IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 178 of 2022

BETWEEN:

PRANESH NAIR
PLAINTIFF

AND:

DR. OM PRASAD
1ST DEFENDANT

AND:

DR. HONG YING
2ND DEFENDANT

AND:

OCEANIA HOSPITAL PTE LIMITED
3RD DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:
Daniel Singh Lawyers for the Plaintiff
Messrs. Neel Shivam Lawyers for the 1st Defendant
Munro Leys for the 3rd Defendant

Date of Hearing:
28 March 2024

Date of Ruling:
26 July 2024

RULING

01. The Court has issued a notice on its own motion on 30/06/2023 pursuant to Order 25 rule 9 of the High Court Rules to the Plaintiff to show cause why this matter should not be struck out for want of prosecution or as an abuse of the process of the court due to the failure of the Plaintiff to take any steps in the matter for over 06 months. The said notice required the Plaintiff to give Notice of Intention to Proceed pursuant to Order 3 Rule 5 of the High Court Rules, **immediately** if the Plaintiff wishes to proceed with the action.

02. The Plaintiff, however, filed a Notice of Intention to Proceed only on the 19/07/2023, almost three weeks after the Order 25 Rule 9 Notice was issued.

03. On 07/09/2023, when the matter was first called on the Order 25 Rule 9 Notice, the counsel for the Plaintiff moved for further time to file an Affidavit to Show Cause. Court then granted 14 days for the Plaintiff to file and serve an Affidavit to Show Cause.

04. The Plaintiff had filed its Affidavit to Show Cause on the 19/09/2023 within the stipulated 14 days but had failed to serve the same on the Defendants till 16/10/2023.

05. Further, as per the directions made on the 07/09/2023, the Plaintiff has filed written submissions in support of his position on the 05/10/2023 and the 3rd Defendant had also filed its written submissions on the 05/10/2023.

06. The 3rd Defendant, on the 17/10/2023, with the leave of the Court, also filed an Affidavit in support of the Court's Order 25 Rule 9 Notice, as sworn by one Ronlyn Kanika Ratiram and an Affidavit by the 2nd Defendant, Dr. Ying Hong, to the effect that, till to date the 2nd Defendant hasn't been duly served with a copy of the Writ and the Statement of Claim.

07. The Plaintiff thereupon, on 19/10/2023, had filed an Affidavit of Service by one Rajeshwar, on the purported service of the Writ on the 2nd Defendant on 06/06/2022.

08. When the matter was called before the Court on the 19/10/2023, the counsel for the 3rd Defendant, pointed out that the Plaintiff's Affidavit to Show Cause was only served to

them on 16/10/2023 and as such sought leave from Court to file an Affidavit in response.

09. Accordingly, with leave of the Court, the 3rd Defendant, on 02/11/2023, filed an Affidavit in response as sworn by one Emily King.

10. Furthermore, the 3rd Defendant with leave of the Court filed a further written submission on 08/01/2024.

11. Now coming to the history of the case, it is noted by the Court that the Plaintiff's Writ of Summons along with the Statement of Claim had been filed on the 27/05/2022.

12. On 01/06/2022, the Acknowledgment of Service for the 3rd Defendant was filed and the 1st Defendant filed the Acknowledgment of Service on the 16/06/2022.

13. Statement of Defence for the 3rd Defendant was filed on 27/06/2022 and the 1st Defendant filed its Statement of Defence on 30/06/2022.

14. Thereafter, as no steps were taken by the Plaintiff to proceed with the matter for almost 01 year until the Court on its own motion had issued the Order 25 Rule 9 Notice on the 30/06/2023.

15. This Court shall accordingly proceed to rule on its Order 25 Rule 9 Notice, having duly considered all affidavit evidence, written submissions and oral submissions of the parties.

16. Order 25 Rule 9 of the High Court Rules 1988 provides for the jurisdiction of the court to strike out any cause or matter for want of prosecution or as an abuse of the 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".*

17. The grounds provided in the above rule are firstly, want of prosecution and secondly, abuse of process of the Court. This is a rule that was introduced to the High Court Rules for case management purposes and was 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 unduly lethargic litigation (**see; *Trade Air Engineering (West) Ltd v Taga [2007] FJCA 9; ABU0062J.2006 (9 March 2007***).

18. Well before the introduction of this rule, the courts in Fiji have 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.

