IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 371 of 2011

BETWEEN : LUKE RAGG of Suva, Real Estate Agent.

PLAINTIFF

AND : YUMIKO YAMAGATA as the trustee of the Yamagata Children's Trust of 28957 Cliffside Drive. Malibu, CA 90265, United States of America.

DEFENDANT

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BEFORE: Acting Master Vishwa Datt Sharma

COUNSELS: Mr. Ritesh Naidu - for the Plaintiff
Mr. Ronal Singh - for the Defendant

Date of Hearing: 08th July, 2015
Date of Ruling : 3rd September, 2015

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# RULING

## (A) INTRODUCTION

1. This court issued a Notice of its own motion pursuant to *Order 25, r 9 of the High Court Rules 1988* on 25th March, 2015.

2. The Notice required the Plaintiff to **show cause** as to why the within action ought not to be **struck out for want of prosecution** or **an abuse of process** of this court since no steps have been taken by the Plaintiff in this cause for more than **six (6) months.**

3. Accordingly, the Plaintiff, **Luke Ragg,** filed an affidavit to show cause on 28th April, 2015.

4. The **Defendant** opted not to file any affidavit to the impending **Order 25 Rule 9** application, relying on case authority of *Deo v Raidu [2015] FJHC 218; HBA 20.2013* and its written submissions.

5. The **Plaintiff** also filed its written submissions accordingly.

## (B) BACKGROUND

*(Writ of Summons and Statement of Claim)*

6. The Plaintiff obtained the leave to issue and serve the **Writ of Summons** coupled with a **Statement of Claim** onto the Defendant **out of the Jurisdiction** of this court on 08th December, 2011.

7. Subsequently, the Writ of Summons and the Statement of Claim was filed on the 15th December, 2011.

8. The **Plaintiff** is a licensed real estate agent and carries on business in Pacific, Harbour, Deuba, Fiji Islands.

9. The **Defendant** is the trustee and shareholder of the Yamagata Children's Trust.

10. The Plaintiff states as follows-

(a) By an agreement in writing dated 20th February, 2009, the Defendant engaged the Plaintiff to sell three properties commonly known as Kanacea Island in the Central Lau Group in Fiji, Advaci Island and Kaimbu Island both in the Northern Lau Group in Fiji for the price of USD 6 million, USD 26 million and USD 22 million respectively.

(b) It was a term and condition of the said agreement referred to in paragraph 3 hereof that the Defendant would pay to the Plaintiff commission at the rate of 5 % based upon the gross selling price and value added tax on the commission.

(c) On 12th March, 2002, the Defendant entered into oral agreement with the Plaintiff and engaged the Plaintiff to sell another property commonly

known as Vatuvara Island in the Lau Group in Fiji for the price of USD 9.5 million.

(d) It was a term and condition of the said agreement referred to in paragraph 5 hereof that the Defendant would pay to the Plaintiff commission at the rate of 2.5 % based upon the gross selling price and value added tax on the commission.

(e) The Plaintiff found a prospective purchaser for Kaimbu and Vatuvara and registered the prospective purchaser's identity with the Defendant in accordance with the agreements.

(f) The Defendant ignored the Plaintiff, directly dealt with the prospective purchaser one James Jannard and sold Kaimbu and Vatuvara to James Jannard and the Defendant failed to pay to the Plaintiff the commission in respect of such sale as follows-

| | |
|---|---|
| Sale of Kaimbu | -$USD 7 million |
| 5% commission due | -$USD 350,000 |
| Sale of Vatuvara | -$USD 15 million |
| 2.5 % commission due | -$USD 375,000 |

(g) The Plaintiff claims the sum of USD $725,000 plus vat 15% value added tax on Fiji Dollar equivalent.

(h) The Plaintiff also claims interest pursuant to Law Reform (Miscellaneous Provisions) (Death and Interest) Act on the amount found to be due to the Plaintiff at such rate and for such period as the court shall think fit.

