IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 139 of 2006

BETWEEN : **VICTOR AUGUSTINE WILSON** of Vatukoula, Fiji.

PLAINTIFF

AND : **EMPEROR GOLD MINING CO. LTD** a duly incorporated company having its registered office at Emperor Gold Mining Company Limited, Vatukoula, Fiji.

DEFENDANT

(Ms) Seruwaia Nayacalevu for the Plaintiff
Mr. Ashnil Kumar Narayan with (Ms) Vikaili Buli for the Defendant

Date of Hearing : - 20th July 2016
Date of Ruling : - 04th November 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Defendant's Summons dated 03rd February 2016 made pursuant to **Order 25, rule 9 of the High Court Rules, 1988,** and the inherent jurisdiction of the Court for an Order that the Plaintiff's action against the Defendant be struck out and dismissed on the following grounds;

- The Plaintiff failed to prosecute the proceedings expeditiously without any real interest in bringing matters to trial

AND/OR

- Has abused the process of the Court

AND/OR

- ❖ Thereby has caused prejudice to the Defendant and a substantial risk of a fair trial.

(2) The Defendant's Summons is supported by an Affidavit sworn by one 'Akesh Sharma', the Human Resource Manager of the Defendant Company.

(3) Upon being served with Summons, the Plaintiff filed an Affidavit to show cause as to why the matter should not be struck out for want of prosecution or as an abuse of process of the Court.

(4) The Plaintiff and the Defendant were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendant filed a careful and comprehensive written submission for which I am most grateful.

(B) BACKGROUND

(1) On 23rd May 2006, the Plaintiff issued a Writ against the Defendant seeking damages for the alleged personal injuries, loss and damage he sustained on 16th September, 2004 in the course of his employment as a result of the Defendant's alleged negligence. The injuries were allegedly the result of a rock dislodging and landing on his head and neck.

(2) The Defendant **denied liability** on the ground that the accident and the resultant injuries if any, sustained by the Plaintiff were solely caused or contributed by the negligence of the Plaintiff.

(C) THE CHRONOLOGY OF EVENTS

[1] Cause of Action arose on 16th September, 2004;
[2] Writ of Summons filed on 23rd May, 2006;
[3] Acknowledgement of Service filed on 24th July, 2006;
[4] Statement of Defence filed on 17th August, 2006;
[5] Summons for Interim Payment filed on 2nd November, 2006;
[6] Affidavit in Support of Summons filed on 2nd November, 2006;
[7] Affidavit in Opposition to Interim Payment filed on 13th December, 2006.
[8] Motion for Leave to Amend Statement of Claim filed on 30th April, 2007.
[9] Affidavit in Support of Motion filed on 30th April, 2007;
[10] Amended Statement of Claim filed on 21st May, 2007;
[11] Plaintiff's Supplementary Affidavit to Summons to Amend filed on 4th July, 2007.
[12] Defence to Amended Statement of Claim filed on 13th July, 2007.
[13] Order for Interim Payment filed on 13th August, 2007;

[14] Summons for Directions filed on 12th August, 2008;
[15] Affidavit Verifying Defendant's List of Documents filed on 16th December, 2008.
[16] **Affidavit Verifying Plaintiff's List of Documents filed on 2nd October, 2009;**
[17] **Summons to Strike Out filed on 2nd February, 2016;**
[18] Affidavit in Support of Summons to Strike Out filed on 2nd February, 2016;
[19] Affidavit of Service filed on 29th February, 2016;
[20] **Notice of Appointment of Solicitors for the Plaintiff filed on 23rd March, 2016;**
[21] Affidavit in Response filed on 29th March, 2016; and
[22] Affidavit of Akesh Sharma filed on 4th May, 2016.

(D) THE DFENDANT'S SUMMONS TO STRIKE OUT THE ACTION FOR WANT OF PROSECUTION

(1) The Defendant's Summons is supported by an **'Affidavit'** sworn by one 'Akesh Sharma', the Human Resource Manager of the Defendant Company, which is substantially as follows;

Para 1. *I am employed by Vatukoula Gold Mines Limited (formerly Emperor Gold Mining Company Limited) of Vatukoula, as the Human Resource Manager and am duly authorised to swear this Affidavit on behalf of the Defendant. Annexed hereto and marked "AS-1" is a copy of the relevant authority.*

2. *My duties entail handling of matters pertaining to employees. This includes recruitment, training, opening and maintaining filed pertaining to compensation, disciplinary and grievances issues, commissioning investigations, reporting to the management and briefing the Defendant's Solicitors (hereinafter referred to as "**AK Lawyers**") on matters taken by or against the Defendant.*

3. *I am able to depose herein on the basis of my personal knowledge of the matters contained herein from handling this claim or, where the matters are not known to me personally, from information derived from the Defendant's files and the information provided by AK Lawyers.*

4. *The Plaintiff instituted proceedings by way of a Writ of Summons and Statement of Claim on 23rd May, 2006.*

5. *The Plaintiff pleads that at the material time he was employed by the Defendant as a Jumbo Off Sider at Vatukoula. He further alleges that he was injured in the course of employment. Consequently the Plaintiff commenced the within action alleging negligence against the Defendant.*

6. *Since the proceedings commenced in 2006, the matter has not been prosecuted by the Plaintiff with any real interest to put it before the Court. This lack of interest has caused delay which is inordinate and inexcusable and as such is an abuse of the process of this Court and/or has created a substantial risk that there will not be a fair trial on the issues thereby causing prejudice to the Defendant.*

7. *The last activity in this matter was when the Defendant filed its Affidavit Verifying List of Documents on 16th December 2008. There has been no movement and/or interest in prosecuting this matter since that date by the Plaintiff.*

8. *The Defendant is desirous of closing its file in the matter to avoid the costs of it having to maintain a contingency reserve fund in the event of an adverse judgment at trial. The Plaintiff has not provided any or any valid excuse for the delays.*

9. *The Defendant has been put to the inconvenience and cost of having to retain Solicitors to defend the action including further investigations into the current whereabouts of the witnesses, not knowing whether the Plaintiff intends to prosecute the action with any certainty.*

