

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

Civil Action No. HBC 358 of 2023

**BETWEEN:**

**ANIL BHISANIBURG KUMAR and HARISH KEVIN KUMAR**  
**PLAINTIFFS**

**AND:**

**EXOTIC (FIJI) PTE LIMITED**  
**1<sup>ST</sup> DEFENDANT**

**AND:**

**MERCHANT FINANCE PTE LIMITED**  
**2<sup>ND</sup> DEFENDANT**

**BEFORE:**

Acting Master L. K. Wickramasekara

**COUNSELS:**

Benjamin Ram Lawyers for the Plaintiffs  
Proceedings Stayed against the 1<sup>st</sup> Defendant  
Haniff Tuitoga Lawyers for the 2<sup>nd</sup> Defendant

**Date of Hearing:**

By way of written submissions

**Date of Ruling:**

25<sup>th</sup> September 2025

**RULING**

## (COURTS' NOTICE UNDER ORDER 25 RULE 9)

01. The Court has issued a Notice on its own motion on 24/03/2025 pursuant to Order 25 Rule 9 of the High Court Rules 1988 (hereinafter referred to as the Notice) on the Plaintiff, to show cause as to why this matter should not be struck out for want of prosecution or as an abuse of the process of the Court due to the failure of the Plaintiff to take any steps in the matter for over 06 months.
02. The said Notice issued directs the relevant party to give with immediate effect, a Notice of Intention to Proceed under Order 3 Rule 5 and to file within 07 days from the date of service of the Court's Notice, an Affidavit to Show Cause, why the Cause/Pleadings should not be struck out for want of prosecution and/or as an abuse of the process of the Court. The Court's Notice further includes a **peremptory order** therein to the effect that if the party fails to comply with the directions in the said Notice within the date given therein, such failure shall result in the cause/matter being struck out.
03. The aforementioned Notice was duly served on the Plaintiff's solicitors on 26 March 2025, and an Affidavit of Service executed by the Court Sheriff has been duly filed on record. Notwithstanding the due service of said Notice, the Plaintiffs failed to file a Notice of Intention to Proceed in accordance with Order 3 Rule 5 of the High Court Rules, nor did they file an Affidavit to Show Cause pursuant to Order 25 Rule 9 of the High Court Rules. This constitutes a clear breach of the mandatory or peremptory order made therein.
04. Given the evident breach of the peremptory order by the Plaintiffs, as demonstrated on the face of the Notice itself, this matter ought to be struck out without further consideration. However, in the interests of justice, the Court has granted an adjournment to allow the parties to file written submissions, so that the Court may duly consider the matters under Order 25 Rule 9 of the High Court Rules.
05. Moreover, the Court observes that the counsel representing the Plaintiffs, when the matter was first called before the Court on 11 April 2025 pursuant to the Notice, failed to provide any justifiable reasons for the failure to file a Notice of Intention to Proceed and/or the Affidavit to Show Cause as directed by the Notice. Consequently, the Court had no valid basis to grant any extension of time for such filings. The Court then granted both parties 14 days to file their written submissions.
06. The Defendant accordingly filed its written submissions on 24 April 2025, within the fourteen (14) days granted by the Court. The Plaintiffs, however, failed to file their written submissions within the prescribed period of fourteen (14) days. Subsequently, with the leave of the Court, the Plaintiffs filed their written submissions on 8 May 2025. In the interests of fairness, the Court has accepted the Plaintiffs' written submissions despite it being filed out of time.

