IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 144 of 2024

BETWEEN:

BSP FINANCIAL GROUP LIMITED formerly called BANK OF THE SOUTH PACIFIC LIMITED
PLAINTIFF

AND:

SIONE FILO LOTO HA' ANGANA INOKE FA
DEFENDANT

BEFORE:

Acting Master L. K. Wickramasekara

COUNSELS:
Neel Shivam Lawyers for the Plaintiff
Law Solution for the Defendant

Date of Hearing:
By way of written submissions

Date of Ruling:
30th September 2025

RULING

(COURTS' NOTICE UNDER ORDER 25 RULE 9)

01. Court has issued a Notice on its own motion on 11 April 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 solicitors for the Plaintiff and the Defendant on 11 April 2025. A copy of the Notice as acknowledged by the solicitors for both the parties 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 as per the given time frame, the matter shall be struck out.

05. Having been duly served with the Court's Notice, the solicitors for the Plaintiff filed a Notice of Intention to Proceed pursuant to Order 3 Rule 5 on 17 April 2025. However, the Plaintiff failed or neglected to file an Affidavit to Show Cause why the matter should not be struck out for want of prosecution and/or as an abuse of the Courts' process, in compliance with the peremptory order therein as per the aforementioned Notice.

06. This failure constitutes a clear breach of the peremptory order as mandated by the Court's Notice issued under Order 25 Rule 9 of the High Court Rules.

07. When the matter was called before this Court on 07 May 2025 pursuant to the said Notice, the Court noted that the Plaintiff had failed to file an Affidavit to Show Cause as demanded by the said Notice or to file an application for an extension of time to do so.

08. Counsel appearing for the Plaintiff offered no explanation or justification for the failure to file an Affidavit to Show Cause, and no proper application was made for an extension of time to do so.

09. In the given circumstances, it is prudent to comment on the implications of a peremptory order of the Court. 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***[1] 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***[2] in the 1840s is widely recognized as a foundational case marking the emergence of this doctrine. In the above case, **Baron Alderson** commented,

> *"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*[3]*".*

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***[4], **Lord Justice Moore-Bick**, expounded upon the history of 'unless orders' in relation to the consequences

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[1] 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
[2] Cocker v. Tempest (1841) 7 M & W 501.
[3] Ibid
[4] Supra at 1

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.[5]. The Court, accordingly, had issued 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 and has clearly stated the sanctions attached to a failure to comply with such order.

15. As the Plaintiff and/or its solicitors failed to furnish any factual basis or justifiable reasons to excuse the failure to file an Affidavit to Show Cause, there was no justifiable ground for the Court to grant any extension of time for filing an Affidavit to Show cause.

16. Consequently, pursuant to the peremptory order of the Court, this cause must be struck out on the face of the failure of the Plaintiff to comply with the Court's order.

17. Nonetheless, in the interests of justice and without directly dismissing the claim pursuant to the peremptory order as per the Notice, the Court granted an additional period of seven (7) days to the Plaintiff to file written submissions prior to the Court's final ruling.

[5] Order 25 Rule 9 (1) of the High Court Rules 1988.

18. Accordingly, the Solicitors for the Plaintiff have submitted their written submissions on the 14 May 2025. At the outset, it is pertinent to note that these written submissions contain evidence on behalf of the Plaintiff, specifically relating to an attempt to explain the reasons for the delay in the proceedings. It is hereby emphasized that written submissions do not constitute an affidavit. They may, however, duly reference evidence that has been tendered before the Court, whether through an Affidavit or *Viva Voce* testimony. In the absence of duly tendered evidence before the Court, the written submissions filed by a party shall not be construed as a conduit of introducing or adducing evidence.

19. The Court shall, therefore, disregard and strike out the evidence referred to by the Plaintiff in its written submissions filed on 14 May 2025.

20. The solicitors for the Defendant have also filed on 18 June 2025, written submissions supporting the Court's Notice under Order 25 Rule 9 of the High Court rules.