11. The Plaintiff claims-

(a) Judgment in the sum of $USD 725,000 plus 15 % vat on Fiji Dollar equivalent of USD 725,000;

(b) Interest; and

(c) Costs.

*(Statement of Defence)*

12. In the Defence, the Defendant states as follows-

(a) As to paragraph 1, the Plaintiff is not aware whether the Defendant is a real Estate agent or not.

(b) Denies paragraph 2.

(c) Paragraph 3 is admitted and states Non- Exclusive Agreement expired on 20th August, 2009 and was terminated and cancelled and of no effect.

(d) Paragraph 4 that commission would only be paid to the Plaintiff in the event the Plaintiff would secure a successful buyer in accordance with the Non- Exclusive Agreement dated 20th February, 2009, the remainders of the allegations are denied.

(e) Paragraph 5 and 6 are denied and any claims under the alleged and purported oral agreement is unenforceable and the same is statute barred in terms of *section 4 (1) of the Limitations Act Cap 35* as the alleged cause of action arose more than 6 years from the date of institution of this action.

(f) Pleads that the claim made in paragraphs 5 and 6 is contrary to *section 59 of the Indemnity, Guarantee and Bailment Act Cap 232* as all dealings in land is required to be in writing.

(g) Further pleads that the claim made in paragraphs 5 and 6 is contrary to *section 55 (1) of the Real Estate Agents Act 2006* as the alleged agency agreement was not in writing.

(h) Paragraph 7 is denied.

(i) Paragraph 8 save as for admitting that the Islands have been sold the remainder of the allegations contained in paragraph 8 of the claim is denied.

(j) Paragraph 9 and 10 are denied as the Plaintiff is not entitled to any commission as claimed.

(k) The Defendant seeks that the claim be struck out with costs.

## (C) THE LAW

13. This application is made pursuant to *Order 25 Rule 9 of the High Court Rules 1988*, which *inter-alia* states as follows:

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

14. Abovementioned rule was introduced on 13th September 2005. After the introduction of this rule the Court of Appeal has had the opportunity to review the law on want of prosecution in Fiji both before and after the coming in to effect of the same.

15. Prior to the introduction of Rule 9, the Court of Appeal in **Abdul Kadeer Kuddus Hussein v. Pacific Forum Lime Civil Appeal No. ABU 0024 of 2000s** (30th May 2003) in readopting the principles expounded in *Birkett v. James [1978] AC 297;* [1977] *2 All ER 801* and explained that:

*"The power should be exercised only where the court is satisfied either (i) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the curt; or (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay would 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)

16. Basically the Court of Appeal affirmed the principle enunciated in ***Brikett v. James (1978) AC 297 (1977) 2 ALL ER*** where the **House of Lords** held as follows:-

*"The power should be exercised only where the court is satisfied either:-*

*(i) That the default has been intentional and contumelious e.g.; disobedience to pre-emptory order of the court or conduct amounting to an abuse of the process of the court; or*

(ii) *(a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers (in the present case Defendant's lawyers); (b) that such delay would give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or is such as it 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 then and a third party."*

17. After the introduction of Order 25 rule 9, ***Birkett v. James*** was revisited by the court of Appeal. This largely arose due to the case management system introduced by the Court to agitate those cases which were lying idle in the registry for many years some ranging over 20 years. This High Court had tended to strike-out the actions based on delay alone.

18. The first case which went on appeal and decided by the Court was ***Bhawis Pratap v Christian Mission Fellowship Civil Appeal No. ABU 0093 of 2005*** (14 July 2006). His Lordship Mr. Justice Coventry struck out the action on a number of grounds one of which was delay of 7 years since the action was filed. On appeal, after reviewing the law on want of prosecution the Court of Appeal affirmed that the applicable law in this country is still as was pronounced in ***Brikett v. James.*** At para. 23 of judgment the Court unreservedly stated:-