07. This action was commenced by way of a Writ of Summons and Statement of Claim filed on 30 November 2023. The claim arises from a dispute concerning a mortgaged property belonging to the Plaintiffs. The Statement of Claim alleges that the Plaintiffs consented to and permitted the 1<sup>st</sup> Defendant to mortgage the property registered under Certificate of Title 12803, Lot 12 on DP3113, as a third-party mortgage to the 2<sup>nd</sup> Defendant, for the sum of \$350,000.00 for a period of 60 months.
08. The Statement of Claim further alleges that, on or about 14 August 2020, the 1<sup>st</sup> Defendant restructured its debt with the 2<sup>nd</sup> Defendant, without the Plaintiffs' being informed or having obtained their consent, for a sum of \$1,583,201.52, by utilizing the said third-party mortgaged property. Plaintiffs, therefore, alleges that the 2<sup>nd</sup> Defendant breached its agreement with the Plaintiffs by not duly informing them of the restructuring of the debt.
09. The Plaintiffs accordingly seek an order from the Court restraining the 2<sup>nd</sup> Defendant from disposing off the said property until the final determination of this matter. Additionally, the Plaintiffs seek an order directing the 2<sup>nd</sup> Defendant to discharge the mortgage on the said property, together with damages for any loss or injury suffered.
10. The 2<sup>nd</sup> Defendant in their Statement of Defence had denied any breach of the agreement and has alleged that the restructuring of the said debt was conducted in accordance with the clauses 1, 7, 10, 19, 20 (c), 24 (d) and 25 of the said mortgage agreement.
11. In reply, the Plaintiffs in their Reply to the Statement of Defence of the 2<sup>nd</sup> Defendant had only claimed that *"They neither agree nor disagree with paragraphs 16 and 17 of the Defence. However, they say they understand that they would be liable for the sum of \$350000.00 which has already been paid"*.
12. Upon the pleadings in the matter being closed, the Plaintiffs had filed a Summons for Directions which was first called before this Court on 25/03/2024. On this date, the 1<sup>st</sup> Defendant was not present in Court, and the Plaintiffs had failed to file an Affidavit of Service of the Summons for Directions. As such the Court was not in a position to hear the said Summons and adjourned the matter to another date whilst directing the Plaintiffs to file the Affidavit of Service.
13. The next date the matter was to be mentioned before the Court, the Court had not functioned, and it was then adjourned to 06/06/2024. On this date, it was revealed to the Court that 1<sup>st</sup> Defendant has now being wound-up and not in operation any longer. Court then granted time for the Plaintiffs to make proper application in Court to obtain leave to proceed against the 1<sup>st</sup> Defendant Company pursuant to Sec. 531 of the Companies Act and in failure put the Plaintiffs on notice that a stay order shall be issued over the proceedings against 1<sup>st</sup> Defendant pursuant to the provisions in the Companies Act.

14. However, when the matter was called before the Court on the next date, the Plaintiff had failed to file a proper application as directed by the Court, instead a Summons was filed to remove the 1<sup>st</sup> Defendant from the proceedings. This Summons, however, was withdrawn by the Plaintiff on the same day and accordingly struck out. The Court then granted further time to the Plaintiffs to file proper application in Court, if the Plaintiffs wished to continue the proceedings only against the 2<sup>nd</sup> Defendant.
15. The matter was called before the Court on 23 July 2024. By this date, the Plaintiffs had filed a Summons dated 16 July 2024 seeking to discontinue the proceedings against the 1<sup>st</sup> Defendant and for various other orders. However, this Summons was subsequently withdrawn by the Plaintiffs, along with the Summons for Directions filed on 8/02/2024. The Court then issued a stay order restraining further proceedings against the 1<sup>st</sup> Defendant and directed the Plaintiffs to take the necessary steps to proceed against the 2<sup>nd</sup> Defendant in the proper course.
16. From 23/07/2024 until the Court issued the Notice under Order 25 Rule 9 of the High Court Rules on 24/03/2025, the Plaintiffs failed to take any further steps to proceed the matter as against the 2<sup>nd</sup> Defendant. The period of inaction in these proceedings therefore is 08 months.
17. This long period of inaction on the part of the Plaintiff and/or its solicitors remain unexplained as no Affidavit to Show Cause was filed in breach of a peremptory order made by the Court as stipulated in the Court's Notice pursuant to Order 25 Rule 9.
18. As per the written submissions filed on behalf of the Plaintiff, it is submitted that the Plaintiffs had not been inactive in the proceedings but had filed an application for leave to proceed against the 1<sup>st</sup> Defendant through the Official Receiver, but the Registry had allocated a separate case number for the said application and that matter was heard before a judge of the High Court separately.
19. The Court took judicial notice of file HBC 279/24, in which the Plaintiffs filed a Summons for Leave to Proceed against the 1<sup>st</sup> Defendant. It is evident that the Plaintiffs submitted the said Summons without correctly referencing the current case number, HBC 358/23, leaving the case number field blank. As a result, the Registry allocated a new case number for the Summons, and the matter was placed before a Judge of the High Court for hearing.
20. Despite this anomaly, when the matter of HBC 279/24 was mentioned before the Judge, the Plaintiffs did not file any proper application to have the proceedings consolidated with this case or to have the issue properly rectified. It is therefore apparent to the Court that the Plaintiffs, for reasons not disclosed to the Court, continued to pursue the proceedings relating to the said Summons as a separate case. Under these