19. Justice Scott, striking out the 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)".*

20. The Court of Appeal of Fiji in ***Trade Air Engineering (West) Ltd v Taga*** (supra) held,

> *"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".*

21. Pursuant to the above decision of the Court of Appeal, it is 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, 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)

22. The first limb in the test to be applied in considering a striking out under Order 25 Rule 9 of the Rules, as expounded in the above case is, ***the intentional and contumelious default***. Lord Diplock gave two examples for that first limb in the above judgment. 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.'***

23. 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 are 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".*

24. 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."*

25. Master Azhar in the case of ***Amrith Prakash v Mohammed Hassan & Director of Lands; HBC 25/15: Ruling (04 September 2017)*** has held,

"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."

26. **It is however, to be noted that the Defendant, is under no duty to prove the prejudice to him/her, or for that matter for the Court to consider the prejudice to the Defendant, to strike out an action under Order 25 Rule 9 of the High Court Rules 1988, if the abuse of the process of the Court is established.** Whereas it is sufficient to establish Plaintiff's inactivity coupled with the complete disregard of the Rules of the Court with the full awareness of the consequences, for an action to be struck out pursuant to Order 25 Rule 9 of the High Court Rules.
27. The burden of proof in determining the matters under Order 25 Rule 9 of the High Court Rules may fall as a "negative burden of proof' on the Plaintiff itself. Master Azhar in ***Amrith Prakash v Mohammed Hassan & Director of Lands*** (Supra) further held,

"If the court issues a notice, it will require the party, most likely 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 that, there has been no intentional or contumelious default, there has been no inordinate and inexcusable delay, and no prejudice is caused to the Defendant. This is the burden of negative proof. In this case, 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 plaintiff's 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 will require the defendant to file an affidavit supporting the prejudice and other factors etc. However, this will not relieve the Plaintiff from discharging his or her duty to show cause why his or her action should not be struck out. In the instant case, it was the notice issued by the court on its own

motion. Thus, the Plaintiff has the burden of negative proof and or to show cause why his action should not be struck out for want of prosecution or abuse of the process of the court."

28. The second limb of the test as per the case of ***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 a 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 and prejudice which makes the fair trial impossible.

29. 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".

30. 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".*

31. In considering whether a period of delay to be inordinate and contumelious pursuant to Order 25 Rule 9 of the High Court Rules, Master Azhar in ***Amrith Prakash v Mohammed Hassan & Director of Lands*** (Supra) went on to hold,

"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 are 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."

32. All in all, since the notice was issued by this Court on its own motion pursuant to Order 25 Rule 9, it is the Plaintiff who must show cause why his action should not be struck out under that rule.

33. Pursuant to the Affidavit of the Plaintiff filed on the 19/09/2023, the reason for the delay is submitted as follows,

"9. That I have traveled to India to be examined and to have an above knee prosthesis (artificial limb) fitted.
10. That a notice of intention to proceed was filed on 19th July 2023
11. That I first travel to India for this purpose on 31st January 2020, I next travel to India for a follow up on 6th June 2023 and I am scheduled again to travel to India for examination and assessment profiling of Rheo Knee 3 and Wired Bionic leg. (Our next copy is of visas marked A and B and later for next appointment marked C).
12. That I have incurred substantial financial expenses in seeking an artificial limb which requires assessment measurements fitment weight balancing wait transferring gate training and practice and stability and adjustment which is a lengthy and intricate process.
13. That my financial expenses are ongoing and incurring and can only be qualified and projected estimate forecasted for life once my artificial limb is fitted and certified as safe for continual use by my specialist Prosthesis Doctor.
14. That I cannot have these costs finalized until after my next prosthesis fitting and usage visit to India in December 2023.
15. That it would be preposterous to have an early trial date without having the expenses and Cos first ascertained and quantified for the fitting of my artificial limb.
16. That my solicitor informs me the days chief registrars practice direction No. 3 of 1993 that requires special damages in personal injury action to be qualified 52 days before trial. (Practice direction annexed marked D)
17. Let my solicitor informs me that prior to this show course matter this has been no disobedience of any court orders or unless orders and the defendants themselves have not filed any strike out for want of prosecution there has been no summons for direction heard on this matter to date even though my solicitor tried to lodge it at the registry."

34. Pursuant to the above averments in the Plaintiff's Affidavit, the sole reason for the delay of almost 01 year of inaction in this cause boils down to the fact that the Plaintiff

was in the process of getting his prosthesis limb duly fitted and operational in order to quantify the special damages.

