IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 211 of 1988

BETWEEN : **DOMINION AUTOPARTS AND ACCESSORIES LIMITED** a limited liability company having its registered office at Ba

1st Plaintiff

AND : **RAHMAT ALI** of Namosau, Ba, Businessman.

2nd Plaintiff

AND : **NEW INDIA ASSURANCE COMPANY LIMITED** a limited liability company having its registered address at Level 1, 91 Gordon Street, Suva.

Defendant

Before : Acting Master U.L. Mohamed Azhar

Counsel : Mr. Padarath for the Plaintiff
Mr. Krishneel Patel for the Defendant

Date of Hearing: 9th May 2017

Date of Ruling: 28th August 2017

RULING

(On striking out under Or 25 r 9)

Introduction

01. This is the summons filed by the defendant on 6th of October 2016 pursuant to Order 25 Rule 9, Order 3 Rule 4 (1) of the High Court Rules and the inherent jurisdiction of this court, seeking to strike out and or dismiss plaintiff's action for want of prosecution and abuse of court process. The supporting affidavit is sworn by one Avinesh Chand Rai of the plaintiff company. The summons is based the following grounds:

1. *The 1st and 2nd Plaintiff failed to prosecute the proceedings expeditiously without any real interest in bringing matters to trial; and/or*

2. *The 1st and 2nd Plaintiff had abused the process of the Court; and/or*

3. *The 1st and 2nd Plaintiff had caused prejudice to the Defendant; and/or*

4. *The delay by the 1st and 2nd Plaintiff have created a substantial risk that there will not be a fair trial; and/or*

5. *The 1st and 2nd Plaintiff have maintained and continued to prosecute the action herein when it was struck out.*

6. *That there be an abridgement of service*

02. The plaintiff opposed this summons and filed an affidavit sworn by one 2nd plaintiffs which was replied by the defendant by an affidavit sworn by the same officer of the defendant company. The claim of the plaintiff against the defendant is based on two fire insurance policies. The first one is bearing No 622/31/7865/86 dated 17th March 1986 issued by the defendant company on payment of premium, covering the loss or damages by fire to the amount of $ 60,000.00 on motor spare parts left at the premises of the second plaintiff. The second one is bearing No. 622/21/1447 dated 29th of November 1985 issued by the defendant company on payment of premium, covering premises of the second plaintiff against the loss or damages for sum of $ 95,650.00. The plaintiff stated that, the said premises and the contents therein were damaged by fire on or about the 2nd day of November 1986 and claimed indemnity by the defendant company pursuant to above two policies, to a sum of $ 50,000.00 for the loss caused to the spare parts and to a sum of $ 16,000.00 for the loss caused to the building. Conversely, the defendant, filling the defence, denied the liability and avoided the contract of insurance on material non-disclosure as the contract of insurance is a 'contract of utmost good faith' which means that all parties to the contract are under a strict duty to deal fully and frankly with each other.

03. The long history of this case goes back to 1988 spanning over a period of 29 years. All pre-trail steps were completed though it took unusual long time and the matter was fixed for trial as well. For some reasons which will be explained later, the trial was vacated by mutual and or unilateral applications of the counsels. Finally on 25.08 2016 the counsel for the defendant took 21 days to consider the settlement and the matter was adjourned to 07.10.2016. On the day before the next mention date (i.e. on 06.10.2016) the defendant filed this summons for striking out. Since the steps taken by the parties are material to this ruling, the chronology from the date of filling of the writ to the date of filling this summons for striking is set out in the following paragraph.

Chronology

04. The supporting affidavit filed on behalf of the defendant has an annexure marked as **"ACR 5"** which set out the chronology. The same is cited here with the addition of later dates which are not included in the said **"ACR 5"**. In addition, I have made part of the chronology from 12.02.2014 onwards in bold letters and the reasons would be explained later in this ruling.