circumstances, the Plaintiffs cannot claim that they were not inactive in this matter, given the separate proceedings conducted in HBC 279/24.

21. Furthermore, on 23/07/2024 this Court ordered that this matter to proceed against the 2<sup>nd</sup> Defendant in the normal cause. The Court, accordingly, directed the Plaintiffs to take appropriate steps to advance these proceedings without undue delay. Despite these orders, the Plaintiffs failed to take any substantive steps to progress the matter against the 2<sup>nd</sup> Defendant for a period of eight (8) months, until the Court issued a Notice pursuant to Order 25 Rule 9 of the High Court Rules.
22. Moreover, even after being issued with the Notice under Order 25 Rule 9 of the High Court Rules, the Plaintiffs ignored and/or failed to file any Notice of Intention to Proceed and/or An Affidavit to Show Cause, as directed by the said Notice.
23. In light of the foregoing, I find that the argument asserting that the Plaintiffs had not been inactive in this matter is manifestly misconceived and lacks merit.
24. The Plaintiffs further contend in their written submissions that the Notice was not signed and does not conform with the High Court Rules. However, the Court duly notes that the Notice has been properly issued by the Registry, bearing the Court's stamp and there is no doubt that it is duly issued.
25. Additionally, the argument that the Notice does not conform with the High Court Rules is manifestly misconceived. The Notice was issued pursuant to Order 25 Rule 9 of the High Court Rules, requiring the Plaintiffs to file an Affidavit to Show Cause why the cause or matter should not be struck out for lack of prosecution and/or as an abuse of the Court's process. There is no prescribed timeline within the Rule for the filing of such an Affidavit. Consequently, it is within the Court's inherent discretion to set a timeline as deemed appropriate.
26. The Plaintiffs' reference to the 30 days mentioned in Order 3 Rule 5 is irrelevant in this context, as the demand to file a Notice of Intention to Proceed constitutes an additional direction issued by the Court, in addition to the requirements under Order 25 Rule 9 of the High Court Rules.
27. For the Court to make an order under Order 25 Rule 9, there is no requirement that a Notice under Order 3 Rule 5 be simultaneously filed by the Plaintiffs. Nonetheless, if the Plaintiffs wished to proceed with the matter after a lapse of six (6) months, they would have been required to file such a Notice under Order 3 Rule 5. The Plaintiffs cannot, however, advance the matter without having filed such a Notice after the six-month period of inaction.
28. That said, this does not preclude the Court from acting under Order 25 Rule 9 of the High Court Rules. Moreover, it is pertinent to note that pursuant to Order 3 Rule 4(1),

the Court possesses an absolute discretion to extend or abridge the time within which a party is required or authorized by the High Court Rules, a judgment, order, or direction, to perform any act in any proceedings.