10. *I have been advised by AK Lawyers that the Plaintiff is under a duty to the Court and the Defendant to progress the action without undue delay and given the premises, his failure to prosecute the matter with due diligence and any real interest, is an abuse of the process of the Court and poses a substantial risk to a fair trial and/or prejudice to the Defendant.*

11. *Witnesses for the Defendant will be required to recall events which occurred on 16th September, 2004 which is more than 11 years ago. Their recollection of events due to the passage of time will affect their reliability.*

12. *In the premises, pursuant to the Inherent Jurisdiction of this Honourable Court, the Defendant prays for an order that the action be struck out and dismissed on the grounds of failure on the Plaintiff's part to prosecute the proceedings expeditiously without any real interest in bringing this matter to trial and has abused the process of this Honourable Court thereby causing the substantial risk of an unfair trial and/or prejudice to the Defendant and that the Plaintiff pay the cost of this application.*

(2) The Plaintiff filed an **'Affidavit in Answer'** sworn on 28th March 2016 which is substantially as follows;

Para 3. *THAT as to paragraph 4 of the Affidavit of Akesh Sharma, I agree with the contents therein and further provide the timeline on this matter as follows after my new Counsels conducted a search of the court file for this matter –*

i. *Writ and Statement of Claim filed on the 23rd of May 2006;*
ii. *Statement of Defence filed on the 17th of August 2006;*
iii. *Summons for Interim payment filed on the 2nd of November 2006;*
iv. *Affidavit of Victor Augustine in Support filed on the 2nd of November 2006;*

v. *Affidavit of Elizabeth Saverio in opposition filed on 13th December 2006.*
vi. *Notice of Motion for leave to amend Statement of Claim filed on 30th April 2007;*
vii. *Affidavit of Julienne Cecilia Borg in support filed 30th April 2007.*
viii. *Amended Statement of Claim filed on 21st May 2007.*
ix. *Supplementary Affidavit of Julienne Cecilia Borg in support filed on 4th July 2007;*
x. *Defence of Amended Statement of Claim filed on 13th of July 2007;*
xi. *Summons for Directions filed on 12th August 2008;*
xii. *Affidavit Verifying List of documents for the Plaintiff filed on 24th September 2008;*
xiii. *Affidavit Verifying List of documents for the Defendant*
xiv. *Draft Pre-Trial Conference Minutes sent to the Defendant's Counsel on the 26th of April 2010.*

4. *THAT as to paragraph 5 of the Affidavit of Akesh Sharma, I agree with the contents therein. Furthermore, I states as follows -*

i. *On the 6th of July 2004, I was employed by the Defendant and working at its premises at Vatukoula mine as a Jumbo off sider, whose task was to clear the rocks by using a bar on the area and to install the Rock Bolt onto the machine known as the Jumbo Boom slot.*

ii. *Whilst underground at the work place being the Prince Incline, Cayser shaft, I was installing the rock bolt onto the Jumbo Boom slot when a substantial rock dislodged and landed on his head and neck causing him to be very seriously injured.*

iii. *As a result of the aforesaid, the Plaintiff received very serious head injuries which have adversely affected his ability to think and or behave properly and logically.*

5. *THAT as to paragraph 6 of the Affidavit of Akesh Sharma, I deny the contents therein and put the Defendant to strict proof. As I have been advised that the Court records would show that this matter came before the Court on the 3rd of September 2008 for Summons for Directions and thereafter parties proceeded through the discovery process.*

6. *THAT as to paragraphs 7 and 8 of the Affidavit of Akesh Sharma, we deny the contents therein and state as per paragraph 2 above, my former Solicitor has sent the draft Pre Trial Conference Minutes to the Defendant's Counsel on the 26th of April 2010. Annexed hereto and marked as Annexure "A" is a copy of the said correspondence to the Defendant's Counsel.*

7. i. *THAT as to paragraph 8 of the Affidavit of Akesh Sharma, I am also desirous for this Honourable Court to make a decision on my Writ of Summons, as to the damages that I had suffered as a result of the negligence of the Defendant. To my knowledge, my former Counsel, Mr. Kafoa Muaror has always done his best to push my matter forward and thus my matter was left in his capable hands as I focused on healing and rehabilitation. My mum would on my behalf follow up with Mr. Muaror that he was taking care and attending to my matter. The last face to face communication that my mum had with Mr. Muaror in late 2014 at his home, my mum was advised by Mr. Muaror that he was looking after my matter and we had nothing to worry about.*

ii. *When my mum approached Ms. Laurel Vaurasi in the later part of 2015 about my matter as she at one time was working with Mr. Muaror on my matter, my mum was advised that Muaror & Associates had gone into receivership in 2012 and that my mum needed to contact the Legal Practitioners Unit to verify this. In the latter part of January 2016, when I personally attended to Mr. Muaror's home, I was advised that my former Counsel was no longer practicing law and was overseas. Prior to this, we had the understanding that my matter was being pushed along by Mr. Muaror only for me to be served in school with a Noah by the Judiciary staff that my matter was before the Court in Lautoka for a Striking Out Application by the Defendant.*

iii. *That I then approached Ms. Laurel Vaurasi of Shekinah Law on Tuesday, 22nd March 2016, who was in carriage of my matter when she was at Muaror Law to help me with my matter as certain directions had been given by the Court on 14th March 2016. My understanding is that my new Counsels filed their Notice of Appointment of Solicitors on Wednesday, 23rd March 2016 and a search was conducted on the court file which has given my new Counsel a brief overview of the directions of the Court and to photocopy the necessary Court documents.*

8. *THAT as to paragraphs 9 and 10 of the Affidavit of Akesh Sharma, I am not aware of the costs factors that have been incurred by the Defendant and put him to strict proof. I believe that my Amended Statement of Claim has a very good prospect of success as we will be able to procure evidence to show that the Defendant Company failed to maintain a system of work and workplace and condition that was conducive to the interests and safety of workers. Throughout the time that I was recovering and rehabilitating from the injuries that I*

sustained, I was led to believe by my former Counsel through his verbal correspondences that he was diligently conducting my matter in the interest of justice. Though I did not earn much money, I also made efforts to pay my legal bills to my former Counsel as and when I am required to make payments.

