

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 150 of 2023**

**BETWEEN:**

**ARBIN CHAND**  
**PLAINTIFF**

**AND:**

**VAIRA SHYANE WATI**  
**1<sup>ST</sup> DEFENDANT**

**AND:**

**KHEMENDRA DEO SHARMA**  
**2<sup>ND</sup> DEFENDANT**

**BEFORE:**

Acting Master L. K. Wickramasekara

**COUNSELS:**

Daniel Singh Lawyer for the Plaintiff  
No appearance for the Defendants

**Date of Hearing:**

By way of Written Submissions

**Date of Ruling:**

12<sup>th</sup> September 2025

# RULING

## (COURTS' NOTICE UNDER ORDER 25 RULE 9)

01. Court has issued a Notice on its own motion on 24/03/2025 pursuant to Order 25 Rule 9 of the High Court Rules 1988 on the Plaintiff to show cause as to 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.
02. The said Notice has been duly served on the Plaintiff's solicitor on 26/03/2025. A copy of the Notice as acknowledged by the Plaintiff's solicitor has been duly filed of record by the Court Sheriff.
03. The Notice issued by the Court thereby directs the relevant party to give with immediate effect, a Notice of Intention to Proceed under Order 3 Rule 5 and to file within 07 days from the date of service of the Court's Notice, an Affidavit to Show Cause, why the Cause/Pleadings should not be struck out for want of prosecution and/or as an abuse of the process of the Court.
04. The Court's Notice further includes therein a peremptory order to the effect that if the party fails to comply with the directions in the Court's Notice, the matter will be struck out in terms of Order 25 Rule 9 of the High Court Rules.
05. Having being duly served with the Court's Notice, the solicitor representing the Plaintiff filed a Notice of Intention to Proceed pursuant to Order 3 Rule 5 on the 26th day of March 2025. However, the Plaintiff and/or its solicitor failed or neglected to file an Affidavit to Show Cause in compliance with the requirements of the aforementioned Notice. This failure constitutes a breach of the peremptory order as mandated by the Court's Notice issued under Order 25 Rule 9 of the High Court Rules.
06. When the matter was first called before this Court on 11/04/2025 pursuant to the Order 25 Rule 9 Notice, it was noted by the Court that the Plaintiff had failed to file an Affidavit to Show Cause as demanded by the Court's Notice or an application for an extension of time to do so.
07. When the Court inquired of the Plaintiff's solicitor regarding his failure to file an Affidavit to Show Cause, the counsel insisted that the Court lacked the authority to order a party to file such an Affidavit and/or to issue a peremptory order in that regard, as purportedly stipulated in the said Notice.

08. It is, however, evident that the above position articulated by the Solicitor for the Plaintiff is a manifest misconception of the law. Prior to proceeding further, I wish to elucidate on the Court's authority to make peremptory and/or "unless" orders, as well as the legal rationale underpinning the issuance of such orders.
09. A 'Peremptory Order' and/or an 'Unless Order' is an order issued by the Court that directs a party to perform a specified act within a designated date or time frame. Failure to comply with such an order invites the imposition of a particular sanction against the defaulting party. In essence, such an order provides a clear directive to a party, accompanied by a predefined penalty or consequence for non-compliance.
10. The rationale for such an order is to ensure that the parties to a suit comply promptly with the directions and orders of the Court, thereby facilitating the timely progress of proceedings. This mechanism serves to eliminate undue delays, uphold procedural fairness, and prevent any abuse of the Court's process.
11. In the celebrated case of *Marcan Shipping (London) Ltd v Kefalas & Anor*<sup>1</sup> the England and Wales Court of Appeal held,