21. Having duly considered the written submissions filed on behalf of the parties, subject to the qualification specified in the preceding paragraphs, the Court now proceeds to deliver its ruling in accordance with Order 25, Rule 9 of the High Court Rules, as set forth herein.

22. The Writ and the Statement of Claim had been filed on 07 May 2024. The claim is for recovery of monies lent to the Defendant as per a car loan agreement entered between the parties. The said loan agreement had been entered on 23 July 2019 for a sum of $ 77922.00 on an annual interest of 9.2%. The repayment was structured into 48 monthly instalments.

23. The Defendant whilst entering the said loan agreement with the Plaintiff had provided as securities to the loan, a mortgage over Certificate of Title No. 32177 being Lot 1 on DP 8213 and a First Registered Specific Security Interest Agreement over the motor vehicle bearing Reg. No. JM 554.

24. Plaintiff contends that the Defendant breached the said loan agreement by defaulting on the repayments. The Plaintiff had then repossessed the vehicle bearing Reg. No. JM 554 and proceeded to sell the said vehicle on tender on 02 December 2022 for a sum of $ 23000.00.

25. Plaintiff had on 25 January 2023 demanded the Defendant to settle the balance due after setting off the sales proceeds against the accrued loan amount. The Defendant has failed to respond, and the Plaintiff had filed its claim to recover the residual sum of the loaned amount along with the interest accrued therein as particularized in the Statment of Claim.

26. As per the Affidavit of Service filed of record, the Writ and the Statement of Claim had been served on the Defendant on 09 May 2024. The Defendant has acknowledged the service of the Writ and had filed a Notice of Intention to Defend the claim on 24 May

2024. However, the Defendant failed to file a Statement of Defence within the specified time frame as per the rules of the Court.

27. Pursuant to Order 18 Rule 2(1) of the High Court Rules, the Defendant was required to file its Statement of Defence within fourteen (14) days from the date upon which the period for acknowledgment of service expired or from the date of service of the Statement of Claim, whichever was later. Accordingly, in the present proceedings, the prescribed period for filing a Statement of Defence lapsed on or about 6 June 2024.

28. Further, pursuant to Order 19 of the High Court Rules, the Plaintiff was entitled to apply for and duly enter a Default Judgment against the Defendant from 6 June 2024 onward. However, the Plaintiff failed to pursue such an application, and subsequently, the Defendant passed away in early July 2024. As the Defendant was a solicitor practicing law in Fiji at the time of his demise, the Court hereby takes judicial notice of his death.

29. Following the demise of the Defendant, the Plaintiff would have been entitled to invoke the procedure outlined in Order 15 Rule 8 of the High Court Rules, if it still wished to proceed against the estate of the Defendant.

30. Nonetheless, there is no evidence before this Court to demonstrate that the Plaintiff, at any time following the Defendant's death, made any efforts to confirm whether a personal representative had been duly appointed in the estate of the Defendant, thereby enabling the Plaintiff to take the necessary steps under Order 15 Rule 8 of the High Court Rules to proceed with this matter without undue delay.

31. Consequently, from the date on which the Defendant's Acknowledgment of Service and Notice of Intention to Defend were filed, the Plaintiff failed to take any further steps to advance or conclude these proceedings within a reasonable time period, until the Court issued a Notice pursuant to Order 25 Rule 9 of the High Court Rules, nearly one year later from 06 June 2024.

32. As illustrated in the foregoing paragraphs of this ruling this action is for the recovery of money based on a loan agreement entered into between the parties. The Court finds no justification for prolonging such proceedings, particularly given that the Defendant has omitted or neglected to file a Statement of Defence. The delay of nearly one year in progressing these proceedings has not been adequately explained, and the Court considers such delay, under the circumstances, to be inexcusable.

33. Furthermore, this undue delay is compounded by the Plaintiff's failure to adhere to the Court's rules pursuant to the High Court Rules 1988, as noted in the previous paragraphs of this ruling, followed with a clear breach of a peremptory order of the Court.