DATE	PARTICULARS
31/05/1988	Filing of Writ
23/06/1988	Entry of appearance by G. P Shankar & Co as solicitor for the Defendant
01/07/1988	Statement of defence filed by the defendant
19/01/1989	Summons for directions filed by Sahu Khan & Sahu Khan solicitors for the plaintiffs
24/02/1989	Order in terms for the summons for the directions granted
22/03/1989	Order on summons for directions filed
10/04/1989	Notice to produce filed by Sahu Khan & Sahu Khan
10/04/1989	Copy Pleadings filed by the Plaintiffs solicitors
27/07/1989	Affidavit Verifying List of Documents by Defendant
27/08/1989	Affidavit Verifying List of Documents by Plaintiff
09/08/1993	Summons filed by Plaintiff solicitors to dispense with PTC under Order 34. Affidavit of Rahimat Ali filed in support of the summons
20/08/1993	Affidavit of Service of Sambhu Sivan Reddy
20/08/1993	Sadal J ordered pre-trial conference to be filed by 27/08/1993
18/09/1997	Notice of change of solicitors filed by Krishna & Company for the defendant
05/11/2009	File note by Master Tuilevuka – plaintiffs solicitors have filed a notice of intention to proceed relating to the above matter
09/11/2009	Notice of intention to proceed filed by Plaintiffs solicitors
23/09/2013	Notice of intention to proceed filed by S K Ram for plaintiffs
02/12/2013	Summons to enter action for trial filed by the plaintiff's solicitors. Matter to be called on 12/02/2014
06/02/2014	Affidavit of service in the name of Rajneel Karan Singh filed by S K Ram for service of summons to enter action for trial
12/02/2014	**Before Justice Abeygunaratne.** **Mr Aman Dayal for the Plaintiffs and Mr Ashneel Sudhakar for the defendant.** **Counsels' Submissions – Mr Dayal says PTC minutes to be finalized. Mr Sudhakar says cases prior to 1990 were struck out and shows a letter issued by registry. Therefore a special application should be**

made. Mr Dayal says letter by registry issued on 20/08/2009 has requested to file notice of intention to proceed.
Court orders - Mention 05/03/2014 at 9.30 a.m. – (to finalise PTC minutes and other step.

05/03/2014 Before Justice Abeygunaratne.
Mr Sharma on instruction of S K Ram. Mr Sudhakar for Defendant.
Counsels' Submissions - both counsels move to a mention date before a hearing date is granted.
Court Orders – Mention to 03/04/2014 at 9.30am

03/04/2014 Before Justice Abeygunaratne.
Mr Dayal for SK Ram. Mr Sudhakar for defendant.
Counsels' submissions- Mr Sudhakar says there are documents to be obtained to reconstruct the file. Mr Dayal agrees. Both counsels move for another date.
Court Orders – Mention on 15/05/2014 at 9.30am

15/05/2014 Before Justice Abeygunaratne.
Mr Dayal for the plaintiff. Mr Krishna for the Defendant.
Counsels' submissions - Mr Dayal seeks further time to prepare PTC as Mr Sudhakar is not well.
Court Orders – Mention on 19/09/2014 at 9.30am

01/08/2014 Before Justice Abeygunaratne.
Mr Dayal for the plaintiffs. Mr Sudhakar for Defendant.
Counsels Submissions – Mr Dayal says PTC is drafted and served on the Defendant Moves for a mention date.
Court Orders – Mention on 29/08/14 at 9.30am

29/08/2014 Before Justice Abeygunaratne.
Mr Dayal for the plaintiffs. No appearance for the Defendant.
Counsels' submissions – Mr Dayal seeks 21 days to finalise PTC.
Court Orders – Mention to finalise PTC on 19/09/2014 at 9.30am

19/09/2014 Before Justice Abeygunaratne.
Mr. Dayal for the Plaintiffs, Mr. Krishna for the Defendant.
Counsels' submissions – Mr. Krishna seeks a mention date to consider PTC. Court Orders – Mention to 14/11/2014 at 9.30am

14/11/2014 Before Justice Abeygunaratne.
No appearance for the Plaintiffs. Mr Krishna for the Defendant.
Counsels Submissions – counsel says PTC finalised. Seeks trial date.
Court Orders - Hearing on the 20th and 21st of July 2015 at 10.00am

20/07/2015 Before Justice Abeygunaratne.
No appearance for the Plaintiffs. Mr Sudhakar for the Defendant.
Counsels Submissions – Mr Krishna seeks mention date to explore whether matter could be settled as it's an old matter.

	Court Orders - Hearing vacated, mention on 11/08/2015 at 9.30am PTC minutes filed by SK Ram on 14/11/2014. Amended copy pleadings filed by S K Ram on 13/01/2015
11/08/2015	**Before Justice Abeygunaratne. Mr Jiten Reddy on instructions of S K Ram for the Plaintiffs. Mr Krishna for the Defendant. Counsels Submissions – Mr Reddy says there is a proposal for settlement. Court Orders - Mention to fix hearing date on 26/01/2016 at 9.30am**
26/01/2016	**Before Justice Abeygunaratne. Mr Sharma on instructions of S K Ram for the Plaintiffs. Mr Krishna for the Defendant. Counsels Submissions – Counsels request the matter to be referred to DR for allocation before another judge as I am terminating my contract in June. Court Orders- Refer to DR for allocation before another Judge**
18/05/2016	**Before Justice R.S.S. Sapuvida. Counsels Submissions – counsel for the defendant informs the matter could be settled and seeks further time to inform on the progress of the settlement. Plaintiffs also confirm. Court Orders- Mention on 10/06/2016 at 9.30am**
10/06/2016	**Before Justice R.S.S. Sapuvida. Ms Nair on instructions of S K Ram for the plaintiffs. Mr Nilesh Kumar for the defendant. Counsels' Submissions – Parties are negotiating for the settlement and seek time to finalise settlement. Court Orders- Mention on 13/07/2016 at 9.30am**
13/07/2016	**Before Justice Sapuvida. Mr Vijay Singh on Instructions of S K Ram for the Plaintiffs. Ms Vandhana Swamy for the Defendant. Counsels' submissions – Both counsels seek time to finalise settlement. Court Orders – Mention on 22/08/2006 at 9.30am**
22/08/2016	**Before Justice R.S.S. Sapuvida. Mr Ravneet Charan on instructions of S K Ram for the plaintiffs. Mr Nilesh Kumar for the defendant. Counsels Submissions – Plaintiffs counsels – no response from the defendant for settlement. Counsel for defendant – seeks 21 days for confirmation of settlement. Court Orders: Mention on 07/10/2016 at 9.30am**
06/10/2016	**The defendant filed the summons under Order 25 Rule 9 to strike out plaintiff's action for want of prosecution and abuse of the process of the court.**