*“In order to ensure that its process is not subverted so as to become an instrument of injustice every procedural system must place at the disposal of the court the power to manage proceedings before it, if necessary, by imposing sanctions on litigants who fail to comply with its rules and orders. The ultimate sanction, of course, is to dismiss the claim or strike out the defaulting party's statement of case. A well-recognised way of imposing a degree of discipline on a dilatory litigant is to make what is known as an "unless" order by which a conditional sanction is attached to an order requiring performance of a specified act by a particular date or within a particular period.”*

12. The authority of the Court to issue such orders derives from its 'inherent jurisdiction and/or power' to manage its own processes. The inherent power of the Courts to regulate their proceedings has existed since the time they were vested with the obligation to administer the judicial authority of the Crown. However, as a distinct legal doctrine, this principle crystallized in the mid-nineteenth century. The decision of **Baron Alderson** in *Cocker v. Tempest*<sup>2</sup> in the 1840s is widely recognized as a foundational case marking the emergence of this doctrine. In the above case, **Baron Alderson** commented,

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<sup>1</sup> *Marcan Shipping (London) Ltd v Kefalas & Anor* [2007] CP Rep 41, [2007] 1 WLR 1864, [2007] EWCA Civ 463, [2007] 1 CLC 785, [2007] WLR 1864, [2007] 3 All ER 365  
URL: <http://www.bailii.org/ew/cases/EWCA/Civ/2007/463.html>

<sup>2</sup> *Cocker v. Tempest* (1841) 7 M & W 501.

*“The power of each court over its own processes is unlimited; it is a power incident to all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice<sup>3</sup>”.*

13. It is in this same spirit and conviction that the Courts, over the years, have consistently employed ‘unless orders,’ thereby intertwining the history of these orders with the development of the doctrine of inherent jurisdiction. In **Marcan Shipping (London) Ltd v Kefalas & Anor<sup>4</sup>**, Lord Justice Moore-Bick, expounded upon the history of ‘unless orders’ in relation to the consequences arising from a breach of such orders. His Lordship at paragraph 11 of the judgment stated,

*““Unless” orders have a long history, dating back well into the nineteenth century and it was recognised at an early stage that once the condition on which it depended had been satisfied, the sanction became effective without the need for any further order. In **Whistler v Hancock** (1878) 3 Q.B.D. 83 the defendant obtained an order that unless the statement of claim were delivered within a week the action should be at an end. The plaintiff failed to serve a statement of claim and applied for relief, but the time allowed under the order expired before his application could be heard. The Divisional Court held that the court had no jurisdiction to grant relief because once the condition had been satisfied the action had come to an end and no longer existed. The decision was followed the next day in **Wallis v Hepburn** (1878) 3 Q.B.D. 84n. The same conclusion was reached in **King v Davenport** (1879) 4 Q.B.D. 402 where a summons issued on the last day for compliance with a conditional order in similar terms was adjourned to the next day. The court held that once the prescribed time had expired the Master had no jurisdiction to extend time because the action had ceased to exist. The fact that in the event of default the order operated without the further intervention of the court led Greene L.J. in **Abalian v Innous** [1936] 2 All E.R. 834, 838 to draw attention to the importance of ensuring that the order was precise in its terms to ensure that the party to whom it was directed should be in no doubt about what he needed to do to avoid the action being dismissed.”*

14. Furthermore, pursuant to Order 25 Rule 9 of the High Court Rules 1988, the wording of the rule clearly provides that the Court has the authority to require a party to show cause why the cause or matter should not be struck out on the grounds of want of prosecution or as an abuse of the Court’s process.<sup>5</sup> It is therefore obvious that there is no legal impediment preventing the Court from issuing an order requiring the relevant party to file an Affidavit to Show Cause in order to fulfil the requirements set forth in the aforementioned rule.

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<sup>3</sup> Ibid

<sup>4</sup> Supra at 1

<sup>5</sup> Order 25 Rule 9 (1) of the High Court Rules 1988.