9. *THAT as to paragraph 11 of the Affidavit of Akesh Sharma, I note the position of the Defendant, but I will also carry the same burden of my witnesses recalling the events of ten (10) years ago that led to me sustaining serious injuries on my head and neck. I have been advised that the reliability of the evidences produced by witnesses is something that the Court will have to determine and it is not proper for the Defendant to make the suggestion that the recollection of events by his witnesses, given the ten year period will affect their reliability. I also believe that witnesses for the Defendant would have prepared their statements of the incident, which would have been kept by the Defendant.*

10. *THAT as to paragraphs 12 and 13 of the Affidavit of Akesh Sharma, I disagree with the contents therein and state that my new Counsels have assured me that they will diligently carry out the next required process for this matter being the Pre-Trial Conference minutes, prepare the copy pleadings before filling the Summons to have this matter set for hearing.*

11. *THAT as to paragraph 14 of Affidavit of Akesh Sharma, I disagree with the contents therein and ask this Honourable Court to allow the parties twenty one (21) days from the day of its Ruling to file the Pre-Trial Conference Minutes and further directions for the steps thereafter to facilitate this matter going before a Judge for a hearing date to be allocated for this matter.*

(E) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing the striking out for want of prosecution.

(2) Rather than refer in detail to the various authorities, I propose to set out very important citations, which I take to be the principles in play.

(3) Provisions relating to striking out for want of prosecution are contained in Order 25, rule 9 of the High Court Rules, 1988.

I shall quote Order 25, rule 9, which provides;

> *"If no step has been taken in any cause or matter for six months then any party on application or the court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the court.*
> *Upon hearing the application the court may either dismiss the cause or matter on such terms as maybe just or deal with the application as if it were a summons for directions".*

(4) Order 25, rule 09 expressly gives power to the court on its own motion to list any cause or matter, where no step has been taken for at least six (06) months.

(5) The Court is allowed to strike out an action on the failure of taking of steps for six (06) months on two grounds. The first ground is for **want of prosecution** and the second is an **abuse of process of the Court.**

(6) The principles for striking out for **want of prosecution (first ground)** are well settled. Lord **"Diplock" in "Birkett v James" (1987), AC 297,** succinctly stated the principles at page 318 as follows:

> *"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; (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 it 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."*

(7) The test in **"Birkett vs James"** (*supra*) has two limbs. The first limb is **"intentional and contumelious default"**. The second limb is **"inexcusable or inordinate delay and prejudice."**

(8) In, **Pratap v Chirstian Mission Fellowship, (2006) FJCA 41, and Abdul Kadeer Kuddus Hussein V Pacific Forum Line, IABU 0024/2000,** the Court of Appeal discussed the principles expounded in **Brikett v James** (*Supra*).

The Fiji Court of Appeal in **"Pratap V Chrisitian Mission Fellowship"** (*supra*) held;

> *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 Line – ABU0024/2000 – FCA B/V 03/382)*** *the court, readopted the principles expounded in* ***Birkett v James [1978] A.C. 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 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, 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'."*

(9) The question that arises for consideration is what constitutes **"intentional and contumelious default"** (First Limb). The term **"Contumely"** is defined as follows by the Court of Appeal in **Chandar Deo v Ramendra Sharma and Anor, Civil Appeal No, ABU 0041/2006,**

> *"1. Insolent reproach or abuse, insulting or contemptuous language or treatment; despite; scornful rudeness; now esp. such as tends to dishonour or humiliate.*
>
> *2. Disgrace; reproach."*

(10) In **Culbert v Stephen Wetwell Co. Ltd,** (1994) PIQR 5, Lord Justice Parker succinctly stated,

> *"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."

Lord Justice Nourse in Choraria [Girdharimal] v Sethia (Nirmarl Kumar) Supreme Court Case No. 96/1704/B, C.A. 15.1.98 said;

"However great does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground."

It has been further stated by ***Nourse J:***

*"That is the principle on which the court must now act. Whether it is identified as being comprehended within the first limb of **Birkett v James** or as one having an independent existence appears to be a point of no importance. I have already said that it is clear that the relevant ground of decision in **Culbert** was based on the first limb of **Birkett v. James**. In other words, it was there effectively held that the plaintiff's conduct had been intentional and contumelious.*

In my view that conclusion was well justified on the facts of the case, which demonstrated not only the plaintiff's complete disregard of the rules but also his full awareness of the consequences. He had, at the least, been reckless as to the consequences of his conduct and, on general principles that was enough to establish that the defaults had been intentional and contumelious."

(11) Therefore, the failure to comply with peremptory orders and/or flagrant disregard of the High Court Rules amounts to contumaciousness.

(12) The next question is what constitutes **"inexcusable or inordinate delay and prejudice".**

In **Owen Clive Potter v Turtle Airways LTD**, Civil Appeal No, 49/1992, the Court of Appeal held,

"(Inordinate)....means so long that proper justice may not be able to be done between the parties. When it is analysed, it seems to mean that the delay has made it more likely than not that the hearing

and/or the result will be so unfair vis a vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties."

And at page 4, their Lordships stated:

"Inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It simply allows the Judge to put into the scales the Plaintiff's conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him opportunity from pursing his action or perhaps any action against the defendant."

In **Tabeta v Hetherigton** (1983) The Times, 15-12-1983, the court observed;

"Inordinate delay means a delay which is materially longer that the time which is usually regarded by the courts and the profession as an acceptable period."

(13) The Court of Appeal, in **"New India Assurance Company Ltd, V Rajesh k. Singhand Anor, Civil Appeal No, ABU 0031/1996,** defined the term "prejudice" as follows,

"Prejudice can be of two kinds. It can be either specific that is arising from particular event that may or may not occur during the relevant period or general, and prejudice that is implied from the extent of delay."