07/10/2016 **Before Justice R.S.S. Sapuvida.**
Counsels' submission – Both counsels seek permission from the court to refer the matter before the Master.
Court orders – The matter is for striking out of the Writ of the plaintiff. I refer the matter before the Master to be mentioned on 28.10.2016.

The law

05. The Order 25 rule 9 provides for the jurisdiction of the court to strike out any cause or matter for want of prosecution or as an abuse of process of the court if no step has been taken for six months. The said rule reads;

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

06. The grounds provided in the above rule are firstly, want of prosecution and secondly, abuse of process of the court. This rule was introduced to the High Court Rules for the case management purpose and is effective from 19 September 2005. The main characteristic of this rule is that, the court is conferred with power to act on its own motion in order to agitate the sluggish litigation (**see; *Trade Air Engineering (West) Ltd v Taga [2007] FJCA 9; ABU0062J.2006 (9 March 2007***). Even before the introduction of this rule, the courts in Fiji exercised this power to strike out the cause for want prosecution following the leading English authorities such as ***Allen v. McAlpine*** [1968] 2 QB 299;[1968] 1 All ER 543 and ***Birkett v. James*** [1978] AC 297; [1977] 2 All ER 801. Justice Scott, allowing the striking out of plaintiff's action in ***Hussein v Pacific Forum Line Ltd [2000] Fiji Law Report 24; [2000] 1 FLR 46 (6 March 2000),*** stated that;

> *"The principles governing the exercise of the Court's jurisdiction to strike out for want of prosecution are well settled. The leading English authorities are **Allen v. McAlpine** [1968] 2 QB 299;[1968] 1 All ER 543 and **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801 and these have been followed in Fiji in, for example, **Merit Timber Products Ltd v. NLTB** (FCA Reps 94/609) and **Owen Potter v. Turtle Airways Ltd** (FCA Reps 93/205)".*

07. The Court of Appeal of Fiji in ***Trade Air Engineering (West) Ltd v Taga*** (supra) reiterated that, the new rule (Or 25 r 9) does not confer any additional or wider power to the court except the power to act on its own motion. It was held in that case that;

> *"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".

08. The above decision of the Court of Appeal made it abundantly clear that the principles set out in ***Birkett v. James*** (supra) are still applicable to strike out any cause where no step is taken for six months, despite the introduction of new rule (Or 25 r 9). Lord Diplock, whilst articulating the principles for striking out the actions for want of prosecution and abuse of the court process in ***Birkett v. James*** (supra), explained the emerging trend of English courts in exercising the inherent jurisdiction for want of prosecution. His Lordship held that;

"Although the rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for direction and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution except upon disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.

To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in Reggentin vs Beecholme Bakeries Ltd (Note) [1968] 2 Q.B. 276 (reported in a note to Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229) and Fitzpatrick v Batger & Co Ltd [1967] 1 W.L.R. 706

The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer to as Allen v McAlpine [1968] 2 Q.B. 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to R.S.C, Ord. 25, R. 1 in the current Supreme Court Practice (1976). ***The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party****".*(emphasis added)

09. As Lord Diplock clearly explained in his judgment the above principles were set out in the note to Ord 25 rule 1 of Rules of Supreme Court 1976 which is equivalent to our Order 25 rule 4 coming under the summons for directions. However those principles of prophesy had caused to the development of the new rule such as Order 25 Rule 9. The first limb in the above case is ***the intentional and contumelious default***. Lord Diplock in his wisdom did not leave the first limb unexplained, but, His Lordship gave two examples for that first limb. One is ***disobedience to a peremptory order of the court*** and the other is ***conduct amounting to an abuse of the process of the court.*** Thus the second ground provided in Order 25 Rule 9, which is 'abuse of the process of the court', is a good example for '***the intentional and contumelious default***' as illustrated by Lord Diplock in ***Birkett v. James*** (supra). According to Lord Diplock abuse of the process of the court falls under broad category of '***the intentional and contumelious default***' However, Lord Diplock did not explain what does exactly amount to an abuse of the process of the court.