15. Accordingly, I find that the position taken by the Plaintiff's solicitor, asserting that the Court lacks the authority to issue a peremptory order requiring the filing of an Affidavit to Show Cause within a specified time frame, is manifestly wrong in law and lacks merit.
16. In addition to contending that the Court lacked the authority to issue a peremptory order of this nature, the counsel for the Plaintiff failed to furnish any factual basis or justifiable reasons to excuse the failure to file an Affidavit to Show Cause. Consequently, the Court had no basis to grant any extension of time for such filing.
17. Nonetheless, in the interests of justice and without directly dismissing the claim, the Court granted an additional period of seven (7) days to the Plaintiff to file written submissions prior to the Court's final ruling.
18. It appears, however, that the counsel for the Plaintiff has disregarded the Court's order and has failed to file any written submissions in support of the continuation of the proceedings.
19. In light of the foregoing circumstances, the Court now proceeds to deliver its ruling in accordance with Order 25 Rule 9 of the High Court Rules, as follows.
20. The original Writ and the Statement of Claim had been filed on 09/05/2023. In the initial Writ, the Accident Compensation Commission of Fiji was named as the third Defendant. Subsequently, an application was filed to strike out the Writ and Statement of Claim insofar as they pertain to the third Defendant.
21. Following the aforementioned application, the Plaintiff conceded and filed an Amended Writ of Summons and Statement of Claim on 08/02/2024 and also filed a Notice of Discontinuance of proceedings against the third Defendant on 25/03/2024. Consequently, on 26/03/2024, this Court ordered that the matter to proceed in the usual manner and to take its normal course.
22. There were no progressive steps taken by the Plaintiff since the filing of the Amended Writ and the Statement of Claim on 08/02/2024, to advance the proceedings forward until this Court issued the Notice pursuant to Order 25 Rule 9 on 24/03/2025.
23. There is no evidence to substantiate that the Amended Writ of Summons and Statement of Claim have been properly served upon the 1<sup>st</sup> Defendant. While an Affidavit of Service was filed on 11/09/2024 in respect of the service on the 2<sup>nd</sup> Defendant, it appears that proper service has not been effected on the 2<sup>nd</sup> Defendant as well.
24. The Affidavit of Service states that the Amended Writ of Summons and Statement of Claim were served at Lot 80, Rokoroi Road, Raiwai, on 03/09/2024. However, it further indicates that the documents were not personally served on the Second

Defendant but were only handed over to 'his family,' as the Second Defendant was in Papua New Guinea at the time.

25. The Amended Writ states that the address of the Second Defendant is unknown. Consequently, it is unclear how the Writ was purportedly served at Lot 80, Rokoroi Road, Raiwai. Furthermore, there is no evidence of personal service being effected on the Second Defendant at that address. The individual(s) identified as 'his family,' who purportedly accepted service, are not named in the Affidavit of Service, and no leave was obtained from the Court to effect substitute service on the 2<sup>nd</sup> Defendant.
26. In the above context, the Court finds that the Affidavit of Service filed on 11/09/2024 constitutes an abuse of the Court's process. Accordingly, the Court orders that the said Affidavit of Service be struck out.
27. Consequently, the Court finds that no valid service has been effected on either of the Defendants in the matter. As a result, the Amended Writ of Summons and Statement of Claim are deemed to have expired, given that twelve (12) months have elapsed<sup>6</sup> since their filing on 08/02/2024 and no subsequent application was made to the Court to extend the validity of the Writ.
28. This fact alone would warrant the striking out and dismissal of the Amended Writ of Summons and Statement of Claim. However, the Court will nonetheless consider the matter in accordance with Order 25 Rule 9 of the High Court Rules, as the Notice required thereunder has been issued.
29. The Plaintiffs claim pertains to a motor vehicle accident, wherein the Plaintiff alleges that a motor vehicle owned by the 2<sup>nd</sup> Defendant and driven by the 1<sup>st</sup> Defendant struck and caused injury to him on 15/08/2019.
30. The Plaintiff seeks general damages for pain and suffering, loss of amenities, special damages, gratuitous care, costs of future care, loss of future earnings, as well as legal costs.
31. However, according to the particulars set out in the Statement of Claim, it emerges that the injuries sustained by the Plaintiff were minor in nature, evidenced by his admission to hospital for a period of one day, followed by a stroke two months later, which resulted in an impairment ranging from 5% to 8% of his entire person<sup>7</sup>.

