including the cases where the court issues notice, is generally applied, it would put the court, which issued the notice on its own motion, in an awkward position. The reason being that, the court may have to still rely on the defendant, after issuing notice on its own motion and may have to ask the defendant to support its motion or may have to discharge the duty of the defendant if he or she is just supporting the court's motion without filling any affidavit. As a result it will futile the purpose of giving additional powers to the court to act on its own motion. Thus, in cases where the courts issue notices on own motion, it is duty of the plaintiff to negatively establish those factors in order to prevent his or her case being struck out by the court. In the instant case, it was the notice issued by the court on its own motion. Thus the plaintiff has the burden to show that the default has not been intentional and contumelious, e.g. no disobedience to a peremptory order of the court or conduct does not amount to an abuse of the process of the court; or (2) (a) that there has not been inordinate and inexcusable delay on the part of the plaintiff or its lawyers, and (b) that the delay, if any, will not give rise to a substantial risk that may cause fair trial impossible or that may cause prejudice to the parties.

22. The affidavit filed on behalf of the plaintiff company is notably silent on this burden to satisfy the court as mentioned above. It simply puts the blame on the defendant's solicitors and moves the court not to strike out plaintiff's action. Besides, the following discussion will show that, not only the plaintiff, but also its solicitors were lethargic and negligent in bringing and prosecuting this matter.

23. The plaintiff's last appearance in this case was on 16.07.2013. It was informed on that day that, the defendant company (first defendant) was wound up and the ninth defendant passed away in 1995. Thereafter, the plaintiff was absent and unrepresented in two consecutive dates until the matter was taken off the cause list on 27.09.2013. Even before 16.07.2013, the plaintiff did not appear in two occasions, i.e. on 28.05.2013 and on 14.06.2013. Admittedly, there has been a delay of 3 years and 3 months from the last date on which the plaintiff company was represented by its solicitors, to the date this court issued the notice under this rule. The only step taken by the plaintiff was filling of notice requesting for pre-trial conference on 08.01.2014. If the delay is computed from that date, still there has been a delay for the period of three full years.

24. The acceptable and or tolerable period of inaction in any matter is 6 months as per the unambiguous language of the Order 25 Rule 9, as it allows a party or the court to issue a notice only after lapse of six months. Thus, the threshold is six months and any delay thereafter would be inexcusable and inordinate so long as no reasonable excuse is provided and justice may not be able to be done between the parties or prejudice is caused to them. The reason adduced by the plaintiff for the delay is that, the defendant's solicitors delayed the matter by not commenting on the draft pre-trial conference minutes. The deponent of the said affidavit also attached some correspondences from the solicitors of the plaintiff to defendants' solicitors (annexures marked as **"S2" "S3"** and **"S5"**). However, this cannot be accepted as a reasonable excuse, because, the plaintiff had other

options to be followed. If the solicitors for the defendants refused to attend the pre-trial conference as alleged by the plaintiff company in its affidavit, its counsel should have applied to the court under order 34 rule 2 (3) of the High Court Rules for an order that such conference be held at such time and place and for such purpose as shall be specified in the order, or for an order that such conference need not be held. The said sub-rule read:

> *(3) If any solicitor refuses to attend such a conference, the solicitor requesting the same may apply to the Court for an order that such conference be held, and the Court may order that such conference be held at such time and place and for such purpose as shall be specified in the order, or may order that such conference need not be held.*

25. However, the solicitors for the plaintiff failed to make such application. This shows that, the plaintiff and its solicitors not only disregarded the specific rules, but also failed to adduce reasonable excuse for the delay of three years. As a result, the delay has become inexcusable. It is obvious from the document annexed with the affidavit and marked as **"S 6"** that, the first defendant company was wound up by an order of this court dated 09.02.2010. However, the plaintiff company instituted this action on 04.08.2010, six months after the first defendant company was wound up by this court. The plaintiff could not have instituted this action against the company that had already been wound up by the court. The plaintiff should have made its claim to the liquidators of the first defendant company. Furthermore, it was informed in court on 16.07.2013 that, the ninth defendant passed away in year 1995, almost 15 years before filling this action. This clearly shows that, the solicitors for the plaintiff failed to diligently act in this regard. The plaintiff instituted the action in an irregular manner which cannot be cured. The plaintiff company is responsible for and bound by the conduct of its solicitors, as the general rule is the parties are bound by the conducts of their solicitors (see: **Lownes v Babcock Power Ltd** [1998] EWCA Civ 211). In addition the incompetence or negligence of legal advisers is not a sufficient excuse (see: **R v. Birks** [1990] 2 NSWLR 677). Given the manner in which this action has been filed as mentioned above, a fair trial in this case is not possible and the remaining defendants will be highly prejudiced.