*"[23] – The* ***correct approach to be taken by the courts in Fiji to an application to strike out proceedings for want of prosecution has been considered by this court on several occasions.*** *Most recently, in Abdul Kadeer Kuddus Hussein v. Pacific Forum Lime Civil Appeal No. ABU 0024 of 2000 - FCA B/V 03/382 the court,* in readopting the principles expounded in Birkett v. James [1978] AC 297; [1977] *2 All ER 801"*

*(2) Upon hearing the application the Court may either dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions."*

(Emphasis added)

19. Again the Court of Appeal was invited to consider the position of Order 25 rule 9 in the *Trade Air Engineering (West) Ltd v. Taga Civil Appeal No. ABU 0062 of 2006 (9 March 2007) (per Gordon P, Barker and Scott JJA.* In considering the appeal the Court categorically formulated the following question:-

> *"[4] - The central question raised by this appeal is whether the Court's powers under O 25 r 9 should be exercised in substantial conformity with the powers it already possessed prior to the making of the new rule or whether an additional jurisdiction, exercisable on fresh principles, has been conferred on the Court."*
>
> (Emphasis added)

20. In Observing the new feature of Order 25 rule 9 their Lordships stated:-

> *"[15] - A notable feature of the new Order 25 rule 9 is that it confers on the court the power to act on its on motion. Within our present High Court Rules such a power is only rarely conferred. One example is O 34 r 2 (6), another is O 52 r 4. In a number of overseas jurisdictions much wider case management powers have been given to the High Court and most of these powers are exercisable upon the court's own motion. Such developments have however not yet reached Fiji."*
>
> (Emphasis added)

21. Their Lordships then conclusively and unanimously held that:-

> *"[16] - 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."**
>
> (Emphasis added)

22. The issue then is whether delay alone is sufficient for the Court to strike-out an action for want of prosecution. The Court of Appeal in *New India*

*Assurance Company Limited v. Rajesh Kumar Singh Civil Appeal Number ABU 0031/1996* emphasized that while inordinate and inexcusable delay might be established, these factors were not, ***on their own, sufficient to warrant the striking out of the action.***

23. The Court of Appeal in ***Bhawis Pratap v Christian Mission Fellowship (supra)*** discussed and distinguished the new rules which applied in England after the introduction of the new Civil Procedure Rules after 2000 inter-alia as follows:-

> *"[28] - Securum Finance Limited v. Ashton (supra is especially instructive since it explains why, following the introduction of the new Rules, the* **courts in England and Wales have been more ready to strike out actions on the ground of delay alone.** *At paragraphs 30 and 31 Chadwick L.J wrote that:*
>
> *"30 the power to strike out a statement of claim is contained in CPR r3.4. On 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 curt 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 talking into accounts the need to allot resources to other cases".*
>
> *"31 In the Arbuthnot Latham 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 which was in issue. From now on it is going to be a consideration of increasing significance."*

> *[29] In* **Fiji there is as yet no equivalent of the English CPR r 1.1 or 3.4 and therefore the approach exemplified in Securum has not yet become part of our civil procedure.**

24. Thus the developments which have been taken in England after the introduction of the new rules do not apply in this instant to Fiji without the introduction of new rules. As such the principle in ***Birkett v James*** applies on all fours. This was also confirmed by the Court of Appeal again in 2008; ***Avinash Singh v Rakesh Singh, Nirmala Devi & Sarojini Kumar*** *Civil Appeal No: ABU 44/06 (8 July 2008).*

## (D) ANALYSIS and DETERMINATION

25. I have perused the court file in terms of the documents or pleadings filed by the parties to this proceeding as required by the set down procedures and the High Court Rules 1988 accordingly.

26. This case was commenced by the Writ of Summons on **15th December, 2011.**

27. The acknowledgment of service was filed by the Defendant on 12th January, 2012 and subsequently, the Statement of Defence filed on 27th January, 2012. **Note 1 day delay in terms of the Rules.**

28. Reply to Defence was filed on 23rd February, 2012.

29. No subsequent action was taken until 01st June, 2012 when the Plaintiff filed the Summons for Directions. **A delay of over 3 months is noted.**

30. The Master of the High Court granted the orders on the Summons for Directions on **29th June, 2012;**
    (i) for the Plaintiff to comply with the service of list of documents within 21 days and
    (j) for the Defendant to serve their list of documents within 21 days hereafter.