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<sup>6</sup> Pursuant to Order 6 Rule 7 (1) of the High Court Rules 1988, for the purpose of service, a Writ is valid in the first instance for 12 months beginning with the date of its issue.

<sup>7</sup> Paragraph 6 of the Statement of Claim filed along with the Amended Writ of Summons on 08/02/2025

32. Returning to the issue of delay in these proceedings, the Court observes that the period from the filing of the Amended Writ of Summons and Statement of Claim until the issuance of the Notice under Order 25 Rule 9 of the High Court Rules exceeds thirteen (13) months. Moreover, the lack of subsequent action has persisted beyond this period, despite the Plaintiff's failure to comply with the requirement to file an Affidavit to Show Cause, notwithstanding the granting of ample time and the existence of a peremptory order. The Plaintiff has failed to furnish any explanation or justification for this delay. It is evident that the delay of over thirteen (13) months is entirely attributable to the conduct of the Plaintiff, which remains unexplained.
33. I will now examine the relevant law concerning Order 25 Rule 9 of the High Court Rules. This rule confers upon the Court, the jurisdiction to strike out any cause or matter for want of prosecution or on the grounds of abuse of process, where no step has been taken in the matter for a period of six months. The relevant provision reads as follows,

**Order 25 Rule 9**

- 9 (1) *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.*
- (2) *Upon hearing the application, the court may either dismiss the cause or matter on such terms as maybe just or deal with the application as if it were a summons for directions".*

34. 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.
35. 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)**). Well before the introduction of this rule, the Courts in Fiji have exercised this power to strike out the cause for want of 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 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 Repts 94/609) and Owen Potter v. Turtle Airways Ltd (FCA Repts 93/205).

36. 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.*

37. 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 a 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)

38. The first limb 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*.’
39. 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.*
40. 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.*

41. Master Azhar, as His Lordship then was, 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.*

42. Pursuant to the first limb of the test formulated in **Birkett v James** (supra) it is incumbent upon the Plaintiff to demonstrate that the delay was not **intentional and contumelious** to justify the continuation of the proceedings. In my understanding of the context in **Birkett v James** (supra), in an instance where the Notice pursuant to Order 25 Rule 9 of the High Court Rules was issued by the Court on its own motion, the Court need not look for the satisfaction of the second limb of the test if the first limb has been duly established to the satisfaction of the Court.
43. This view is fortified by the sentiments expressed by Lord Woolf MR in **Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd** [1998] 1 WLR 1426; [1998] 2 All ER 181 where it was held,

*While an abuse of process can be within the first category identified in **Birkett v James** it is also a separate ground for striking out or staying an action (see **Grovitt v Doctor**, 642 H to 643 A) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigation questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired.*

44. Conversely, where a Notice under Order 25 Rule 9 of the High Court Rules was issued by the Court on its own motion, the Defendant bears no such obligation to prove prejudice nor is it a prerequisite for the Court to consider prejudice to the Defendant when determining whether to strike out an action under Order 25 Rule 9 of the High Court Rules 1988.
45. It suffices to be judiciously determined by the Court that the Plaintiff has displayed persistent inactivity and a flagrant disregard for the Rules of Court, including non-compliance with a peremptory order issued by the Court, with full knowledge of the attendant consequences, when the Court on its own motion has issued a Notice under Order 25 Rule 9 of the High Court Rules. As exemplified in the first limb of **Birkett v James** (supra), such conduct may also constitute an abuse of process. Accordingly, in such an instance, it is within the Court's discretion to strike out the action *suo motu* pursuant to Order 25 Rule 9 of the High Court Rules, without a need for the Defendant to establish any prejudice to its case.

