IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

Civil Action No. HBC 68 of 2012

BETWEEN : **AUSFURN FIJI LIMITED** a duly incorporated limited liability company having its registered office at Nadi.

Plaintiff

AND : **THE DIRECTOR OF LANDS**, Government Buildings, Suva.

First Defendant

AND : **ATTORNEY GENERAL,** Attorney-General's Chambers, Suva.

Second Defendant

AND : **MATRIX ENVIRONMENTAL SOLUTIONS LIMITED,**
A duly incorporated limited liability company having its registered office at Nadi.

Third Defendant

AND : **PETER MICHAEL McGAHAN,** a Company Director of Nadi.

Fourth Defendant

Before : Master U.L. Mohamed Azhar

Counsels : Ms. B. Doton for the Plaintiff
Mr. J. Mainavolau for the First and Second Defendants
Mr. Nilesh Kumar for the Third and Fourth Defendants
(On instruction)

Date of Ruling : 10th July 2019

RULING

01. This is the Notice of Motion filed by the plaintiff company on 12.07.2017 pursuant to Order 32 rule 6 of the High Court, which gives discretionary power to the court to set

aside an order made *ex parte*. By the said motion, the plaintiff company sought an order that, the within the action which was taken off the cause list on the 16th day of November 2015 be reinstated and the matter be relisted to the cause list. The motion is supported by an affidavit sworn by Keith Treffers, the director of the plaintiff company.

02. This matter has a long history since it was instituted on 10.04.2012 and I do not see any reason to go through the entire history of the matter. Suffice to say that, the directions were given by the court for the plaintiff to file the supplementary affidavit verifying list of documents and to finalize the Pre-Trial Conference Minutes and thereafter the matter was adjourned to 04.11.2015. The plaintiff was absent and unrepresented on 04.11.2015, and the matter was then adjourned to 16.11.2015 with the notice to the plaintiff. On 16.11.2015 the neither the plaintiff nor its solicitor appeared and the matter was taken off the cause list. The plaintiff on 25.11.2015 (within 9 days) filed an application supported by an affidavit sworn by the law clerk seeking to reinstate the matter back to the cause list. The then Master rejected the supporting affidavit sworn by the law clerk and dismissed the said application. The plaintiff company then sought the leave to appeal against the said ruling, however failed in its attempt as the judge refused the leave to appeal. The plaintiff company thereafter renewed the application before this court by the instant motion which is now supported by an affidavit of its director.

03. The first and second defendants did not object to this motion of the plaintiff. However, the third and fourth defendants opposed the motion and filed their affidavit in opposition sworn by a director of the third defendant company. The said affidavit simply attached two rulings of the then Master dismissing first application and the ruling of the judge who refused the leave to appeal, and also relied on the affidavits filed in respect of the first application. The plaintiff chose not to file any affidavit in reply, and both counsels for the parties moved the court to dispose this matter by way of their written submissions.

04. The main contention put forward on behalf of the third and fourth defendants was that, this court was *functus officio* and did not have jurisdiction to hear the second or the renewed application as the first application was dismissed and leave to appeal too was refused. The counsel for the third and fourth defendant further submitted that, the present application to reinstate has been determined by two levels of the High Court and is therefore as abuse of court process. Seemingly, the third and fourth defendants rely on the doctrine of *res judicata* and abuse of process.

05. Conversely, it was submitted on behalf of the plaintiff that, the court did not decide the first application on merits, but dismissed it on the ground that there was no valid affidavit supporting the motion. It was further submitted that, the court in the first application did not consider the facts that led absence of the plaintiff and its solicitors on the said two

consecutive 'mention dates'. Therefore, it was argued that, the plaintiff is not barred from bringing the second application. Accordingly, there are two issues to be determined by this court. The first is whether the doctrine of *res judicata* applies and this court is *functus officio* since the counsel for the third and fourth defendants claims that, application to reinstate has been determined by two levels of the High Court or this court has jurisdiction to hear the renewed motion for reinstatement? The second is whether the court should be strict to the order made on 16.11.2015 taking the matter out of the cause list or reverse it?