31. The **Plaintiff** filed his Affidavit Verifying List of Documents on **24th August, 2012,** and the **Defendant** filed theirs on **24th October, 2012** respectively.

32. It is noted that the **Plaintiff did not comply** with the 21 days direction to file and serve his list of documents within 21 days but only after a **lapse of 56 days**. Likewise, the **Defendant filed** and served their list of documents late also, after a **lapse of** 61 days from the time calculated after the Plaintiff filed his list of documents on 24th August, 2012. Here, **both parties are to be blamed for the delay.**

33. Again, no action was taken by either party after the filing of the last pleading on **24th October, 2012**, until **21st December, 2012**, when the Defendant filed their supplementary affidavit verifying the Defendant's list of documents. The court records does not indicate anywhere, how the defendant succeeded in filing a supplementary affidavit verifying list of documents. Therefore, it can be said that the Defendant took longer than 56 days to settle his affidavit verifying list of documents which was not in conformity to the grant of directions of 21 days as per the Summons for Directions.

34. Once again it is noted that no action was taken thereafter until **10th May, 2013** when the Plaintiff decided to file his **Interlocutory Summons** coupled with an Affidavit of Yumiko Yamagata in support of the interlocutory summons.

35. A notice of change of solicitors was filed by the Defendant on **09th September, 2013.**

36. **By consent,** the matter was adjourned on two consequent occasions until the **18th October, 2013,** to allow the Defendant's new solicitors (Munro Leys) to review the court file and the answers.

37. The matter was further adjourned to **29th November, 2013** to allow the Plaintiff's counsel to file the interrogatories in an affidavit form.

38. Extension of time was again granted for the affidavit to be filed by the Plaintiff by **24th January, 2014** since he informed court that he was still searching for some documents and conducting title searches. He filed the same on **24th January, 2014.**

39. Hereafter, it is noted that no action was taken until **02nd February, 2015,** when the Plaintiff filed a **Notice of Intention to proceed, giving 30 days' notice which expired on 03rd March, 2015.** It should be noted that case authorities

have established that Notice of Intention to Proceed is not a cause of action within any proceedings.

40. When one calculates the duration of the lapse of time with effect from 24th January, 2014, and disregard when the Notice of Intention was filed (02nd February, 2015), then a period of over 12 months has lapsed. *(24/01/2013 to 02/02/2015= 12 months and 8 days lapsed).*

41. **Has there been any explanation provided for to this court of this delay which is over a period of 6 months?**
The answer is negative.

42. On 25th March, 2015 the High Court Registry issued and served a **Notice to Show Cause** pursuant to *Order 25 Rule 9 of High Court Rule 1988.*

43. The **onus** is on the **Plaintiff** to provide a cogent and credible explanation for not taking any steps to advance the litigation in this case from 24th January, 2014 till the **02nd February, 2015** when the **Notice of Intention to proceed was filed.**

44. This court is therefore required to deliberate on the following issues in terms of the impending *Order 25 Rule 9 application* to arrive at a determination whether to dismiss the cause or deal with the application as if it were a summons for directions accordingly:

(i) *that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or*
(ii) *that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers,(* **In this case the Plaintiff's lawyers***); and*
(iii) *that such delay would 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."*

**Default is contumelious**

45. "Contumelious" in the context of want of prosecution refers to disobedience of any orders or directions of this court.