35. It is however to be noted that even in his Statement of Claim, at paragraph 19, the Plaintiff has stated that, *"the plaintiffs special damages are continuing, and he craves leave to file full schedule of his special damages prior to the hearing of this case".*

36. The Practice Direction No. 3 of 1993 issued by the Chief Registrar and relied upon by the Plaintiff to justify the lengthy delay in the proceedings, is in fact, to the effect that within 38 days from the date of the trial being fixed, the Plaintiff is to prepare a schedule of all particulars relating to the damages claimed and to have the same served upon all other parties. The aim of this directive is clearly explained in the said direction, and it is to avoid delays at the trial by parties disputing the special damages during the time of the trial. This is clearly indicated to come into effect when the matter is fixed for trial and not at the stage of pre-trial proceedings before the Master.

37. The Plaintiff has failed to duly file a Reply to the Statement of Defence of the 1st and 3rd Defendants. Filing of the Reply has nothing to do with the reason as submitted by the Plaintiff, which is the process in getting his prosthesis limb fitted. The time for filing the Reply had lapsed on or about 14/07/2022. This is therefore a breach of Order 18 Rule 3 of the High Court Rules.

38. In the event where no Reply to the Statement of Defence is filed, then pursuant to Order 18 Rule 13 the pleadings shall come to a closure and the Plaintiff is to attend to Discovery and Inspection pursuant to Order 24 Rule 2 within 14 days from the close of pleadings. This time has lapsed somewhere around 28/07/2022. The Plaintiff is therefore in breach of Order 18 Rule 13 of the Rules.

39. Thereafter, the Plaintiff must, pursuant to Order 25 Rule 1 (1) file Summons for Directions within 30 days from the close of pleadings. This period lapsed on about 28/08/2022. Thus, the Plaintiff is in breach of Order 25 Rule 1 (1) of the High Court Rules.

40. If the Plaintiff's matter is to be considered as a 'personal injury action', then Order 25 Rule 8 shall apply when the pleadings are deemed to be closed. Yet, there again the Plaintiff is in breach of the automatic directions as per Order 25 Rule 8 of the High Court Rules.

41. The reason as submitted by the Plaintiff for the delay of almost 01 year in the proceedings and the 'practice direction of the Chief registrar' as relied upon by the Plaintiff, in my considered view, shed no light on delaying the pre-trial proceedings as highlighted in the above rules.

42. In the event the Plaintiff wanted further time to properly quantify the special damages, owing to the ongoing process of duly fitting his prosthesis limb, the Plaintiff, could clearly have raised that issue at the time of summons for directions or when the matter is to be fixed for trial pursuant to Order 34 of the High Court Rules.

43. Order 34 Rule 1 reads as follows,

> *"Time for setting down action (O.34, r.1)*
>
> *1. (1) Every order made in an action which provides for trial before a judge shall, wherever the trial is to take place, fix a period within which the plaintiff is to set down the action for trial.*
>
> *(2) Where the plaintiff does not, within the period fixed under paragraph (1), set the action down for trial, the defendant may set the action down for trial or may apply to the Court to dismiss the action for want of prosecution and, on the hearing of any such application, the Court may order the action to be dismissed accordingly or may make such order as it thinks just."*

44. Pursuant to the above Rule, the Plaintiff undoubtedly has an opportunity to have a longer date set for trial, if as the Plaintiff has submitted, that the process in which his prosthesis limb is fitted is taking further time and thus needed more time to properly quantify and submit the special damages. There is no explanation as to why the Plaintiff just delayed these pre-trial proceedings for almost an year in breach of a number of High Court rules as elaborated in the foregoing paragraphs.

45. As held in ***Amrith Prakash v Mohammed Hassan & Director of Lands*** (Supra), the legally acceptable period for inaction in a civil cause in Fiji is 06 months as embodied in Order 25 Rule 9 of the High Court Rules 1988. Thus, at this juncture, this Court is faced with the question of, can a delay beyond the limit of 06 months be simply excusable by submitting 'time being taken for the process of fitting the prosthesis limb of the Plaintiff? Or in the absence of any other justifiable reasons, to explain the delay in the pre-trial proceedings, it be held inordinate and inexcusable?