(14) Lord "Woolf" in **"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,** has discussed the principles for striking out for **"Abuse of process" (Second ground in Order 25, rule 9) as follows,**

"This conduct on the part of the appellant constituted an abuse of process. 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".*

(15) The Court of Appeal in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006** affirmed the principle of **Grovit –v- Doctor** as ground for striking out a claim, in addition to, and independent of principles set out in **Brikett v James** (see paragraph 16 of the judgment). Their Lordships held:-

"It may be helpful to add a rider. 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"*

(16) **It seems to me perfectly plain that under "Grovit and Others v Doctor and Others" (*supra*) there is no need to show prejudice any more for it says that maintaining proceedings without a serious intention to progress them may amount to "abuse of process" which justifies for want of prosecution without having to show prejudice.**

(F) ANALYSIS

(1) Before I pass to consideration of substantive submissions, let me record that Counsel for the Plaintiff and the Defendant in their written submissions have done a fairly exhaustive study of the judicial decisions and other authorities which they considered to be applicable. I interpose to mention that I have given my mind to the oral

submissions made by the parties as well as to the written submissions and the judicial authorities referred to therein.

(2) At the oral hearing of the matter, Counsel for the Plaintiff and the Defendant sought to read and rely on the following Affidavits;

- Affidavit of Akesh Sharma sworn on 15th January 2016.
- Affidavit in response of Victor Augustine Wilson sworn on 28th March 2016.
- Affidavit of Akesh Sharma sworn on 02nd May 2016.

(3) At the hearing in this Court, Counsel for the Defendant objected to the Affidavit in Response of Victor Augustine Wilson sworn on 28th March 2016 on the following grounds; (I focus on paragraph 4.2 of his written submissions).

Para 4.2 *Before proceeding any further with out submissions, we submit that the Affidavit of in Response of Victor Augustine Wilson sworn on 28th March, 2016 is defective and otherwise factually incorrect/false which is tantamount to being misleading for the following reasons:-*

[a] *At paragraph 3 of the said affidavit the deponent had erroneously averred that the Plaintiff's List of Documents was filed on 24th September, 2008. Instead the Defendant's List of Documents was filed on 16th December, 2008, while the Plaintiff's List of Documents was filed ten months later on 2nd October, 2009. (See Annexure AS-3 of Akesh's Affidavit sworn on 2nd May 2016). Accordingly, the timeline provided by the Plaintiff in his Affidavit is false and misleading.*

[b] *At paragraph 4(i), (ii), (iii) and 8 of the said affidavit – this Honourable Court would note the use of words "his", "him" and "we" when giving evidence about himself. This is in direct contravention of Order 41 rule 1 of the high Court Rules. It appears that these statements were deposed by someone other than the deponent.*

[c] *The deponent has not compiled with Order 41 rule 5 of the High Court Rules by failing to provide the sources of his information and belief for the matters deposed in paragraph 7 of the said affidavit. This application is interlocutory in nature and covers contentious issues. Thus the Rules of the Court mandates that such affidavit ought to contain the deponent's source of information and belief. The deponent does not state when, where and who advised him of his mother's discussions and dealing with the Solicitor.*

(4) As against this, I heard no word said on behalf of the Plaintiff. Ms Nayacalevu, Counsel for the Plaintiff did not argue on this point.

I closely read the Affidavit in Response of 'Victor Augustine Wilson', the Plaintiff, sworn on 28th March 2016.

(5) For the sake of completeness, the paragraph 3, 4 (i), (ii), (iii) and 7 is reproduced below in full.

Para 3. *THAT as to paragraph 4 of the Affidavit of Akesh Sharma, I agree with the contents therein and further provide the timeline on this matter as follows after my new Counsels conducted a search of the court file for this matter –*

i. *Writ and Statement of Claim filed on the 23rd of May 2006;*
ii. *Statement of Defence filed on the 17th of August 2006;*
iii. *Summons for Interim payment filed on the 2nd of November 2006;*
iv. *Affidavit of Victor Augustine in Support filed on the 2nd of November 2006;*
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vi. *Notice of Motion for leave to amend Statement of Claim filed on 30th April 2007;*
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xi. *Summons for Directions filed on 12th August 2008;*
xii. ***Affidavit Verifying List of documents for the Plaintiff filed on 24th September 2008;***
xiii. *Affidavit Verifying List of documents for the Defendant*
xiv. *Draft Pre-Trial Conference Minutes sent to the Defendant's Counsel on the 26th of April 2010.*

4. *THAT as to paragraph 5 of the Affidavit of Akesh Sharma, I agree with the contents therein. Furthermore, I states as follows -*

i. *On the 6th of July 2004, I was employed by the Defendant and working at its premises at Vatukoula mine as a Jumbo off sider, **whose** task was to clear the rocks by using a bar on the area and to install the Rock Bolt onto the machine known as the Jumbo Boom slot.*

ii. *Whilst underground at the work place being the Prince Incline, Cayser shaft, I was installing the rock bolt onto the*

*Jumbo Boom slot when a substantial rock dislodged and landed on **his** head and neck causing him to be very seriously injured.*

iii. *As a result of the aforesaid, the Plaintiff received very serious head injuries which have adversely affected **his** ability to think and or behave properly and logically.*