In this case, this court notes the following-

- that the Statement of Defence was filed one (1) day late;
- On 29th June, 2012, orders were granted on the Summons for Directions and the **Defendant** filed his affidavit verifying list of documents after a **lapse of 56** days. Not only that, the **Defendant** went ahead and filed a **supplementary affidavit verifying list of documents**, taking much longer to settle the list of documents;
- Further orders with regards to the **inspection of documents within the 14 days** after the service of the lists and parties to **attend to a pre-trial conference within 90 days** were also granted but have not been complied with, but the Plaintiff thought fit and proper to file the **'Answer to Interrogatories" ahead of parties complying with the inspection of documents within the 14 days after the service of the lists and parties to attend to a pre-trial conference within 90 days.**
- Not only that, the Plaintiff went ahead and also **filed a Notice of Intention to proceed within 30 days,** but to no success.

46. Taking into consideration the above at paragraph 45, I would not conclude that the directions granted in terms of the Summons for Directions will tantamount to disobedience of any orders or directions. Neither party to the proceedings objected to the filing of each party's affidavit verifying list of documents outside the period ordered in terms of the summons for directions. Further, there has been part compliance of the directions made on the Summons for Directions or otherwise delayed by both parties for one reason or another, better known to both parties' and because of the inception of the Interlocutory application seeking Interrogatories as well as change of Counsel by the Defendant.

47. For the above rational, the **first arm** of the test does not apply herein.

**Delay**

48. The test for delay is both *'intentional'* and *'inordinate'*.

In the above circumstances I am of the finding that both the **Plaintiff** as well as the **Defendant contributed** to the **delay in filing** of their respective pleadings which has caused this matter to remain pending in the court. The **Plaintiff has admitted relevant period of delay from 06th March, 2014 to 04th March, 2015** but **explained** the cause of **this delay** when he referred to paragraph 5 of his client's affidavit to show cause accordingly which **is acceptable** to this court. I do note that the **Plaintiff has not given any explanation for the delay on his part prior to the 06th March, 2014.** The Plaintiff has furnished some **explanation** which I regard as **excusable.** On the other hand, the Defendant was of the view that it is for the Plaintiff to show cause and the onus to show cause is on the part of the Plaintiff and relying on case authorities of *Deo v Raidu [2015] FJHC; HBA 20.2013,* he submitted it was not for him to file any affidavit in the given circumstances.

Still, this court is of the view that when the Defendant furnished written submissions and orally argued the case, the Defendant was still entitled and or at liberty to assist the court with an explanation as to the delay on his part as pointed out hereinabove.

Further, according to the Plaintiff as stated in his written submissions at paragraph 4.01, page 5, explains the reasons for the delays as follows-

- '03rd February, 2014- Defence counsel sought time to obtain instructions from client. Matter adjourned to 26th February, 2014;
- 26th February, 2014- Defence counsel advices he will be seeking further and better particulars of the statement of claim, matter to take normal cause;
- 06th March, 2014- Naidu Law wrote to Munro Leys advising they are in the process of obtaining the particulars sought by the defence.'

The Defence counsel in his written submissions at paragraph 50 states as follows-

- "A review of the Statement of claim shows that the Plaintiff alleges that an oral contract was formed in 2002 (some 13 years ago) and a written contract in 2009. Some 6 years ago. The Defendant challenges the purported contracts on substantial grounds and now more importantly as it turns out (see annexure R-4 of the Ragg's Affidavit) the prospective purchasers were allegedly found by the Plaintiff way before he had any contractual dealing with the Defendant, it at all."

Now, upon the perusal of the above two sets of arguments by the Plaintiff and the Defendant's counsels, it can be concluded that the Plaintiff was making an effort to furnish the further and better particulars of the statement of claim as sought by the Defendant's Counsel.

Therefore this issue of obtaining the further and better particulars of the statement of claim by the Defendant's Counsel was necessary and of relevance not only to this case but also to the issue of *'inexcusable* and *inordinate* delay' in prosecuting a claim.

Therefore, the plaintiff in the circumstances has succeeded in overcoming the issue of *'Inexcusable* and *inordinate* delay' accordingly.

Even though the Plaintiff has succeeded in establishing 'inordinate' and 'inexcusable' delay, these factors would not, on their own, be sufficient to warrant the striking out of this action.