10. There is a latest judgment by the House of Lords in **"Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417,** where Lord Woolf held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held as follows;

> *"The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings".*

11. The Fiji Court of Appeal in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006** followed the principles of **"Grovit and Others v Doctor and Others"** (supra) and held that;

> *"During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in **Grovit and Ors v Doctor** [1997] 2 ALL ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in **Birkett v James** [1977] 2 ALL ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the*

court was entitled to strike out the action as being an abuse of the process of the Court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the Court"

12. Both the **The Grovit** case and **Thomas (Fiji) Ltd** (supra) which follows the former go on the basis that, *"abuse of the process of the court"* is a ground for striking out, which is independent from what had been articulated by Lord Diplock in ***Birkett v James*** (supra). However, it is my considered view that, this ground of *"abuse of the process of the court"* is part of '***the intentional and contumelious default'*** the first limb expounded by Lord Diplock. The reason being that, this was clearly illustrated by Lord Diplock in ***Birkett v. James*** (supra). For the convenience and easy reference I reproduce the dictum of Lord Diplock which states that; "...***either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court..."*** (Emphasis added). According to Lord Diplock, the abuse of the process of the court falls under broad category of '***the intentional and contumelious default'***. In fact, if a plaintiff commences an action and has no intention to bring it to conclusion it is an abuse of the process of the court. Thus the default of a plaintiff intending not to bring it to conclusion would be intentional and contumelious. Accordingly, it will fall under the first limb of the principles expounded in ***Birkett v. James*** (supra). This view is further supported by the dictum of Lord Justice Parker who held in **Culbert v Stephen Wetwell Co. Ltd,** (1994) PIQR 5 as follows;

"There is however, in my view another aspect of this matter. An action may also be struck out for contumelious conduct, or abuse of the process of the Court or because a fair trial in action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court. In my view however a series of separate inordinate and inexcusable delays in complete disregard of the Rules of the Court and with full awareness of the consequences can also properly be regarded as contumelious conduct or, if not that, to an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice."

13. In any event, the defendant is under no duty to establish the prejudice in order to strike out an action if he can prove the abuse of the process of the court. Suffice to establish plaintiff's inactivity coupled with the complete disregard of the Rules of the Court with the full awareness of the consequences.

14. The second limb of the ***Birkett v. James*** (supra) is (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants. In short inordinate and inexcusable delay and the prejudice which makes the fair trial impossible.

15. Their Lordships the Justices of Fiji Court of Appeal in **New India Assurance Company Ltd v Singh [1999] FJCA 69; Abu0031u.96s (26 November 1999)** unanimously held that, *"We do not consider it either helpful or necessary to analyse what is meant by the words 'inordinate' and 'inexcusable'. They have their ordinary meaning. Whether a delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case"*. However, in **Deo v Fiji Times Ltd [2008] FJCA 63; AAU0054.2007S (3 November 2008)** the Fiji Court of Appeal cited the meaning considered by the court in an unreported case. It was held that;

> *"The meaning of "inordinate and inexcusable delay" was considered by the Court of Appeal in **Owen Clive Potter v Turtle Airways Limited v Anor** Civil Appeal No. 49 of 1992 (unreported) where the Court held that inordinate meant "so long that proper justice may not be able to be done between the parties" and "inexcusable" meant that there was no reasonable excuse for it, so that some blame for the delay attached to the plaintiff".*

16. The Order 25 Rule 9 by its plain meaning empowers the court to strike out any cause either on its own motion or an application by the defendant if no steps taken for six months. The acceptable and or tolerable maximum period for inaction could be six months. The threshold is six months as per the plain language of the rule. It follows that, any period after six months would be inordinate and excusable so long that proper justice may not be able to be done between the parties and no reasonable excuse for it. Therefore, whether a delay can be described as inordinate or inexcusable is a matter of fact which to be determined in the circumstances of each and every case. As established by courts delay of itself, without being shown that the delay is seriously prejudicial to the defendant, is not sufficient to strike out of an action. The Fiji Court of Appeal in **New India Assurance Company Ltd v Singh [1999] FJCA 69; Abu0031u.96s (26 November 1999)** has reaffirmed the burden of the defendant to establish that serious prejudice would be caused to it by the delay. It was held that;