06. Briefly, the rule of estoppel by *res judicata* is that, where final judicial decision has been pronounced by a competent court or tribunal over the parties to, or subject matter of the litigation, any person is estopped in any subsequent litigation to dispute the question of such decision on the merits. The term *Res Judicata* is Latin term which means "a matter adjudged"; "a thing judicially acted upon or decided"; "a matter or thing settled by judgment" etc. The full Latin maxim reads as "***Res judicata pro veritate accipitur***" which means *'a thing adjudged must be taken for truth'* and over a period of time it shrunk to mere *"Res Judicata"*. This doctrine is based on two Latin maxims. The first one is ***"Nemo bebet big vexam pro una et eadem causa"*** and it means that ***"No one ought to be twice vexed for one and the same cause".*** The second one is ***"Interest rei publicae ut sit finis litium,"*** and it means that ***"it is for common good that there be an end to litigation".*** The effect of this doctrine is that, it stops a party from later controverting any issue or question that had already been decided by a court and also prevents a party from obtaining same relief for the second time from the same party. A passage considered being the best known or most authoritative on this doctrine is found in the judgment of **Sir James Wigram VC** in **Hendersen v. Hendersen (1843) Hare 100**. It was held at page 115 as follows;

> *"In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

07. The above authority sets a general rule that, the courts require the litigants to bring forward the entire case for adjudication. This requirement is not limited to issues or the points upon which the courts may form their opinion and pronounce the judgement, but it extends to each and every point which properly belonged to the subject of the litigation, and which the litigants exercising reasonable diligence and care might have brought forward at the time of adjudication. It is expected from a litigant to bring all the issues that a litigant exercising reasonable diligence and care might have brought. Thus it involves the application of an objective test in which the conduct of the litigant is compared to that of a reasonable person under similar circumstances. The rationale is that all the aspects of a matter will be finally decided by a court of law and in that sense it is based on the public policy that litigation should not drag on forever and the defendant should be protected from the successive oppressions by the multiple suits. This proposition was upheld by the English Court of Appeal in **Barrow v. Bankside Agency Ltd**.[1996] 1 All ER 981. **Lord Justice Sir Thomas Bingham MR** with whom **Peter Gibson** and **Saville L JJ** agreeing held at page 983 that;

> *"The rule in Hendersen v Hendersen (1843) 3 Hare 100, [1843-60] All ER Rep 378 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.*

08. The examination of the successive decisions after **Hendersen v. Hendersen** (supra) reveals that, the courts have gone to the extent to declare any such new issues, which the litigants could have put forward for decision on the first occasion but failed to raise, being brought, as an abuse of the process of the court. There is plethora of cases which is evident to that proposition and of which below are some which reflect the trend of the English court after the rule in **Hendersen v. Hendersen** (supra).

09. **Somervell LJ** in **Greenhalgh v Mallard** [1947] 2 ALL ER 255 at 257) held that;

> *'issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them'*

10. In **Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd** a claimant who had unsuccessfully sued a bank on one ground brought a further action against the same bank and another party on a different ground shortly thereafter. Giving the advice of the Judicial Committee of the Privy Council, Lord Kilbrandon said (See [1975] AC 581 at 589 – 590, [1975] 2 WLR 690 at 696.):

> *"The second question depends on the application of a doctrine of estoppel, namely res judicata. Their Lordships agree with the view expressed by McMulin J, that the true doctrine in its narrower sense cannot be discerned in the present series of action, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings."* (Emphasis added)

11. However, the recent cases on this area have shown that the English courts have diverged from the earlier view of abuse of process and turned to distinguish between the *Res Judicata* and abuse of process not qualifying a *Res Judicata*. Reference need not be made to all of them except citing the following case **Bradford & Bingley Building Society v Seddon (Hancock and ors, t/a Hancocks (a firm), third parties)** [1999] 4 ALL ER 217, [1999] 1 WLR 1482 which was decided by the Court of Appeal. **Auld LJ** with whom **Nourse** and **Ward LJJ** agreeing, said:

> *'In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the court's subsequent application of the above dictum. The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in "special cases" or special circumstances'. See Thoday v Thoday [1964] 1 ALL ER 341 at 352, [1964] P 181 at 197 – 198 per Diplock LJ and Arnold v National Westminster Bank plc[1991] 3 ALL ER 41, [1991] 2 AC 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter. Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because of the parties or the issue are different) for example where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to*

permit the later one to continue" (See: [1999] 4 ALL ER 217 at 225, [1999] 1 WLR 1482 at 149.)