26. Further, the prejudice that may be caused by delay of one party should not be looked at a narrow viewpoint and also not to be confined to the prejudice that may be caused solely by death or disappearance of witnesses or their fading memories or loss and destruction of records. Lord Denning in **Biss v. Lambeth, Southwark and Lewisham Health Authority** (supra) held that:

> *The one solution that I see is that 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: like the prejudice to Damocles when the sword was suspended over his head at the*

banquet. It was suspended by a single hair and the banquet was a tantalizing torment to him. So in the President of India case which we heard the other day. The business house was prejudiced because it could not carry on its business affairs with any confidence, or enter into forward commitments, whilst the action for damages was still in being against it. Likewise the hospital here. There comes a time when it is entitled to have some peace of mind and to regard the incident as closed. It should not have to keep in touch with the nurses saying: 'We may need you to give evidence'; or to say to the finance department: 'We ought to keep some funds in reserve in case this claim is persisted in'; or to say to the keepers of records: 'Keep these files in a safe place and don't destroy them as we may need them.' It seems to me that in these cases this kind of prejudice is a very real prejudice to a defendant when the plaintiff is guilty of inordinate and inexcusable delay since the issue of the writ, and it can properly be regarded as more than minimal.

27. Even though the correspondences of plaintiff's solicitors to defendants' solicitors regarding pre-trial conference minutes (annexures marked as **"S2"** and **"S3"**) are considered as the attempts by the plaintiff to proceed with this matter, those correspondences were in year 2013 and there was no single step thereafter till the court issued the notice. Accordingly, there has been an inordinate and inexcusable delay in complete disregard to the rules, especially Order 34 rule 2 (3).

28. It appears that, the plaintiff company did not have any intention to proceed with its matter. Lord Justice Parker 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."* (Emphasis added).

29. It reveals from the statement of claim that, the plaintiff company had adequate securities for the loan granted to the first defendant company as mentioned above. It includes Bills of sale over several vehicles, assignment over Cartage Proceeds with Pine Landowner Company Limited and adequate insurance cover. That may be the reason for the plaintiff

company not making any effort in prosecuting this matter, as it would have recovered all the due from the first defendant company through other avenues using those securities.

30. Thus the conduct of the plaintiff company and its solicitors clearly indicates that, it did not have any intention to bring this action to conclusion. This amounts to an abuse of the process of the court. The House of Lords in **Grovit and Others v Doctor and Others** (1997) 01 WLR 640, 1997 (2) ALL ER, 417, held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held 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".*

31. As the first defendant company was wound up prior to institution of this action and the ninth defendant passed away about 15 years before this action was filed, the case has been hanging over the heads of the second to eighth defendants for the long period of 3 years whilst the plaintiff company has not moved it further. Thus, the prejudice is more than minimal. Further, the court should not be ignorant of the impact of a prolonged case on the limited resources of the courts. The Fiji Court of Appeal in **Singh v. Singh** [2008] FJCA 27; ABU0044.2006S (8 July 2008) succinctly expounded this and said that:

> *There is also developing a new line of authority which is not utterly critical to the decision of the learned Judge in this case. Nevertheless, it would be inappropriate to fail to refer to this development. The proposition is that regard should also be had to the impact of a case on the resources of the court. Those resources are not infinite and for every case which takes up time, another case is potentially delayed. If the case which takes up time and delays another case is, on any view, an utter waste of time and resources and stands in the way of other more deserving*

cases being heard at an earlier time, then that is a factor which the courts cannot ignore.

Conclusion

32. For the reasons expounded above, I am fully entitled to say that, the very existence of an action which the plaintiff has no interest at all in pursuing it, cannot be allowed to such a long period which is inexcusable and intolerable. There is no reason why this case should be hanging over the remaining defendants when the first defendant company had already been wound up, and the ninth defendant too passed away about 15 years before institution of this matter, whilst the plaintiff company has, absolutely, been inactive and lethargic. Thus I decide that the plaintiff company failed to establish to the satisfaction of this court, which issued the notice on its own motion, as to why this action should not be struck out for abuse of the process of the court or for want of prosecution under the Order 25 rule 9 of the High Courts Rules. Therefore I strike out the same. Since this notice was issued on the own motion of this court, I make no order as to cost.

33. In result, the final orders are;

a. Plaintiff's cause is struck out for want of prosecution and abuse of process of the court, and

b. There is no order as to cost.

HIGH COURT OF FIJI LAUTOKA

U.L. Mohamed Azhar
Master of the High Court

At Lautoka
13/09/2019