7. i. *THAT as to paragraph 8 of the Affidavit of Akesh Sharma, I am also desirous for this Honourable Court to make a decision on my Writ of Summons, as to the damages that I had suffered as a result of the negligence of the Defendant. To my knowledge, my former Counsel, Mr. Kafoa Muaror has always done his best to push my matter forward and thus my matter was left in his capable hands as I focused on healing and rehabilitation. My mum would on my behalf follow up with Mr. Muaror that he was taking care and attending to my matter. The last face to face communication that my mum had with Mr. Muaror in late 2014 at his home, my mum was advised by Mr. Muaror that he was looking after my matter and we had nothing to worry about.*

ii. *When my mum approached Ms. Laurel Vaurasi in the later part of 2015 about my matter as she at one time was working with Mr. Muaror on my matter, **my mum was advised** that Muaror & Associates had gone into receivership in 2012 and that my mum needed to contact the Legal Practitioners Unit to verify this. In the latter part of January 2016, when I personally attended to Mr. Muaror's home, **I was advised** that my former Counsel was no longer practicing law and was overseas. Prior to this, we had the understanding that my matter was being pushed along by Mr. Muaror only for me to be served in school with a Noah by the Judiciary staff that my matter was before the Court in Lautoka for a Striking Out Application by the Defendant.*

iii. *That I then approached Ms. Laurel Vaurasi of Shekinah Law on Tuesday, 22nd March 2016, who was in carriage of my matter when she was at Muaror Law to help me with my matter as certain directions had been given by the Court on 14th March 2016. My understanding is that my new Counsels filed their Notice of Appointment of Solicitors on Wednesday, 23rd March 2016 and a search was conducted on the court file which has given my new Counsel a brief overview of the directions of the Court and to photocopy the necessary Court documents.*

(6) Upon perusal of the Court Record, it is observed that the Defendant's List of Documents were filed on 16th December 2008 and the Plaintiff's List of Documents was filed on ten months later, i.e. 02nd October 2009. Thus, the timeline provided by the Plaintiff in paragraph (3) of his Affidavit is incorrect.

(7) Upon perusal of Paragraph 4(i), (ii) and (iii) of the Plaintiff's Affidavit in Response, it is observed that the deponent has used the words **"his", "him" and "we".** Therefore, it is perfectly clear to me that the Statements in para 4 (i), (ii) and (iii) were deposed by someone other than the deponent. The Affidavit should contain only the Statements of the deponent. Thus, I expunge paragraph 4(i), (ii) and (iii) of the Affidavit.

(8) Upon perusal of paragraph 7 (ii) of the Plaintiff's Affidavit in Answer, it is also observed that the deponent has blithely used the expression " *my mum was advised that Muaror & Associates had gone into receivership in 2012"* and *"when I personally attended to Muaror's home, I was advised that my former Counsel was no longer practicing law and was overseas"* without disclosing or identifying the source of his information. This is in breach of Order 41, rule 5 (2) of the High Court Rules. Thus, I expunge paragraph 7 (ii) of the Plaintiff's Affidavit in Answer.

(9) Now, let me move to consider the substantive application and the submissions.

As I mentioned earlier, on 2nd October 2009, the Plaintiff filed his list of Documents. Thereafter, activity ceased. The action went to sleep for some 06 years. The Plaintiff did absolutely nothing. On 3rd February 2016, the Defendant filed Summons to strike out the Claim. The Plaintiff has taken no formal steps since the Affidavit Verifying List of Documents was filed on 02nd October 2009. The Plaintiff has failed to take the following steps;

- ❖ File a Notice of Intention to proceed under Order 3, rule 4.
- ❖ Respond to the Defendant's Solicitors in regard to the PTC Minutes.
- ❖ Proceed to file Pre-Trial Conference minutes.
- ❖ File Summons to enter action for Trial.

The real point is whether the Plaintiff, having done nothing for a period of over 06 years, i.e. between 02nd October 2009 and 03rd February 2016 (after issuing the Writ) should now be allowed to revive it? An Affidavit is put in on his behalf in which he says; (Reference is made to paragraph 7 (i), (iii) and (8) of the Plaintiff's Affidavit in Response).

Para 7. i. THAT as to paragraph 8 of the Affidavit of Akesh Sharma, I am also desirous for this Honourable Court to make a decision on my Writ of Summons, as to the damages that I had suffered as a result of the negligence of the Defendant. To my knowledge, my former Counsel, Mr. Kafoa Muaror has always done his best to push my matter forward and thus my matter was left in his capable hands as I focused on

healing and rehabilitation. My mum would on my behalf follow up with Mr. Muaror that he was taking care and attending to my matter. The last face to face communication that my mum had with Mr. Muaror in late 2014 at his home, my mum was advised by Mr. Muaror that he was looking after my matter and we had nothing to worry about.

iii. *That I then approached Ms. Laurel Vaurasi of Shekinah Law on Tuesday, 22nd March 2016, who was in carriage of my matter when she was at Muaror Law to help me with my matter as certain directions had been given by the Court on 14th March 2016. My understanding is that my new Counsel filed their Notice of Appointment of Solicitors on Wednesday, 23rd March 2016 and a search was conducted on the court file which has given my new Counsel a brief overview of the directions of the Court and to photocopy the necessary Court documents.*

Para 8. *THAT as to paragraphs 9 and 10 of the Affidavit of Akesh Sharma, I am not aware of the costs factors that have been incurred by the Defendant and put him to strict proof. I believe that my Amended Statement of Claim has a very good prospect of success as we will be able to procure evidence to show that the Defendant Company failed to maintain a system of work and workplace and condition that was conducive to the interests and safety of workers.* ***Throughout the time that I was recovering and rehabilitating from the injuries that I sustained, I was led to believe by my former Counsel through his verbal correspondences that he was diligently conducting my matter in the interest of justice.*** *Though I did not earn much money, I also made efforts to pay my legal bills to my former Counsel as and when I am required to make payments.*

(Emphasis Added)

(10) As I understand the Plaintiff's Affidavit in Answer, the explanation was that his erstwhile Solicitors were at fault and the Plaintiff was continuing to suffer from the physical and mental sequels of the accident.

In deciding whether or not it is proper to strike out, the Court asks itself a number of questions:- First, has there been inordinate delay? Secondly, is the delay nevertheless excusable? And thirdly, has there in consequence been prejudice to the other Party? But these questions are, as it were, posed en route to the final test which overrides everything else and was enunciated by the Master of Rolls in **Allen v Sir Alfred McAlpine & Sons Ltd, (1968) 2. QB 229**, in the words at p.245;

"The principles upon which we go is clear; when the delay is prolonged and inexcusable, and is such as to do grave injustice to

one side or the other or to both, the Court may in its discretion dismiss the action straight away...."

So the overriding consideration always is whether or not justice can be done despite the delay.