Auld LJ continued:

"In my judgment, mere "re-litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim, which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose. As Kerr LJ and Sir David Cairns emphasized in Bragg's case [1982] 2 Lloyd's Rep 132 at 137 and 138 – 139 respectively, the court should not attempt to define or categorize fully what may amount to an abuse of process; see also per Stuart Smith LJ in Ashmore v British Coal Corp [1990] 2 ALL ER 981 at 988, [1990] 2 QB 338 at 352. Bingham MR underlined this in Barrow v Bankside Members Agency Ltd [1996] 1 ALL ER 981 at 986, [1996] 1 WLR 257 at 263, stating that the doctrine should not be "circumscribed by unnecessary restrictive rules" since its purpose was the prevention of abuse and it should not endanger the maintenance of genuine claims; see also [1996] 1 ALL ER 981 at 989, [1966] 1 WLR 257 at 266 per Saville LJ. Some additional element is required, such as a collateral attack on a previous decision (see e.g. Hunter v Chief of Constable of West Midlands [1981] 3 ALL ER 727, [1982] AC 529, Bragg's case [1982] 2 Lloyd's Rep 132 at 137 and 139 per Kerr LJ and Sir David Cairns respectively and Ashmore v British Coal Corp) some dishonesty (see eg Bragg's case at 139 per Stephenson LJ and Morris v Wentworth Stanley [1999] 2 WLR 470 at 480 and 481 per Potter LJ) or successive actions amounting to unjust harassment (see e.g. Manson v Vooght [1999] BPIR 376") (S.ee [1999] 4 ALL ER 217 at 227 – 228, [1999] 1 WLR 1482 at 1492.)

12. Having extensively considered the path on which the rule in **Henderson v. Henderson** (supra) passed through over period of time, the House of Lords had an opportunity in **Johnson v. Gore Wood & Co (a firm)** [2001] 1 All ER 481 to discuss a plethora of cases on the subject matter. In that case the House of Lords re-stated the rule in **Henderson v. Henderson** and held that:

"what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V C made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that

there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis or efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party. It is however; wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether , on given facts, abuse is to be found or not. Thus while I would accept that lack of funds, would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice".

13. It seems that, the House of Lord has encouraged a very balanced view for the courts to adopt when applying the doctrine of Res Judicata set out in ***Henderson.*** Thus, bringing of a claim or the raising of a defence in later proceedings may amount to abuse if the court is satisfied that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. However, it is necessary to identify additional element such as collateral attack on a previous decision or some dishonesty, before abuse may be found, Where those elements are present the later proceedings will, obviously, be much more

abusive. Moreover, there will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party. It always better for the court to ask whether, in all circumstances of the case, the conduct of a party is an abuse and if it is so, then to ask whether such abuse is excused or justified by special circumstances or not. The overriding factor, however, should be the interest of justice. The Court of Appeal in **Barrow v. Bankside Members Agency and another** [1996] 1 All ER 981 held at page 989 that:

> *"The object of the rule of res judicata was said by Lord Blackburn in Lockyer v Ferryman (1872) 2 App Cases 519 at 530 to be put on two grounds – the one public policy, that it is in the interest of the state that there should be an end to litigation, and the other, the hardship on the individual that he should be vexed twice for the same cause. Thus, as Somervell LJ stated in Greenhalgh v Mallard [1947] 2 ALL ER 255 AT 257, the principle covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. In Brisbane City Council v A-g for Queensland [1978] ALL ER 30 at 36, [1979] AC 411 at 425 Lord Wilberforce described 'abuse of process' as the true basis of the doctrine, a description approved by Lord Keith in the House of Lords in Arnold Westminster Bank plc [1991] 3 ALL ER 41 at 48, [1991] 2 AC 93 at 107. What this and other cases have emphasized, of course, is that the rule does not apply to all circumstances. As Lord Keith observed in Arnold [1991] 3 ALL ER 41 at 50, [1991] 2 AC 93 at 109, one of the purposes of estoppel being to work justice between the parties, it is open to the courts to recognize that in special circumstances inflexible application of it may have the opposite result. The existence of special circumstances excluding the application of the rule was, of course, recognized by Wigram V-C himself in the passage I have quoted".*

14. Later in 2003, Lord Justice Clarke in **Dexter Ltd v. Vieland Boddy** [2003] EWCA Civ 14 having examined the authorities from **Henderson** to **Johnson v Gore Wood & Co** summarized in a very simple and classic way the principles that derived from those authorities. This manifestly demonstrates that, the rule in **Henderson** since its express adoption till **Johnson v Gore Wood & Co** has been developed to what is now referred to as an *'Extended Doctrine of Res Judicata'* by the broad merit based approach of the English court, which intended to protect the interest of justice. Lord Justice Clarke said in para 49 and 50 that:

"The principles to be derived from the authorities, of which by far the most important is ***Johnson v Gore Wood & Co*** *[2002] 2 AC 1, can be summarized as follows:*

i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.

ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.

iii) The burden of establishing abuse of process is on B or C or as the case may be

iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive

v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process

vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C

Proposition ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B,C , D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others".

15. On the other hand, **Port of Melbourne Authority –v- Anshun Proprietary Limited** [1981] HCA 45; [1981] 147 CLR 589 is the most celebrated case decided by the High Court of Australia, which analyzed the rule in ***Henderson***. Whilst affirming the rule in ***Henderson,*** the High Court of Australia has extended it to the *'reasonableness'*. Since pronouncement of this judgment by the High Court, this doctrine is now known as "*Anshun Estoppel"* in Australia. It was held in that case that:

"In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of

circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings e.g. expense, importance of the particular issue, motives extraneous to the actual litigation to mention but a few. See the illustrations given in Cromwell v County of Sac. (1876) 94 US (24 Law Ed, at p 199) (at p603)

It has generally been accepted that a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment. In this respect the discussion in Brewer v Brewer [1953] HCA 19; (1953) 88 CLR 1 is illuminating. (at p603)".

16. This modern extended doctrine was briefly explained by ***Spencer, Bower, Turner and Handley*** in ***'The Doctrine of Res judicata***, (3rd edition) ***1996,*** after analyzing all the cases from **Hendersen -v- Hendersen** *(per, Wigram VC),* **Greenhalgh -v- Mallard** [1974] 2 ALLER 255 *(per Somervelle),* to **Port of Melbourne Authority -v- Anshu Proprietary Limited** *(per Gibbs CJ, Mason and Aickin JJ).* It reads that:

"In 1843 Wigram VC referred in Henderson to "points which properly belonged to the subject matter of litigation in earlier proceedings". Somervell LJ ('part of the subject matter of the litigation") and the Full Court of Hong Kong ("necessary and proper") echoed this approach in slightly different language. The test of reasonableness in Anshun attempted to work out the underlying principle. It can be seen to be derived from the requirement in Henderson that the point should "properly belong" to the earlier litigation coupled with the concept of vexatious and unreasonable conduct central to the exercise of the court's powers to prevent abuse of its process.

It is therefore suggested that the extended doctrine does not prevent a party bringing forward in later litigation a cause of action not previously adjudicated upon, provided it is not substantially the same as one that has been, unless success in the new proceedings would result in inconsistent judgments".

17. The question may, now, arise as to whether this extended doctrine is applicable in Fiji jurisdiction. The was simply answered by the Fiji Court of Appeal in **Reserve Bank of Fiji –v- Gallagher** Civil Appeal No. ABU 0030, ABU 0031, ABU 0032/2005 (14th July, 2006). Their Lordships Ward P and Baker JA and Henry JA said as follows at paragraph 70 when the counsel referred to many manifestations of applications of the rule in ***Henderson*** :

*"Counsel referred us to many manifestations of applications of the **Henderson** rule. We find it unhelpful to review them all since we are attracted by the non-dogmatic approach in **Johnson v. Gore Woods** and the reasonableness approach in **Anshun"**.*

18. The above analysis suggests that, that the extended doctrine of res judicata does not prevent a party bringing forward in later litigation a cause of action not previously adjudicated upon, provided it is not substantially the same as one that has been, unless success in the new proceedings would result in inconsistent judgments. In the case before me, the court did not consider the merit in the first application made by the plaintiff for reinstatement, as it is evident from the last paragraph of the ruling delivered on 10.06.2016. On the contrary, the main consideration was on the admissibility of the affidavit of the law clerk who sworn the supporting affidavit of the notice of motion for reinstatement. The issue in the application for leave to appeal was the failure of the plaintiff appellant to comply with the Order 59 rule 11 of the High Court, which requires the application for leave to be filed within 14 days from the date of interlocutory ruling. In addition, the judge considered the main issue of admissibility of the affidavit of the law clerk. Thus, the matters relating to the circumstances which led the court to take the matter out of the cause list were never determined in both levels, though the counsel for the third and fourth defendants contented that, plaintiff's application was tested in both levels of the High Court. As such there is no previous ruling on merits of the matter.