46. 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, as His Lordship then was, 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.*

47. The second limb of the test as expounded in the case of *Birkett v. James* (supra) is twofold. The two components of the second limb is as follows,

- (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 and the prejudice which makes the fair trial impossible.

48. 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.*

49. However, in *Deo v Fiji Times Ltd* [2008] FJCA 63; AAU0054.2007S (3 November 2008) the Fiji Court of Appeal cited with approval the meaning considered by the Court in an unreported case. It was held in this case,

*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.*

50. 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 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 (is) to be determined in the circumstances of each and every case.*

51. In light of the foregoing authorities, it is clear that, since the Notice was issued by this Court on its own motion pursuant to Order 25 Rule 9 of the High Court Rules, the onus is on the Plaintiff to establish sufficient cause why the action should not be struck out under that provision. Any argument to the contrary is legally unsustainable and may, in itself, amount to an abuse of the Court's process.
52. Notably, despite the Court's directions to file an Affidavit to Show Cause, and the issuance of a peremptory order in the event of non-compliance, the Plaintiff, without any justifiable cause, has failed to adhere to these directions.
53. A failure to comply with a peremptory order, in itself, constitutes an abuse of the Court's process, a principle firmly established in *Birkett v. James* (supra). Furthermore, the consequence of such non-compliance is expressly outlined, whereby the Court shall, in its discretion, strike out the matter pursuant to Order 25 Rule 9 of the High Court Rules, as explicitly stated in the Notice.

54. It is clear that the Plaintiff and/or its solicitors have flouted the rules of the Court as they failed to take any steps to proceed with the matter for over thirteen (13) months. Notwithstanding the issuance of a Notice pursuant to Order 25 Rule 9 of the High Court Rules, the Plaintiff and/or its solicitors persisted in disregarding the applicable rules and failed to comply with the direction to file an Affidavit to Show Cause, allowing the delay of over thirteen (13) months to go unexplained.
55. As previously stated, the substantial delay of over Thirteen (13) months in this proceeding is solely attributable to the Plaintiff and remains unsubstantiated, as the Plaintiff has failed to file any Affidavit to Show Cause despite being duly ordered to do so through the Court's Notice.
56. It is a fundamental principle in Common Law civil jurisprudence that, in the absence of the Defendant filing an Acknowledgment of Service and/or a Statement of Defence, the Plaintiff is entitled to enter a Default Judgment against the Defendant. Consequently, there are no material before this Court to substantiate the continuation of the proceedings, especially when viewed in conjunction with the legal principles governing Notices issued by the Court on its own motion pursuant to Order 25 Rules, (see *Amrith Prakash v Mohammed Hassan & Director of Lands* (supra), at para 19).
57. Having regard to the unexplained delay for over thirteen (13) months in this proceeding, in conjunction with the non-compliance with Court rules and the breach of a peremptory order (as per the Order 25 Rule 9 Notice), and taking into consideration that the Amended Writ and the Statement of Claim has already expired, the Court hereby finds that such delay is both intentional and contumelious, as well as inordinate and inexcusable.
58. 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.
59. Any delay exceeding the acceptable period must be satisfactorily explained by the party responsible for such delay. The Plaintiff's failure to reasonably explain the delay despite the directions and a peremptory order of the Court, may be deemed conclusive evidence that the Plaintiff lacked the genuine intention to bring the proceedings to a conclusion within a reasonable time at the time of commencement of the proceeding.
60. In this regard it is helpful to reiterate the words of Lord Justice Parker in *Culbert v Stephen Wetwell Co. Ltd.* (1994) PIQR 5, where it was 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).