> *"Where principle (2) is relied on, both grounds need to be established before an action is struck out. There must be both delay of the kind described and a risk of an unfair trial or serious prejudice to the defendants. In Department of Transport v Smaller (Transport) Limited [1989] 1 All ER 897 the House of Lords did not accept a submission that the decision in Birkett should be reviewed by holding that where there had been inordinate and inexcusable delay, the action should be struck out, even if there can still be a fair trial of the issues and even if the defendant has suffered no prejudice as a result of the delay. Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ delay will either make a fair trial impossible or prejudice the defendant. He went on to affirm the principle that the burden is on the defendant to establish that serious prejudice would be caused to it by the delay".*

17. In **Pratap v Christian Mission Fellowship [2006] FJCA 41; ABU0093J.2005 (14 July 2006)** the Fiji Court of Appeal cited the dictum of Eichelbaum CJ in Lovie v. Medical Assurance Society Limited [1992] 2 NZLR 244. It was held in that case at page 248 by Eichelbaum CJ that;

> *"The applicant must show that the Plaintiff has been guilty of inordinate delay, that such delay is inexcusable and that it has seriously prejudiced the defendants. Although these considerations are not necessarily exclusive and at the end one must always stand back and have regards to the interests of justice. In this country, ever since NZ Industrial Gases Limited v. Andersons Limited [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."*

18. The above analysis of law on striking out of an action clearly shows that, the courts in Fiji had, before the introduction of Order 25 rule 9 exercised that jurisdiction to strike out following the principles expounded in ***Birkett v. James*** (supra). Even after the introduction of the above rule the same principles apply as confirmed by the superior courts. The ground of '*abuse of the process of the court* advanced by the recent case of ***Grovit v. Doctor*** (supra) too comfortably falls into the first limb of ***Birkett v. James*** as Lord Diplock cited *'the abuse of the process of the court'* as a good example for the first limb expounded by him. The rationale is that, commencing an action without the intention of bringing it to conclusion amounts to an abuse of the process of the court and in turn it is an intentional and contumelious default. 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 be regarded as contumelious conduct or, an abuse of the process of the court under the second limb of Or 25 r 9. On the other hand the inordinate and inexcusable delay together with the prejudice should be established in order to succeed in an application under first limb of Or 25 r 9.

Analysis

19. The defendant company filed the affidavit sworn by Avinesh Chand Rai for the support of the summons for striking out. On perusal of the averments of the said affidavit, it reveals that, the defendant primarily relies on the ground of abuse of the process of the court, whilst supporting other ground of delay and prejudice. The argument of the defendant on the ground of abuse the process is twofold. The first is that the plaintiff continued to prosecute this action when it was actually struck out. To substantiate this argument, the defendant has submitted the documents marked ***"ACR 2"*** to ***"ACR 5"***. The ***"ACR 2"*** is the letter written by the solicitors of the defendant Krishna & Co dated 17.05.2007. This letter had been addressed to the Acting Deputy Registrar of Lautoka High Court seeking confirmation whether this action had been struck out or not. Though the supporting affidavit of Avinesh Chand Rai states that, this confirmation was sought as the deponent was advised by his solicitors that, Justice John Connors and Justice Finnegan – the then sitting judges of Lautoka High Court- had struck out all the cases instituted prior to year 1990, it was not clear from the wording of ***"ACR 2"*** on what basis that said letter was sent to the Acting Deputy Registrar. The said ***"ACR 2"*** is as follows;

17th May 20017

The Acting Deputy Registrar
High Court
Lautoka

Dear Sir,

Re: ***Dominion Auto Parts & Associates Ltd –v- Rahmat Ali***
Lautoka High Court Civil Action o. HBC 211 OF 1998

We refer to the above matter.

Please confirm to us that the matter has been struck out so we can close our file.

Your urgent response in the matter will be highly appreciated.

Yours faithfully,

Krishna & Co

20. The ***"ACR 3"*** is the reply dated 21.05.2007 by Acting Court Officer who signed the said letter on behalf of the Deputy Registrar. The said ***"ACR 3"*** confirmed that this matter was struck out. The said ***"ACR 3"*** is as follows;

21/05/07
Messrs Krishna & Co,
Barristers & Solicitors
Lautoka

Dear Sir,

Re: ***1. HBC 211/88 – DOMINION AUTO PARTS & ASSOCIATES VS RAHMAT ALI***

2. HBC 137 /85 – HUSSEIN MOHAMMED –V- SACHIDA SEGRAN

3. HBC 159/85 – KAMLA WATI VS RAM CHANDRA & LAUTOKA GENERAL

The Civil matters prior to 1990 which were unattended by Counsels were struck out by Justice Connors & Justice Finnigan in year 2003 – 2004.

This includes the above file

Thanking you
Pravin Anand
Acting Court Officer
For Deputy Registrar.