29. Having summarised the background of these proceedings and the arguments advanced by the Plaintiffs in their written submissions and taking into due consideration the written submissions of the Defendants, I will now move on to address the legal provisions under Order 25 Rule 9 of the High Court Rules.
30. Order 25 Rule 9 of the High Court Rules 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 a span of six months. The said rule reads as follows,

**Order 25 Rule 9**

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

31. The grounds provided in the above rule are firstly, want of prosecution and secondly, abuse of process of the Court. This is a rule that was introduced to the High Court Rules for case management purposes and was effective from 19 September 2005.
32. The main characteristic of this rule is that the Court is conferred with power to act on its own motion in order to agitate the unduly lethargic litigation (see; **Trade Air Engineering (West) Ltd v Taga** [2007] FJCA 9; ABU0062J.2006 (9 March 2007). Well before the introduction of this rule, the Courts in Fiji have exercised this power to strike out the cause for want of prosecution following the leading English authorities such as **Allen v. McAlpine** [1968] 2 QB 299; [1968] 1 All ER 543 and **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801. Justice Scott, striking out the Plaintiff's action in **Hussein v Pacific Forum Line Ltd** [2000] Fiji Law Report 24; [2000] 1 FLR 46 (6 March 2000), stated that,  
  
*The principles governing the exercise of the Court's jurisdiction to strike out for want of prosecution are well settled. The leading English authorities are **Allen v. McAlpine** [1968] 2 QB 299; [1968] 1 All ER 543 and **Birkett v. James** [1978] AC 297; [1977] 2 All ER 801 and these have been followed in Fiji in, for example, **Merit Timber Products Ltd v. NLTB** (FCA Repts 94/609) and **Owen Potter v. Turtle Airways Ltd** (FCA Repts 93/205).*
33. The Court of Appeal of Fiji in **Trade Air Engineering (West) Ltd v Taga** (supra) held,

*In our view the only fresh power given to the High Court under Order 25 rule 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation, it does not in our opinion confer any additional or wider jurisdiction on the Court to dismiss or strike out on grounds which differ from those already established by past authority.*

34. Pursuant to the above decision of the Court of Appeal, it is clear that the principles set out in *Birkett v. James* (supra) are still applicable to strike out any cause where no step is taken for six months, despite the introduction of a new rule (Or 25 r 9). Lord Diplock, in *Birkett v. James* (supra), explained the emerging trend of English courts in exercising the inherent jurisdiction for want of prosecution. His Lordship held that,

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

*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)

35. The first limb in the above case is *the intentional and contumelious default*. Lord Diplock gave two examples for that first limb in the above judgment. One is *disobedience to a peremptory order of the Court*, and the other is *conduct amounting to an abuse of the process of the Court*. Thus, the second ground provided in Order 25 Rule 9, which is ‘abuse of the process of the Court’, is a good example for ‘*the intentional and contumelious default*’ as illustrated by Lord Diplock in *Birkett v. James* (supra). According to Lord Diplock abuse of the process of the Court falls under broad category of ‘*the intentional and contumelious default.*’
36. House of Lords in *Grovit and Others v Doctor and Others* (1997) 01 WLR 640, 1997 (2) ALL ER, 417, held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held as follows,

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

37. 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.

38. Master Azhar (as His Lordship then was), in the case of **Amrith Prakash v Mohammed Hassan & Director of Lands; HBC 25/15: Ruling (04 September 2017)** has held,

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

*"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.*

39. Pursuant to the first limb of the test formulated in *Birkett v James* (supra) it is incumbent upon the Plaintiff to demonstrate that the delay was not *intentional and contumelious* to justify the continuation of the proceedings. In my understanding of the context in *Birkett v James* (supra), in an instance where the Notice pursuant to Order 25 Rule 9 of the High Court Rules was issued by the Court on its own motion, the Court need not look for the satisfaction of the second limb of the test if the first limb has been duly established to the satisfaction of the Court.
40. This view is fortified by the sentiments expressed by Lord Woolf MR in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426; [1998] 2 All ER 181 where it was held,