46. The Plaintiff's reasons for the delay, as discussed above, do not shed any light on the delay at these pre-trial proceedings for almost an year. It is the considered view of this Court that it cannot accept the reasons as given by the Plaintiff in his Affidavit filed on the 19/09/2023 to have duly explained the delay of almost 12 months in these proceedings.

47. This Court accordingly finds that the delay caused by the Plaintiff in this case clearly amounts to an inordinate and inexcusable delay and or otherwise an abuse of the process of the Court.

48. Lord Justice Parker in ***Culbert v Stephen Wetwell Co. Ltd,*** *(1994) PIQR 5* held,

> *"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).

49. I shall, at this stage, further consider the fact of service of process on the 2nd Defendant. The 3rd Defendant filed an Affidavit from the 2nd Defendant on the 17/10/2023 to the effect that the 2nd Defendant has never been served with the Writ and Statement of Claim in this case. When this Affidavit was filed, the Plaintiff thereafter filed an Affidavit of one Rajeshwar, on the 19/10/2023 claiming to have served the Writ and Acknowledgment on the 2nd Defendant on the 06/06/2022. However, it is to be noted that this affidavit has been sworn on the 18/10/2023.

50. Be that as it may, the real issue is that the Affidavit of Rajeshwar claims that the Writ and Acknowledgement was accepted by a representative of the 2nd Defendant. According to the annexed copy of the Writ, one 'Shweta Ram' has purportedly signed the same and has stated 'For Dr. Fong'.

51. Service of process is covered in Order 10 Rule 1 of the High Court Rules. It reads to the following,

> *"General provisions (O.10, r.1)*
>
> *1.-(1) A writ must be served personally on each defendant by the plaintiff or his agent.*
>
> *(2) A writ for service on a defendant within the jurisdiction may, instead of being served personally on him, be served–*
>
> *(a) by sending a copy of the writ by ordinary post to the defendant at his usual or last known address, or*
>
> *(b) if there is a letter box for that address, by inserting through the letter box a copy of the writ enclosed in a sealed envelope addressed to the defendant.*
>
> *(3) Where a writ is served in accordance with paragraph (2)–*
>
> *(a) the date of service shall, unless the contrary is shown, be deemed to be the seventh day (ignoring Order 3, rule 2(5)) after the date on which the copy was sent to or, as the case may be, inserted through the letter box for the address in question;*
>
> *(b) any affidavit proving due service of the writ must contain a statement to the effect that–*

(i) in the opinion of the deponent (or, if the deponent is the plaintiff's solicitor or an employee of that solicitor, in the opinion of the plaintiff) the copy of the writ, if sent to, or, as the case may be inserted through the letter box for, the address question, will have come to the knowledge of the defendant within 7 days thereafter; and

(ii) in the case of service by post, the copy of the writ has not been returned to the plaintiff through the post undelivered to the addressee.

(4) Where a defendant's solicitor indorses on the writ a statement that he accepts service of the writ on behalf of that defendant, the writ shall be deemed to have been duly served on that defendant and to have been so served on the date on which the endorsement was made.

(5) Subject to Order 12, rule 7, where a writ is not duly served on a defendant, but he acknowledges service of it, the writ shall be deemed, unless the contrary is shown, to have been duly served on him and to have been so served on the date on which he acknowledges service.

(6) Every copy of a writ for service on a defendant shall be sealed with the seal of the High Court and shall be accompanied by a form of acknowledgement of service in Form No. 2 in Appendix [1]225, in which the title of the action and its numbers has been entered.

(7) This rule shall have effect subject to the provision of any Act and these Rules and in particular to any enactment which provides for the manner in which documents may be served on bodies corporate."

52. It is abundantly clear that the alleged service made to the 2nd Defendant is not a personal service of the process as per the above rule. There is affidavit evidence from the 2nd Defendant that he was not duly served the Writ. The Affidavit of service, by Rajeshwar, does not establish a personal service on the 2nd Defendant. The 2nd Defendant is only named in his personal capacity in the Writ. As such there cannot be any service of process on an alleged 'representative of the 2nd Defendant'. The Court, therefore, cannot accept the affidavit of Rajeshwar as proof of personal service of the Writ and Acknowledgment on the 2nd Defendant.

53. This brings out another failure by the Plaintiff on duly serving the Writ of Summons and the Statement of Claim on the 2nd Defendant. As the Writ and Statement of Claim has been issued on the 27/05/2022, this may well be a breach of Order 6 Rule 7 of the High Court Rules and the Writ may be held expired in respect of the 2nd Defendant.