34. 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".*

35. 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.

36. 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 Taqa*** *[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 Reps 94/609) and **Owen Potter v. Turtle Airways Ltd** (FCA Reps 93/205).*

37. The Court of Appeal of Fiji in ***Trade Air Engineering (West) Ltd v Taqa*** (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.*

38. 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.*
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> *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*
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> *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)

39. 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.'***

40. 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.*

41. 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.*

42. 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,*
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> > *"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.*

43. 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.

44. 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.*

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.

51. 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.

52. 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.*

53. 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.

54. 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.

55. 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.

56. As discussed in the foregoing paragraphs in this ruling, 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 nearly an year. 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 nearly an year to go unexplained.

57. As previously stated, the substantial delay in these proceedings 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.

58. If the Defendant's death had contributed in any way to the delay (as the Plaintiff appears to suggest in its written submissions), it was incumbent upon the Plaintiff to substantiate such claim before the Court through evidence submitted by way of an affidavit as demanded by the Court's Notice. However, no such evidence has been presented. Furthermore, the Plaintiff had ample time to bring these proceedings to a conclusion by applying for and obtaining a Default Judgment against the Defendant prior to his demise, as outlined in the preceding paragraphs of this ruling. Yet, the Plaintiff failed to do so, and such failure remains unaccounted for and unexplained to date.

59. Consequently, there are no material facts before this Court to justify 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 Rule 9, (see ***Amrith Prakash v Mohammed Hassan & Director of Lands*** (supra).

60. Having regard to the unexplained delay for nearly an year in these proceedings, in conjunction with the non-compliance with Court rules and the breach of a peremptory order (as per the Order 25 Rule 9 Notice), the Court hereby finds that such delay is both intentional and contumelious, as well as inordinate and inexcusable pursuant to the legal authorities as cited above.

61. 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.

62. 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 proceedings.

63. 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).

64. In light of the foregoing discussion and findings, my overarching conclusion is that, despite the Plaintiff initiating this action against the Defendant, 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.

65. 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.*

66. I wish to reiterate a point that I have observed in many previous rulings of this Court. It is noteworthy that, in the context of litigation, some parties may engage in sporadic pursuit of their cases or deliberately default with the intention of prolonging proceedings and keeping the matter pending against the opposing parties, without genuine intention to advance towards a final resolution.

67. Courts should not tolerate such practices or parties. Such conduct must be promptly disallowed, as it constitutes an abuse of the Court's processes and leads to an unnecessary expenditure of the Court's limited time and resources.

68. 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.*

69. 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)

70. 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.

71. 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**[6] 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.*

72. In the case of ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*** (supra), Lord Woolf, MR, expressed in unequivocal 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*

[6] ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426; [1998] 2 All ER 181***

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.

73. 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.

74. As outlined in the preceding paragraphs of this ruling, the Plaintiff's claim appears to be a straightforward case of money recovery action. The Plaintiff has also submitted that a mortgage over a parcel of land belonging to the Defendant has been provided as security over the said loan. In these circumstances prolonging the matter, as has been done in these proceedings, shall certainly stand adverse to the interest of justice, especially in the context of prejudice against the due administration of justice, as expounded in the case of ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*** (supra).

75. Accordingly, having duly considered all the facts and circumstances before this Court, the Court concludes that advancing this matter, despite the undue delay in these proceedings, shall be contrary to the interests of justice, particularly given that the delay is held contumelious and inexcusable.

76. I refer to Lord Woolf MR in ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*** (supra) where His Lordship 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)

77. Accordingly, this Court finally concludes 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 Writ of Summons and the Statement of Claim be struck out pursuant to Order 25 Rule 9 of the High Court Rules.

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

    1. Writ of Summons and the Statement of Claim filed on 24 May 2024 is hereby struck out and dismissed pursuant to Order 25 Rule 9 of the High Court Rules.

    2. Considering all the circumstances of this matter, Court makes no orders for costs.

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

At Suva
30/09/2025.