19. Further, mere renewal of application for reinstatement by the plaintiff does not necessarily give rise to abuse of process in the circumstances which does not give rise to estoppel by res judicata, as the merit of the application was never tested either by the then Master or by the judge who heard the application for leave to appeal. **Auld LJ** stated in **Bradford & Bingley Building Society v. Seddon (Hancock and ors, t/a Hancocks (a firm), third parties)** that, the maintenance of a second claim, which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. This applies to the instant case too and the second application for reinstatement should not, per se, be regarded as an abuse of process in the absence of some additional element, such as (a) a collateral attack on a previous decision, (b) some dishonesty, and (c) successive actions amounting to unjust harassment.

20. The plaintiff, having failed in getting the leave to appeal the decision of the then Master, filed this second application and sought for reinstatement. There is nothing before the court which indicates that, there is a collateral attack on the previous decision or some dishonestly on part of the plaintiff or the plaintiff intended to harass the defendants by this second application for reinstatement. Since the first application was dismissed on the technical ground, the plaintiff preferred to correct it and re filed it, moving the court to

consider the merit of its application, which was not discussed in the previous application. The second application is the assertion of the constitutional right enshrined in Article 15 (2) of the Constitution, which provides that, every party to a civil dispute has the right to have the mater determined by a court of law. Therefore, I am unable to agree with the argument of the counsel for the third and fourth defendants that, the second application for reinstatement is abuse of process. I also decline the contention of the counsel for the third and fourth defendant that the matter has been tested by two levels of High Court, because, the merit of the application was not tested in both levels.

21. Now I turn to discuss the second issue whether this court should be strict to the order taking off the matter out of the cause list or reverse it. It has been the practice, both in the High Court and in the Magistrate's Court to take the case or matter out of the cause list when the plaintiffs are absent and unrepresented on the consecutive 'mention date'. The case before me is one of such kind and it was ordered on 16.11.2015 to take this matter out of cause list for non-appearance of the plaintiff for two consecutive 'mention dates'. It is necessary to consider the relevant provision that empowers the court to do so, before discussing the reasons adduced by the plaintiff company for such non-appearance. The only rule that allows the court to strike any matter out of the list is Order 35 rule 1 (1) and it reads as follows:

> *If, when the trial of an action is called on, neither party appears, the action may be struck out of the list, without prejudice, however, to the restoration thereof, on the discretion of a judge.*

22. It is the discretion given to the trial judge to strike out an action on the trial date if neither party appears when the matter is called for trial. If one party does not appear, the judge has discretion again to proceed with the trial under rule 1 (2) or may adjourn the matter in his discretion to another date as he thinks fit under Order 35 rule 3. Apart from the above provision under Order 35 rule 1 (1), there is no single rule, to my knowledge, in the High Court rules which gives jurisdiction to the court to take any matter, on a 'mention date', out of the cause list for consecutive non-appearance of the plaintiff or the solicitor on such 'mention dates'. Once a Writ is issued and the action has been instituted the early disposal of such action, before the full investigation at trial, is allowed only in limited circumstances which are specifically provided for, by the rules of the court. Such early and summary intervention of the court may be warranted under Order 13 for default of notice of intention to defend, under Order 14 for summary judgment, under Order 16 (5) for default of the third party, under Order 18 rule 18 for striking out and under Order 19 for default of pleadings etc.

23. Apart from the above circumstances, there are other instances where the court has power to summarily dispose a matter. Those instances could be under Order 24 rule 16 for failure to comply with the requirement for discovery, under Order 25 rule 1 (4) for failure to take out the summons for directions, under Order 25 rule 9 failure to take steps for six months, under Order 26 rule 6 (1) for failure to comply with the order in relation to interrogatories. In case of a matter or cause that begun by Originating Summons, the court may order for dismissal for failure to prosecute proceedings with dispatch under Order 28 rule 11. In addition, the court may summarily dispose a matter when a party fails to comply with the peremptory orders. However, there is no specific provision which allows the court to take any matter out of cause list for non-appearance, though it has been the practice for quit long time. One might say that, this practice has been followed for the purpose of case management. However, it was stressed in **Commerce Commission v. Giltrap City Limited** (1998) 11 PRNZ 573, at 579 that case management principles should not be allowed to undermine the delivery of justice to the parties. Furthermore, having a civil matter determined by a court of law or if appropriate, by an independent and impartial tribunal is one of the fundamental rights guaranteed by Article 15 (2) of the constitution to every party to a civil dispute. Therefore, such right should not be lightly taken out merely for non-appearance in the absence of any specific rule which gives jurisdiction to do so.