61. In light of the foregoing discussion and findings, my overarching conclusion is that, despite the Plaintiff initiating this action against the Defendants, the conduct of the Plaintiff demonstrates a clear lack of genuine intention to bring these proceedings to a conclusion within a reasonable timeframe. Such conduct, in itself, constitutes contumelious behaviour.

62. 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.*

63. I wish to reiterate at this instance a fact that I have observed in many previous rulings of this Court. It is noteworthy that, in the context of litigation, certain parties may engage in sporadic pursuit of their cases or default deliberately, with the intention of prolonging proceedings and maintaining the matters pendente against the opposing parties without advancing towards a final resolution.

64. Courts should not overlook such practices or parties. Such conduct must be promptly disallowed, as it constitutes an abuse of the Court's processes and results in an unnecessary expenditure of the Court's finite time and resources.

65. In Singh v Singh (supra) it was held,

*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.*

66. Such practices also infringe upon the fundamental rights guaranteed under Sections 15(2) and 15(3) of the Constitution, which provide, respectively,

(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)

67. In this regard, it is pertinent to observe recent developments within the English Courts, where judicial considerations of the interest of justice are now approached in a broader and more holistic manner, taking into account the overall fairness of proceedings. Courts are increasingly inclined to dismiss sporadic or unnecessary claims that do not contribute to the substantive finality of the matter.

68. In the case of *Securum Finance Ltd v Ashton [2001] Ch 291 (Securum Finance Ltd)* it was held,

*[30] the power to strike out a statement of claim is contained in CPR r 3.4. In particular, rule 3.4 (2) (b) empowers the court to strike out a statement of case ... if it appears to the court that the statement of case is an abuse of the court's process ... In exercising that power the court must seek to give effect to the overriding objective set out in CPR 1.1: see rule 1.2 (a). The overriding objective of the procedural code embodied in the new rules is to enable the court "to deal with cases justly": see rule 1.1 (1). Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into accounts the need to allot resources to other cases".*

*[31] In the Arbuthnot Latham<sup>8</sup> case this court pointed out in a passage which I have already set out that:*

*In Birkett v James the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance.*

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<sup>8</sup> *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426; [1998] 2 All ER 181*

69. I quote the full passage from *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* (supra), for further clarification whereas Lord Woolf, MR, expressed in no uncertain terms that,

*In Birkett v James the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers, must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.*

70. Likewise, such sporadic and contumelious conduct may certainly result in serious prejudice to the opposing party, as the effective administration of justice is compromised when the matter remains pending without any substantive steps taken to achieve finality.
71. As outlined in the preceding paragraphs of this ruling, the Plaintiff's claim appears to have been exaggerated as the particulars do not support all the relief sort therein. Accordingly, the Court concludes that advancing this matter would be contrary to the interests of justice, particularly given the unacceptable delay in proceedings.
72. Based on the foregoing discussion, the Court is of the considered opinion that the interests of justice do not favour the continuation of this action, as it appears that the Plaintiff does not genuinely seek to realize finality in this proceeding.
73. Lord Woolf MR in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* (supra) held,

*Whereas hitherto it may have been arguable that for a party on its own initiative to in effect "warehouse" proceedings until it is convenient to pursue them does not constitute an abuse of process. When hereafter this happens, this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. **If the claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they are not***

*to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. The courts exist to assist parties to resolve disputes, and they should be used by litigants for other purposes. (Emphasis added)*

74. Thus, the Court finds that the Plaintiff has failed to demonstrate cause why the action should not be struck out for abuse of the Court's process or for want of prosecution. The Court shall therefore order that the Amended Writ of Summons and the Statement of Claim be struck out pursuant to Order 25 Rule 9 of the High Court Rules.

75. Consequently, the Court makes the following final order,

1. Plaintiff's Amended Writ of Summons and the Statement of Claim filed on 08/02/2024 is hereby struck out pursuant to Order 25 Rule 9 of the High Court Rules and the Cause is accordingly struck out and dismissed subject to no costs.

At Suva  
12/09/2025.



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