(11) As I said earlier, the Plaintiff filed his list of documents on 02nd October 2009. Then the action went to sleep for some 06 years. Between 02nd October 2009 and 03rd February 2016 that is for a period of over 06 years, the Plaintiff did absolutely nothing.

This delay is inordinate. The delay can be explained **but not excused**. So far as the Plaintiff is concerned, **it is explained by the fault of the Solicitor** and the Plaintiff's continued suffer from the physical and mental sequels of the accident; **but I fear not excused.**

I must confess that I remain utterly unimpressed by the Plaintiff's explanations as to why he let his claim sleep for a period of over 06 years. To be more precise, I cannot accept those explanations due to the following reasons;

- The Plaintiff, even in a personal injury case, had to be responsible for the conduct of his Solicitor. Any delay by the Solicitor is not excluded. The litigant is responsible for the solicitor's default. (See, **B.W. Holdings Ltd v Service Engineers Ltd [2011] FJHC 182; HBC 183.2008 (21 March 2011)**. Neither does any alternative remedy, if any the Plaintiff may have against the legal representative, in the event of the action being struck out, is relevant. **Paxton –v- Allisop** [1971] 1WLR 1310. Also, Lord Woolf in **Lownes –v- Babcock Power Ltd.**, (1998) The Times 19th February, 1998, brushed aside a suggestion, where it was submitted :-

  "... the person who suffered because the action was dismissed was not the Plaintiff's solicitor but the Plaintiff personally, therefore it could be said that the Judge was visiting the sins of the Solicitor on the client and should not let the desire to discipline the Solicitor injure the Plaintiff personally. His Lordship was very conscious of the force of that point but it was wrong to give weight to it. The plaintiff, even in a personal injuries case, had to be responsible for the conduct of his Solicitor.

- There is no medical evidence to establish that the Plaintiff was continuing to suffer from the physical and mental squeals of the accident.

- The Plaintiff says that in the later part of 2015 his mother was advised that his former Solicitor's had gone into receivership.

But no steps were taken by the Plaintiff to instruct a new Solicitor until March 2016 when he was served with a Notice under Order 25, rule 9 to dismiss the action for want of prosecution. Why did not he act promptly? Why did not he go to new Solicitors promptly? Why did he wait until he was served with Order 25, rule 9 Notice to appoint new Solicitors?

- ❖ What is the reason for the Plaintiff's failure to file **Notice of Intention to Proceed** under Order 3, rule 4 to terminate the delay?

- ❖ How long would the Plaintiff have laid in abeyance, had it not been for the Defendant's initiative to apply under Order 25, rule 9 to dismiss the action for want of prosecution?

(12) It is incumbent upon the Plaintiff to provide an adequate excuse for such delay. It is not for the Defendant to demonstrate its inexcusability. **I am not by any means satisfied that Counsel for the Plaintiff has succeeded in explaining away her client's inactivity for a period of over 06 years.** It is true that there are attendant circumstances which arouse one's sympathy namely, the inactivity of the Plaintiff's erstwhile Solicitors and the Plaintiff's continued suffer from the physical and mental sequels of the accident.

Stripped off the persuasions of (Ms) Nayacalevu's skilful advocacy (Counsel for the Plaintiff), the proposition is; "*The Plaintiff's erstwhile Solicitor has let time go by; therefore the Plaintiff is ipso facto to be excused for all delay which has occurred.*"

I am not impressed at all. The Plaintiff cannot shield himself behind the erstwhile solicitor's default. The Plaintiff is responsible for the erstwhile solicitor's default. Prejudice owing to inordinate and inexcusable delay which must be imputed to the Plaintiff having being well established in the present case , there appear to be **no grounds** on which the Plaintiff's ability to sue his erstwhile solicitors should have any bearing on the Defendant's entitlement to have the action dismissed . See; **Martin V Turner (1970) 1 ALL. E.R. 256 and Paxton V Allsopp (1971) 3 ALL. E.R. 370.**

It is still the duty of the party to prod his Solicitors into activity. Indeed, I am satisfied that there has been nothing approaching an adequate excuse for the inordinate delay in this case.

(13) This is not a criminal case in which I am called upon to allow my imagination to play upon the facts and find reasonable hypothesis consistent with innocence. A balance of probability is enough. And when the greater probability is that the Plaintiff did not care at all to proceed with his action with expedition after the issue of the Writ, why should this Court hesitate to find accordingly against the Plaintiff ?

It is in the public interest that, once a Writ is issued, the action should be brought to trial as quickly as possible.

The fact of more than 06 years having lapsed since the last proceedings and the Plaintiff's failure to file Notice of Intention to Proceed to terminate the delay tend to show that the Plaintiff had intentionally abandoned the prosecution of the action or there is either the inability to pursue the claim with reasonable diligence and expedition or lack of interest in bringing it to a conclusion.

Inordinate and inexcusable delay in civil litigation caused by default on the part of the Solicitors was totally unacceptable. This case dramatically demonstrated that the manner in which the personal injuries litigation was conducted was not in the interests of the parties, the Courts or Justice. It also showed that it could be extremely damaging to the reputation of the lawyers. The Plaintiff, even in a personal injuries case, had to be responsible for the conduct of his erstwhile Solicitor.

(14) The underlying principle of Civil litigation is that the Court takes no action in it of its own motion but only on the application of one or other of the parties to the litigation, the assumption being that each will be regardful of his own interest and take whatever procedural steps are necessary to advance his cause.

The High Court Rules give to the Plaintiff the initiative in bringing his action for trial. The pace at which it proceeds through the various steps of issue and service of Writ, or pleadings and discovery, order for directions and setting down for trial is in the first instance within his control.

The rules also provide machinery whereby the Plaintiff can compel the Defendant to take promptly those steps preparatory to the trial which call for positive action on his part and provide an effective sanction against unreasonable delay by the Defendant.