*While an abuse of process can be within the first category identified in *Birkett v James* it is also a separate ground for striking out or staying an action (see *Grovitt v Doctor*, 642 H to 643 A) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigation questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired.*

41. Conversely, where a Notice under Order 25 Rule 9 of the High Court Rules was issued by the Court on its own motion, the Defendant bears no such obligation to prove prejudice nor is it a prerequisite for the Court to consider prejudice to the Defendant when determining whether to strike out an action under Order 25 Rule 9 of the High Court Rules 1988.
42. It suffices to be judiciously determined by the Court that the Plaintiff has displayed persistent inactivity and a flagrant disregard for the Rules of Court, including non-compliance with a peremptory order issued by the Court, with full knowledge of the attendant consequences, when the Court on its own motion has issued a Notice under Order 25 Rule 9 of the High Court Rules. As exemplified in the first limb of *Birkett v James* (supra), such conduct may also constitute an abuse of process. Accordingly, in such an instance, it is within the Court's discretion to strike out the action *suo motu* pursuant to Order 25 Rule 9 of the High Court Rules, without a need for the Defendant to establish any prejudice to its case.
43. The burden of proof in determining the matters under Order 25 Rule 9 of the High Court Rules may fall as a "negative burden of proof" on the Plaintiff itself. Master Azhar in *Amrith Prakash v Mohammed Hassan & Director of Lands* (Supra) further held,

*If the court issues a notice, it will require the party, most likely the Plaintiff, to show cause why his or her action should not be struck out under this rule. In such a situation, it is the duty of the Plaintiff to show to the Court negatively that, there has been no intentional or contumelious default, there has been no inordinate and inexcusable delay, and no prejudice is caused to the Defendant. This is the burden of negative proof. In this case, the Defendant does not even need to participate in this proceeding. He or she can simply say that he or she is supporting court's motion and keep quiet, allowing the plaintiff to show cause to the satisfaction of the court not to strike out plaintiff's cause. Even in the absence of the defendant, the court can require the plaintiff to show cause and if the court is satisfied that the cause should not be struck out, it can give necessary directions to the parties. Generally, when the notice is issued by the court, it will require the defendant to file an affidavit supporting the prejudice and other factors etc. However, this will not relieve the Plaintiff from discharging his or her duty to show cause why his or her action should not be struck out. In the instant case, it was the notice issued by the court on its own motion. Thus, the Plaintiff has the burden of negative proof and or to show cause why his action should not be struck out for want of prosecution or abuse of the process of the court.*

44. The second limb of the test as expounded in the case of **Birkett v. James** (supra) is twofold. The two components of the second limb is as follows,

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

45. 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.*

46. However, in **Deo v Fiji Times Ltd** [2008] FJCA 63; AAU0054.2007S (3 November 2008) the Fiji Court of Appeal cited with approval the meaning considered by the Court in an unreported case. It was held in this case,

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

47. In considering whether a period of delay to be inordinate and contumelious pursuant to Order 25 Rule 9 of the High Court Rules, Master Azhar in Amrith Prakash v Mohammed Hassan & Director of Lands (Supra) went on to hold,

*Order 25 Rule 9 by its plain meaning empowers the Court to strike out any cause either on its own motion or an application by the defendant if no steps taken for six months. The acceptable and/or tolerable maximum period for inaction could be six months. The threshold is six months as per the plain language of the rule. It follows that any period after six months would be inordinate and excusable so long that proper justice may not be able to be done between the parties and no reasonable excuse is shown for it. Therefore, whether a delay can be described as inordinate or inexcusable is a matter of fact which (is) to be determined in the circumstances of each and every case.*