21. The ***"ACR 4"*** is the letter written to the defendant company by its solicitors confirming the striking out of the action and informing the closure of case file. In addition, the defendant submitted that, that the counsel who appeared for the defendant on 12.02.2014 showed the ***"ACR 3"*** to the then Judge of the High Court, Justice Abeygunaratne. The defendant, therefore, submits that, the plaintiff has been maintaining and prosecuting the matter which had already been struck out and it is amounting to abuse of the process of the court.

22. Conversely, the plaintiff submits that, though the defendant claims that the matter had been struck out, there is no formal order by the court to that effect. The solicitors for the plaintiff wrote on 30.08.2006 to the registry seeking for hearing date. The solicitors then followed up by letter dated 20.07.2008. The plaintiff then filed the Notice of intention to proceed on the request of the Registry. In fact there was a letter dated 20.08.2000 issued by the Registry after the direction of the then Master Justice A. Tuilevuka advising the plaintiff to file the Notice of intention to proceed. Thereafter the matter was taken up and continued till the defendant filed this summons for striking out. Basically, the plaintiff reiterates the chronology from sending the letters to the Registry and filling the Notice of intention to proceed till the date of this summons.

23. The main question is whether this matter had already been struck out as claimed by the defendant or not. On perusal of the record, I found that there is a Note attached to this record. It is printed on A4 size paper in the biggest, capital and bold letters as follows; **"ALL CIVIL CASES PRIOR TO 1990 HAS BEEN STRUCK OUT BY JUSTICE CONNORS AND JUSTICE FINNIGAN ON APRIL 26TH 2005 AT HIGH COURT, LAUTOKA"**. However there is no formal order by the court to that effect as claimed by the plaintiff. The defendant submitted that, the judicial notice to be taken in relation to such striking out. Then I found two letters both written by the then solicitors of the plaintiff. One is dated 30.08.2006 seeking to re-list the matter for hearing. Though the defendant's counsel claimed during the hearing that this letter is missing from the record based on the then Master's direction on 18.08.2009, it is found attached on the front side of the record. The other is dated 20.07.2009. There seems no action had been taken on the first letter sent by the solicitors for the plaintiff. After the second letter dated 20.07.2009, the clerk made a file note to the then Master Justice A. Tuilevuka and the master had given the directions. The same note and the directions are as follows;

Clerks notes and letters to registry

1) *Letter dated 30/08/2016 from Sahu Khan and Sahu Khan to DR asking matter to be listed for next call to obtain hearing date*

2) *Note attached in file – "All civil cases prior to 1990 has been struck out by Justice Connors and Justice Finnegan on April 26th 2005 at High Court Lautoka*

3) *Letter dated 20/07/2009 from Sahu Khan to DR asking for matter to be listed to obtain hearing date*

4) *File note by Akanisi Vuetanavanua, Deputy Registrar Lautoka to the Master for the High Court Mr A. Tuilevuka dated 18/08/2009*

Directions

1. *This case should have been struck out as per Justice Connors and Finnegan's orders carried out as April 26th 2005*
2. *Not sure how this one escaped the order*
3. *Counsel are now asking for a date to fix hearing date*
4. *Attached for your perusal are Ms. Sahu Khan and Sahu Khan's letters on the above*
5. *For your directions please*

Response by Master A Tuilevuka

1. *I presume that this case was left out when we sent out our O25 R9 Notices last week*
2. *The registry staff should explain why this was left out then*
3. *I see no record of the letter dated 30.08.06 on the court file*
4. *Had we sent O25 R 9 Notice, then we'd do now is to hear Plaintiffs on why cause or matter should not be struck out*
5. *Certainly, Plaintiffs has been rather dilatory in his carriage of this matter*
6. *I note that Connors and Finnegan J. did strike out all pre-1990 cases on 26/04/05. Yes a mystery indeed how this one escaped the "guillotine"*
7. *In my view, best way to proceed is issue NOAH to both Plaintiffs and Defendant counsel for a mention date in 3 weeks' time*
8. *If Defence Counsels are alert, they will file, no doubt, application under O25 R9.*

PS: Can we have discussion with staff on "stock take" of all files. Vinaka AT 18.08.09

24. The then Master, Justice A. Tuilevuka's direction and or the note makes it clear, among other things, that this case was not struck out by Justice Connors and Justice Finnigan, though a note printed on an A4 size paper as mentioned above, was affixed on this record. Had this matter been struck out, the then Master would not have directed to issue a NOAH on the parties. The directions made by the then Master is judicial direction made after going through the history of the case. Thus this direction and or the notes of the judicial officer will prevail over ***"ACR 3"*** a letter issued by an officer in an acting capacity. The said ***"ACR 3"*** in my view does not stand against the judicial direction issued after careful reading of the record. It is my view that, the said ***"ACR 3"*** would have been issued inadvertently by looking at the note printed on an A4 size paper as aforesaid, without

having full knowledge of what had happened in that case. In addition, the ***"ACR 3"*** is missing from the record and only the defendant has a copy of it. Other important concern regarding the ***"ACR 3"*** is that, it includes another 2 different cases as well, whereas the query by the solicitors for the defendant was only on this matter. For the above reasons I am unable to rely on the said ***"ACR 3"*** and therefore decline to hold that this matter had been struck out as claimed by the defendant's counsel.