It is thus inherent in an adversary system which relies on the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the Defendant, instead of spurring the Plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the Court to dismiss the Plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

Returning back to the case before me, it is the contention of the Plaintiff that the Defendant did not comment on Plaintiff's draft PTC Minutes and the Defendant too sat back and allowed so much time to elapse as to make a fair trial of the action impossible, and now seeks to profit from this by escaping liability to the Plaintiff. This argument does not attract me. To accede to this argument would be an encouragement to the careless and lethargic. It would mean that the Plaintiff can neglect his claim for years without any risk to himself, until a warning shot is fired.

In any event, this is a matter of little consequence because the High Court Rules give to the Plaintiff the initiative in bringing his action on trial.

It would be unrealistic to expect a Defendant in an ordinary action for damages, particularly in accident cases, to take steps to hasten on for trial an action in which the Plaintiff's prospect of success appears at the outset to be good.

(15) The Plaintiff's cause of action, if he has one, arose on 16th September 2004. The Writ was not issued until 23rd May 2006. The Plaintiff waited until the last one year of the three years. The Plaintiff has no legal right to delay for that period. The Plaintiff had made use of the three years allowed by Section 4(1) of the Limitation Act, Cap 35)

(16) It is the totality of the delay from the time of the accident to the time of the application to strike out which matters, and the ultimate question is – has the total delay from the accident down to the application to strike out been such as to make a fair trial of the action between the parties impossible?

In the case before me, the Writ was only issued one year and four months before the limitation period of 03 years ran out. One word more, the accident took place on 16th September 2004. After 01 year and 08 months, the Writ was sprung on the Defendant.

After the Writ was issued, the Plaintiff inexcusably delayed for another 06 years and 04 months.

There is a delay of 12 years from the accident, 01 year and 08 months before issuing the Writ and another 06 years and 04 months after issuing the Writ. At the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened 12 years ago, memories grow dim, witnesses may die or disappear. The claim depends on an investigation of facts which took place nearly 12 years ago. How in the world could the Court find out what really happened 12 years ago?

It is often during the first three or four years that witnesses die or disappear or forget what happened and that records and notes are lost or destroyed. Thus, every year that passes prejudices the fair trial. It would be impossible to have a fair trial after 12 years. The Plaintiff has lasted so long as to turn justice sour.

Therefore the chances of the Court being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard.

Just consider the position of the Plaintiff ! If the claim is allowed to proceed for trial, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the Court as to what happened generally lies. At the trial itself, the lapse of time will tell more heavily against the Plaintiff than against the Defendant. I reiterate that at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened 12 years ago, memories grow dim, witnesses may die or disappear. The claim depends on an investigation of facts which took place nearly 12 years ago. It has long been

recognised that the longer the delay the more difficult it can be for witnesses accurately to remember events that may have occurred years before. Such events may be forgotten, and there may be an increased possibility that a witness may, by virtue of the passage of time, come to believe an event or a happening that in fact did not occur, or did not occur in the manner he or she now believes. It is reasonable to assume that the Plaintiff did not take the steps a police investigator would normally take under the circumstances. Thus, there will be no detailed statements of the witnesses. Witnesses who would otherwise be unable to recall relevant events can frequently do so when they are able to refresh their memory by reading detailed statements that they made shortly after the incident. There is no reason to believe that this would occur in the present case. Then, how in the world could the court do justice to the parties? One word more. The Plaintiff will be further embarrassed, if this case goes to trial, as to the presentation of medical evidence. The medical reports dated back to 2004. The Doctors will probably have no recollection at all of the case; they will have to rely on the reports that they made 12 years ago and oral evidence or cross examination as to the Plaintiff's condition will be extremely difficult. The Doctors, despite their records, would be faced with considerable difficulty in recalling effectively the situation which must form the basis of the assessment of damages. Would that mean the justice of the case?? How in the world could the Court assess the damages? Thus, there is no real possibility of prejudice to the Plaintiff by dismissing the action. The Plaintiff may be better off than if the action is allowed to continue. There can be no injustice in his bearing the consequences of his own fault.

When the trial of the action is prolonged, there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.

The delay in the present case had an effect on the administration of justice by taking up Court time (06 years after issuing the Writ) and putting other cases further back in the queue. That damaged the reputation of Civil Justice. The message to the profession, which should be read and understood, is that the standard of diligence in this case was totally unacceptable. In balancing the prejudice to the Plaintiff against the prejudice to the Defendant, account had to be taken of prejudice to other litigants and the administration of justice generally.

In the present case, the accident took place nearly 12 years ago. Clearly the inexcusable lapse of time for which the Plaintiff is responsible has given rise to a substantial risk that the issue whether the accident occurred in the way alleged by the Plaintiff cannot now be fairly tried. It is impossible to have a fair trial after so long a time. This Court should not wear blinkers. I cannot shut my eyes to the fact that the Defendant too sat back and adapted a 'blame storming' approach. Clearly no Defendant can successfully apply for an action to be dismissed for want of prosecution if he has waived or acquiesced in the delay. However, the mere inaction on the part of the Defendant cannot in my view amount to waiver or acquiescence in the delay in which the Defendant found its application.

In all the circumstances, I think that the delay is so great as to amount to a denial of justice. The condition precedent to the Defendant's right to have the action dismissed is thus fulfilled.

(17) The Plaintiff is not entitled to delay as of right for 12 years from the accident, 01 year and 08 months before issuing the Writ and another 06 years and 04 months after issuing the Writ. He has no such right. The delay is inordinate and inexcusable.

If the Plaintiff is guilty of inordinate and inexcusable delay before issuing the Writ, then it is his duty to proceed with it with expedition after the issue of the Writ. He must comply with all the rules of the Court and do everything that is reasonable to bring the case quickly for trial.

Even a shorter delay after the Writ may in many circumstances be regarded as inordinate and inexcusable, and give a basis for an application to dismiss for want of prosecution. This is a stern measure; but it is within the inherent jurisdiction of the Court. So, in the present case, the delay of 06 years and 04 months after the Writ is inordinate and inexcusable.

It is a serious prejudice to the Defendant to have the action hanging over its head even for that time. On this simple ground, I think this action should be dismissed for want of prosecution.