24. On the other hand there is serious concern in relation to sluggish conduct of some parties and their solicitors in some civil suits. This includes non-appearance of the solicitors and failure to take steps on time as specified by the rules. Thus, this way of taking matters out of the cause list is sometimes justified in order to combat these issues of delays and failures. It is true that courts' time and resources are limited, and as the Court of Appeal said in **Singh v. Singh** [2008] FJCA 27; ABU0044.2006S (8 July 2008), the more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition, and want their cases to be heard within a reasonable time. However, this issue of delay and failure to take steps could be dealt with by imposing cost under the Order 62 either on the party or its solicitors who caused the adjournment without useful progress being made, or may be dealt with under the Order 25 rule 9 after lapse six months either on application of any party or on the own motion of the court. In fact, the Order 25 rule 9 was introduced to agitate the sluggish litigation. In **Trade Air Engineering (West) Ltd v Taga** [2007] FJCA 9; ABU0062J.2006 (9 March 2007) Court of Appeal said the power under Order 25 rule 9 may, very valuably, be employed to agitate sluggish litigation. The Order 25 rule 9 gives allowance of six months for inaction and furthermore, mere inaction for six months will not automatically allow the court to summarily dispose the matter without hearing the relevant party. The practice of taking a matter out of the cause list might have started before introduction of Order 25 rule 9. However, it cannot be

justified in the presence of an express rule which allows six months of inaction and requires hearing the relevant party. Thus, taking any matter on a 'mention date' for non-appearance of plaintiff is neither provided by, nor consistent with the rules of the court.

25. The question also may arise as to whether the court has an inherent power to take any matter out of the cause list as it happened in this case. The exercise of inherent jurisdiction is a broad doctrine, which allows a court to control its own processes and to control the procedures before it. This jurisdiction does not stem from any particular statute or legislation, but rather from inherent powers invested in a court to control the proceedings brought before it. However, it is settled that, the inherent jurisdiction cannot be exercised so as to conflict with a statute or rule (see: **Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al.**, [1976] 2 SCR 475, 1975 CanLII 164 (SCC) and **Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited**, 1971 CanLII 960 (MB CA), [1971] 4 W.W.R. 542 at p. 546 et seq). Since we have clear rule 9 under Order 25 which tolerates six months of inaction, the court could not have exercised the inherent power.

26. For the above reasons, I am of the view that, the order dated 16.11.2015 to take this matter out of the cause list for non-appearance of the plaintiff or its solicitors, was made *per incuriam*. Lord Greene, M.R. in **Young v. Bristol Aeroplane Co. Ltd.** [1944] 2 All ER 293 held at page 300 that, the Court was not bound to follow a decision of its own if it were satisfied that the decision was given *per incuriam*.

27. The Privy Council when the hearing the appeal from the Supreme Court of Hong Kong in **Rodger v. Comptoir D'Escompte De Paris** (1871) LR 3 PC 465 at 475; [1870-71] VII Moore N.S. 314 observed at page 328 that;

> *One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.*

28. Accordingly, the act of the court in this case should not cause injury to the plaintiff and the order taking the matter out of the cause list on 16.11.2015 should be reversed. Further, it's the fault of the plaintiff that caused delay and expenses to the defendants and they should be compensated. Though the plaintiff has given reason for non-appearance

on two consecutive dates, it must be stressed that, it behooves the solicitor for the plaintiff to ensure that no further and inexcusable delay is caused in this matter and to prosecute the proceedings with dispatch.

29. In result, I make the following orders:

a. The plaintiff's action is reinstated,

b. The plaintiff to pay a summarily assessed cost of $ 1,000 to the third and fourth defendants within 14 days from today,

c. The plaintiff to file the supplementary affidavit verifying list of documents and circulate Draft Pre-Trial Conference Minutes within 14 days from today, and

d. The matter to be mentioned on 01.08.2019.

HIGH COURT OF FIJI
LAUTOKA

U.L. Mohamed Azhar
Master of High Court

At Lautoka
10.07.2019