25. Even we disregard all the directions and notes of the then Master and hold that, the matter had, already, been struck out as per ***"ACR 3"***; still the defendant cannot succeed in his argument of abuse of the process. The reason is that the defendant's solicitors came to know about this ***"ACR 3"*** in 21.05.2007 as this letter was the reply to the letter written by them. Thereafter, the plaintiff filed notice of intention to proceed and the summons to enter action for trial. When the said summons was served on the defendant, the counsel appeared for the defendant and brought the said ***"ACR 3"*** to the notice of the then presiding judge Justice Abeygunaratne on 12.02.2014. He further stated that a special application should be made. The counsel for the plaintiff then stated that, the Registry issued a letter dated 20.08.2009 requesting to file the notice of intention to proceed. Having heard the submissions of the counsels, the court adjourned the matter for ***finalizing the PTC and other step***. The reason to adjourn for such steps is that there was the summons for direction and court made order in terms of it. The court also mentioned ***"other step"*** as the defence counsel wanted to file a special application on the issue of ***"alleged striking out"*** as per ***"ACR 3"***. The particulars dated 12.02.2014 mentioned under the Chronology above is self-explanatory to this event. According to the chronology, this matter was called for 14 times over a period of 2 years and 8 months from that date (12.02.2014) to the date of filling this summons for striking out (06.10.2016). The defendant never took up any step in that line of ***"alleged striking out"***. The particulars during this period are highlighted in bold letters under the Chronology for the easy reference and to highlight the steps taken by both parties since the plaintiff started to prosecute the matter. Moreover, the solicitor for the defendant unilaterally made following applications in this case during this period. On 03.04.2014 he moved for a mention date in order to reconstruct the file; on 29.08.2014 sought an adjournment to finalize the PTC minutes, even in the absence of the counsel for the plaintiff; on 19.09.2014 he moved for date to consider PTC; on 20.07.2015 sought mention date to explore the settlement stating it is an old matter and the trail was vacated on that application and the matter was adjourned for mention; on 18.05.2016 informed the court that the matter could be settled and sought further time to inform on the progress of the settlement and finally on 22.08.2016, sought 21 days for confirmation of settlement. Those are the unilateral applications made by the solicitors of the defendant. Apart from that, he joined with the solicitor for the plaintiff on several occasions and sought adjournments. The chronology is self-explanatory for this and I avoid repetition of the same. By all these actions and conducts in court, the solicitors for the defendant had forgone the issue of "alleged striking out". His actions speak louder than his words. In addition to that, he had given an expectation not only to the plaintiff but also to the court that, the matter to be settled considering its age and got the trial date too vacated. The

record shows that, the same solicitors have been in record throughout of the case for the defendant. The most improper conduct of the defendant is that of filling of this summons for striking out the action on the 20th day after getting 21 days for the confirmation of settlement. That is to say the counsel for the defendant moved for 21 days on 22.08.2016 for the confirmation of settlement and the matter was adjourned to 07.10.2016. However on 06.10.2016 (the day before next date) the defendant filed this summons to strike out for the abuse of process of the court. It is my view that, it is the conduct of the defendant which could be considered as an abuse of the process of the court. For these reasons, I decide that, the argument of the defendant on the abuse of the process of the court should fail.

26. The second ground of abuse of the process of the court as argued by the defendant's counsel is that, intentional and inordinate delay on part of the plaintiff. The defendant further argues the want of prosecution and prejudice. I think both of these arguments could be dealt with together. The counsel for the defendant rightly pointed out the total delay in this case. There was 4 years delay from 27.08.1989 to 09.08.1993; there was 16 years delay 20.08.1993 to 09.11.2009 and finally there was a 4 years delay from 09.11.2009. However, the defendant never filed any such application for striking out during any of these intervals of delay, though our courts exercised the same jurisdiction to strike out even before the introduction of Order 25 Rule 9. The then Master, Justice A. Tuilevuka's note dated 18.08.2009 too clearly states that, "*If Defence Counsels are alert, they will file, no doubt, application under O25 R9*". The defendant only filed this summons claiming the past delay, when the case has been on motion for 2 years and 8 months and even after accompanying the plaintiff in taking the matter forward during these 2 years and 8 months. The question is whether any defendant can seek striking out of any matter under Order 25 Rule 9 for the past delay when the plaintiff has been prosecuting the matter for a long time after such delay?