54. I shall now come to consider the prejudice to the Defendants as a result of the inaction of the Plaintiff. Although the Defendants are not strictly required, at this instance, to show prejudice caused to them due to the delay, as the Notice under Order 25 Rule 9 was issued by the Court on its own motion, the 3rd Defendant has submitted via affidavit evidence, how this delay caused by the Plaintiff has prejudiced the Defendants in duly defending this matter.

55. As alleged by the Affidavits filed on behalf of the 3rd Defendant, the claim of negligence is primarily against the 1st and 2nd Defendants. The allegations of negligence against the 2nd Defendant are mainly based on verbal statements made by the 2nd Defendant. 3rd Defendant is joined on vicarious liability as an employer of the 2nd Defendant. From the date of the alleged incident, almost 05 years have now lapsed, and the 3rd Defendant claims that it's employees that were employed at the time of the incident, that would be potential witnesses for the 3rd Defendant are no longer employed with the 3rd Defendant. Even if some of the witnesses may be available, these employees, whilst working for the 3rd Defendant handles hundreds of patients each day. Thus, time is of the essence for preserving the memory of such witnesses.

56. Whereas the 3rd Defendant alleges that they will be put to unnecessary costs to locate these employees as witnesses (if at all possible) and even if so located, the lengthy delay would clearly have an adverse effect on their memory to recall verbal statements as allegedly made by the 2nd Defendant. At the same time, it is alleged that as the 2nd Defendant not being duly served would create more issues, when the 3rd Defendant must independently defend claims of negligence on the part of the 2nd Defendant.

57. I find these facts to clearly support and establish serious prejudice to the Defendants, especially the 3rd Defendant, in duly defending the claim of the Plaintiff. In the Court's considered view, these facts clearly support the notion that a fair trial is not possible considering the lengthy and inexcusable delay in these proceedings. To continue the proceedings irrespective of the prejudice caused to the Defendant by the delay, in my view, would certainly be detrimental to the administration of justice.

58. In overall consideration of all above findings, it is the conclusion of the Court that although the Plaintiff instituted this action against the Defendants, it seems from his conduct as described above, that he appears not to share any intention to bring it to a conclusion within a reasonable time. 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".*

59. As already highlighted in the foregoing paragraphs, the acceptable and/or tolerable period of inaction in any matter is 6 months as per the plain meaning of Order 25 Rule 9. The threshold is, therefore, 6 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. In this case, the Court does not find any justifiable reasons for a delay of almost 12 months. The delay is therefore inordinate and contumelious.

60. It is to be noted that in litigation, there could be parties that pursue their cases sporadically or make default with the intention of keeping the matters pending against the other parties without reaching a finality. The Courts shouldn't ignore such practice or parties.

61. Such practices shall be disallowed promptly for reasons that they are an abuse of the process of the Court, and a waste of the Court's time and resources which are not infinite.

'*The more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition and want their cases to be heard within a reasonable time'* (see; ***Singh v Singh***-supra).

62. Such practices also violates the fundamental rights guaranteed by the sections 15 (2) and (3) of the Constitution which read,

(2) Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.
(3) Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time. (Emphasis added)

63. Further, such a practice may also constitute serious prejudice to the other party as justice may not be done between the parties since the matter is pending idle without any steps being taken to reach a finality.

64. For the reasons and findings set out above, it is the Courts conclusion that the Plaintiff has no interest at all in duly pursuing this cause and the delay caused by the Plaintiff in these proceedings is inexcusable and inordinate or otherwise amounts to an abuse of the process of the Court.

65. I therefore conclude that the Plaintiff has failed to duly show cause as to why his action should not be struck out for abuse of the process of the Court or for want of prosecution and accordingly this Court orders that the Writ of Summons and the Statement of Claim filed on the 27/05/2022, to be struck out pursuant to Order 25 Rule 9 of the High Court Rules 1988.

66. Consequently, the Court makes the following final orders,

I. Plaintiff's Writ of Summons and the Statement of Claim is hereby struck out and dismissed pursuant to Order 25 Rule 9 of the High Court Rules subject to a cost of $ 3000.00 to be paid to the 3rd Defendant and $ 1000.00 to be paid to the 1st Defendant, as summarily assessed by the Court, as costs of these proceedings,

II. The Cause is accordingly dismissed.

L. K. Wickramasekara,
Acting Master of the High Court.

At Suva,
26/07/2024.