**Prejudice**

50. It is trite law that the Defendant must establish that is **prejudiced by the** delay.

51. Most importantly, I make reference once again to the case authority of *Deo v Raidu [2015] FJHC 218; HBA 20.2013* wherein the Court stated as follows-

> *'16.... Therefor it is my view that it is the Court that should look into the history of the matter and the conduct of the parties to assess the*

*degree of prejudice caused to the Defendants before striking out a claim under Order 25 Rule 9.'*

52. The Defendant in his written submissions submitted that there is a 'substantial risk' that it is not possible to have a 'fair trial' of the matter should the action be allowed to proceed.

The Defendant will suffer serious prejudice simply because the witness (for both the Plaintiff and the Defendant) will have to recall events which took place at least over or dating as far back as 1999. This matter has a real likelihood to cause prejudice in a trial which is not likely to take place for at least another 12 months.

On the other hand, Plaintiff's Counsel submitted that inordinate and inexcusable delay has not been established. The presumption of prejudice is not a presumption of law. It is rebuttable.

Delay alone is not enough to support a finding of prejudice- Case of *Bhawis Pratap v Christian Mission Fellowship Civil appeal No. ABU 0093 of 2005.*

This court finds that above certainly alleviates any prejudice to the Defendant.

53. This court has carefully perused both the Plaintiff and the Defendant's arguments on this' **issue of prejudice'**.

- Firstly, this court has reached a finding that the delay on the part of the Plaintiff as conceded is inordinate but excusable and also unintentional in the circumstances.
- Secondly, the Defendant has not established to this court that the delay has prejudiced him in the conduct of his defence.
- Thirdly, whether the Defendant has lost track of witnesses, material or otherwise.

*must always stand back and have regard to the interests of justice, in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.'*

58. Even the courts are reluctant to strike- out any matter summarily which has certain merits in it on the grounds of abuse of process. In *Dey v. Victorian Railway Commissioners* (1949) 78 CLR 62, at 91 Dixon J said:-

'26. This principle was restated by the Court of Appeal of Fiji in *Pratap v Kristian Mission Fellowship [2006] FJCA 41*. Also refer to; *New India Assurance Co Ltd v Singh [1999] FJCA 69.*
*The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include; Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210; Dey v. Victorian Railway Commissioners (1949) HCA 1; (1949) 78 CLR 62; Birkett v James [1978] AC 297; Lovie v Medical Assurance Society Limited [1992] 2 NZLR 244; Agar v Hyde (2000) 201 CLR 552. Indeed the passage from Abdul Kadeer Kuddus Hussein v Pacific Forum Line reflects closely Birkett v James (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'*

59. In the interest of Justice, a fair trial is obvious and must be conducted expeditiously in order to deliberate on the pending issues and the cause of action accordingly.

60. I have carefully perused the substantive application, the pleadings filed so far, the written and oral submissions coupled with the applicable laws and the case authorities and make a finding as follows:-

(i) *Explanation has been provided by the Plaintiff for the delay as such the Plaintiff has overcome the factor of inexcusable;*
(ii) *The delay is neither inordinate nor intentional;*
(iii) *The default is not contumelious and the Plaintiff has not disobeyed any orders of this court;*
(iv) *The Defendant has not suffered any real prejudice; and*
(v) *In the interest of justice, a fair trial is still possible.*

61. For the aforesaid rational, I make the following orders:-

(a) Application on courts own motion made in terms of Order 25 Rule 9 of the High Court Rules 1988 seeking striking out of Plaintiff's substantive Writ and the Statement of Claim for want of prosecution or an abuse of the process of the court is struck out accordingly.
(b) This case to take its normal cause;
(c) Further directions in terms of the compliance of consequent pleadings to be made accordingly;
(d) Each party to bear their own costs.

Dated at Suva this 3rd Day of September, 2015

HIGH COURT OF FIJI SUVA

.....
VISHWA DATT SHARMA
Acting Master of High Court, Suva

cc: *Mr. Ritesh Naidu of Naidu Law, Suva.*
*Mr. Ronal Singh of Munro Leys, Suva.*