27. The condition precedent either for the court to act on its own motion or the defendant to file an application to strike out is the inactivity for six months under the rule. The rule starts with the provision that ***"If no step has been taken in any cause or matter for six months then....."*** The word used in the rule after 'six months' is ***"then"***. Its plain meaning is 'after that, next, afterward and subsequently' etc. it follows that, the application for striking out under this rule should be filed following the inactive period of six months. If not, it will be considered as waiver of such application. Even the court wants to act on its own motion; it should issue the notice following the said six months inactivity. Neither the court can act nor can the defendant file the same after the plaintiff has actually started the prosecution of the matter. This view is further supported by the decision of ***Trade Air Engineering (West) Ltd v Taga [2007] FJCA 9; ABU0062J.2006 (9 March 2007)*** which stated that the purpose of introduction of this rule is to agitate the sluggish litigation. In fact this rule was introduced to clear the stagnated cases and not the cases that were going on and were actually being prosecuted. It is my considered therefore, that if any part intends to file an application under Or 25 r 9 or the court intends to act on its own motion, it should be consecutively done after the inactive period without

interruption. Thus, any defendant should not be allowed to benefit out of the delay which is followed by an actual prosecution. In the instant case, there was a long delay on part of the plaintiff. However, the defendant was sleeping on his right without filing summons for striking out during the period of inactive. This summons, filed on his belated wisdom, cannot give any benefit to him. It is not the question of filling 'Notice of intention to defend' to consider the Court of Appeal decision in ***Singh v Singh [2008] FJCA 27; ABU0044.2006S (8 July 2008)***, which held that the filling of notice of intention to defend buys no immunity from exercising the courts inherent power, rather, the real prosecution by the plaintiff for 2 years and 8 months with the full and complete support of the defendant. For these reasons, I decide that, the defendant has failed to file the application when the plaintiff was inactive and also decide that, this matter was on motion well over the period of 2 years and 8 months. Therefore summons for striking out cannot be filed when the matter is on an actual motion and certainly not when it has been actually being prosecuted for a period of 2 years and 8 months with the full and complete support of the defendant. If this summons is allowed, it would open the floodgate and other defendant may try to benefit from the previous delay when the matter is on motion after such delay. Thus, the second ground of abuse of the process of the court and the want of prosecution advanced by the defendant's counsel too should fail.

28. On the question of prejudice the defendant stated that, they could not reconstruct the file; material documents were missing and the memory of the witnesses would be impaired due to the passage of the time etc. These are the typical issues raised by the insurance companies when it comes to the prejudice. For the reasons mentioned above, there is no necessity to examine this issue of prejudice. However it would be better to deal the same and I cannot do so better than borrowing the dictum of Court of Appeal in a similar case of ***New India Assurance Company Ltd v Singh [1999] FJCA 69; Abu0031u.96s (26 November 1999).*** In that case their Lordship held that;

> *"The appellant has given no evidence of the steps that it took to investigate the fire at the time, and the extent to which, if it all, those investigations were continued after the respondents issued their writ on 10 June 1985. In the absence of any evidence to the contrary, it is reasonable to assume that the appellant took the steps an insurance company would normally take under those circumstances. They would include an assessor investigating the claim and obtaining written statements of evidence from relevant witnesses. The assessor would then prepare a detailed report which, together with those statements, would be submitted to the insurance company for decision. Obviously a decision to decline a claim would not be made without clear evidence in support. All of that evidence should have been carefully recorded. Further, it seems that the police were involved, as is to be expected when there is an allegation of arson. There will be more detail and witnesses' statements on the police file.*
>
> *Similarly with the claim under the policy, presumably the assessors will have considered that claim with care and have prepared material that persuaded the appellant that the claims submitted by the respondents were fraudulently exaggerated. All of this information also will have been carefully recorded, or we*

assume it would have been in the absence of any evidence from the appellant to the contrary.

These steps may well largely overcome the problem caused by the passage of such a long period of time. 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 statement that they made shortly after the event. There is no reason to believe that that would not occur in the present case".

Conclusion

29. For the reasons adumbrated above, I decide that the summons filed by the defendant on 06.10.2016 ought to be dismissed. In addition, the conduct of the defendant, to file this summons after joining with the plaintiff in taking forward the case for a long time of 2 years and 8 months with the hope of settling the same, should punished with cost, to note the denunciation by the court of such improper conduct.

30. In result, the final orders are;

a. The summons filed by the defendant on 06.10.2016 is dismissed

b. The defendant to pay a summarily assessed cost of $ 1,000 to the plaintiff within a month from today and

c. The matter is referred to Deputy Registrar to allocate before a judge for trial as soon as possible.

HIGH COURT OF FIJI
LAUTOKA

U.L. Mohamed Azhar
Acting Master

At Lautoka

28/08/2017