The two key witnesses for the Defendant are no longer available as one has migrated overseas (with his whereabouts unknown) whilst the other has passed away. (See paragraph 14 and Annexure AS-4 of the Affidavit of Akesh Sharma sworn on 02nd May 2016). Thus, there is a substantial risk of the delay causing serious prejudice to the Defendant. Postponement of a trial until two key defence witnesses had vanished created a substantial risk that justice could not be done.

However, I do not wish to rest the matter there. The prejudice to a Defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a Defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

It would be an intolerable injustice to the Defendant Company and to the Directors and Staff, to have to fight this case 12 years after the accident. They are no doubt suffering at least some apprehension as to what may happen at the trial. It is reasonable to assume that the defendant may well suffer continuing financial stringency and loss each week that goes by through having to set aside funds against its contingent liabilities. Should they continue to have to suffer? The Defendant is entitled to have some peace of mind and to regard the incident as closed. It is the duty of the Court to prevent its process being used to create injustice.

This kind of prejudice is a very real prejudice to a Defendant and when this prejudice is added to the great and prejudicial delay before the Writ then I find it hard to believe that this Court should be powerless to intervene to prevent such a manifest injustice.

In the context of the present case, I am comforted by the rule of law enunciated in the following judicial decision;

> *"Prejudice can be of two kinds. It can either specific, that it is arising from particular events that may or may not have occurred during the relevant period or general, that is prejudice that is implied from the extent of the delay"*; per Hon. Sir Maurice Casey, **New India Assurance Company Ltd v Singh**, (1999) FJCA 69.
>
> *The prejudice will generally be regarded as inherent in substantial delay:* **Green v CGU Insurance Ltd** [2008] NSWCA 148; (2008) 67 ACSR 105 and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

In an era when the need to ensure the efficient use of judicial resources has become increasingly important, delay may also be significant in that regard. **Town & Fencott & Associates Pty Ltd v Eretta Pty Ltd** [1987] FCA 102; (1987) 16 FCR 497, 514, and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

> *"We now turn to consider whether prejudice should be inferred from the extent of the delay. It has long been recognized that the longer the delay the more difficult it can be for witnesses accurately to remember events that may have occurred years before. Such events may be forgotten, and there may be an increased possibility that a witness may, by virtue of the passage of time, come to believe an event or a happening that in fact did not occur, or did not occur in the manner he or she now believes."* per Hon. Sir Maurice Casey, **New India Assurance Company Ltd v Singh**, (1999) FJCA 69.

Lord Denning summed up prejudice in **Biss v. Lambeth, Southwark & Lewisham Health Authority**, [1978] 2 All E.R. 125, as follows:

> *"The prejudice that might be suffered by a defendant as a result of the Plaintiff's delay was not to be found solely in the death or disappearance of witnesses, or their fading memories, or in the destruction of records,* ***but might also be found in the difficulty experienced in conducting his affairs with the prospects of an action hanging indefinitely over his head in the circumstances, by having the action suspended indefinitely over their heads,*** *the defendants have been more than minimally prejudiced by the Plaintiff's inordinate and inexcusable delay and contravention of rules of court as to time since the issue of the Writ, and that, added to the Plaintiff's great and prejudicial delay before the issue of the Writ, justified the court in dismissing the action for want of prosecution."*
>
> (Emphasis Added)

(18) Leave all that aside for a moment! It is not essential that the defendant demonstrates prejudice ***(Grovit v Doctor & Others* [1997] 2 ALL ER 417)**. The Court still has the power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse of process irrespective of whether the classic tests enunciated in ***Birkett v James*** (supra) for dismissal for want of prosecution have been satisfied.

"The circumstances in which abuse of process can arise are varied and the kinds of circumstances in which the court has a duty to exercise its inherent jurisdiction are not limited to fixed categories. The dual principles are well settled. It is a matter of determining on the facts whether the continuation of the present proceedings will be an abuse of process of the court" **(Richardson J in the New Zealand Court of Appeal decision of *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 at page 10).**

The fact of more than six years having lapsed since the last proceedings tends to show that the Plaintiff had intended to abandon his claim or there is either the inability to pursue the Claim with reasonable diligence and expedition or lack of interest in bringing it to a conclusion.

I must stress here that it is an abuse of Court process if actions are commenced or maintained without the intention to pursue them with reasonable diligence and expedition.

Certainly, this case falls within the category of "abuse of process" held in "***Grovit and Others v Doctor and Others"*** (*supra*). As earlier mentioned, it seems to me perfectly plain that under "***Grovit and Others v Doctor and Others***" (*supra*) there is no need to show prejudice any more for it says that maintaining proceedings without a serious intention to progress them may amount to "abuse of process" which justifies for want of prosecution without having to show prejudice. I echo the words of Lord "Woolf" " in "***Grovit and Others v Doctor and Others***" (*supra*)

> *"This conduct on the part of the appellant constituted an abuse of process. 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*

(G) CONCLUSION

Having regard to the facts of this case, I apply the legal principles laid down in the case of **Grovit and Others v Doctor and others** (*Supra*). Accordingly, I conclude that the Plaintiff maintained the action in existence notwithstanding that he had no interest in bringing it to a conclusion.

This conduct on the part of the Plaintiff constituted an abuse of process of the court. In these circumstances, I am driven to the conclusion that this is one of those rare cases where the court is obliged to strike out the proceedings in order to prevent an abuse of process of the court. I cannot resist in saying that it would be an affront to justice to allow the proceedings to carry any further.

This should be made clear; *the limited resources of this Court will not be used to accommodate sluggish litigation.*

Essentially that is all I have to say !!

(H) FINAL ORDERS

(1) The Plaintiff's action against the Defendant is dismissed for want of prosecution and abuse of process of the Court. **Civil Action No- HBC 139 of 2006 is hereby struck out.**

(2) The Plaintiff to pay costs of $1500.00 (occasioned by this action) to the Defendant within 14 days hereof.

HIGH COURT OF FIJI LAUTOKA

04/11/2016

.....

Jude Nanayakkara
Master.

At Lautoka

04th November 2016.