48. In light of the foregoing authorities, it is clear that, since the Notice was issued by this Court on its own motion pursuant to Order 25 Rule 9 of the High Court Rules, the onus is on the Plaintiffs to establish sufficient cause why the action should not be struck out under that provision. Any argument to the contrary is legally unsustainable and may, in itself, amount to an abuse of the Court's process.
49. Notably, despite the Court's directions to file a Notice of Intention to Proceed pursuant to Order 3 Rule 5, accompanied by an Affidavit to Show Cause, and the issuance of a peremptory order in the event of non-compliance, the Plaintiff, without any justifiable cause, has failed to adhere to these directions.
50. A failure to comply with a peremptory order, in itself, constitutes an abuse of the Court's process, a principle firmly established in Birkett v. James (supra). Furthermore, the consequence of such non-compliance is expressly outlined, whereby the Court shall, in its discretion, strike out the matter pursuant to Order 25 Rule 9 of the High Court Rules, as explicitly stated in the Notice.
51. Additionally, it is prudent at this juncture to examine the legal authorities governing compliance with Order 3 Rule 5 of the High Court Rules. Order 3 Rule 5 of the High Court reads as follows,

*Notice of intention to proceed after 6 months delay (O.3, r.5)*

5. *Where six months or more has elapsed since the last proceeding in a cause or matter, a party intending to proceed must give not less than one month's notice of that intention to every other party. An application on which no order was made is not a proceeding for the purpose of this rule.*

52. In *Seva Varani (as member of Mataqali Yanuya and for and on behalf of Mataqali Yanuya) v Aanuka Island Resort Limited t/a Amanuca Resort & iTaukei Land Trust Board*; HBC 161.2012, Ruling (6 February 2015), Justice Ajmeer (as he then was) has held that,

*The word 'must' used in rule 5 suggests mandatory compliance. The plaintiff was not even mindful to give the mandatory notice of intention to proceed required by HCR. This attitude clearly shows that the plaintiff has no interest in prosecuting his claim.*

53. It is clear that the Plaintiffs and/or their solicitors have flouted the rules of the Court as they failed to take any steps to proceed with the matter for 08 months. This inaction was despite there being a Court order made on 23/07/2024 for the Plaintiffs to proceed with their claim against the 2<sup>nd</sup> Defendant, although the proceedings against the 1<sup>st</sup> Defendant were stayed by the Court.
54. The Plaintiffs failed to adhere to the said orders and has blatantly disregarded the rules of the Court in failing to file any appropriate applications to advance the case against the 2<sup>nd</sup> Defendant until such time the Court issued a Notice under order 25 Rule 9 of the High Court Rules.
55. Notwithstanding the issuance of a Notice pursuant to Order 25 Rule 9 of the High Court Rules, the Plaintiffs and/or its solicitors persisted in disregarding the applicable rules and failed to comply with the mandatory requirement under Order 3 Rule 5 of the High Court Rules to file a Notice of Intention to Proceed. As outlined in the foregoing paragraphs of this ruling, the Plaintiffs are clearly in breach of the peremptory order of the Court as stipulated in the Notice under Order 25 Rule 9 of the High Court Rules.
56. The above conduct of the Plaintiffs clearly render the delay in these proceedings contumelious, and it is, in itself, an abuse of the Court's process as per the principles set out in the case of *Birkett v. James* (*supra*).
57. As previously stated, the substantial delay of 08 months in these proceedings is solely attributable to the Plaintiffs and/or their solicitors and remains unsubstantiated, as the Plaintiffs have failed to file any Affidavit to Show Cause, despite being duly ordered to do so through the Court's Notice.

58. Having regard to the unexplained delay exceeding Eight (08) months in these proceedings, in conjunction with the non-compliance with mandatory Court rules and the breach of a peremptory order, the Court hereby finds that such delay is both intentional and contumelious, as well as inordinate and inexcusable.
59. As held in *Amrith Prakash v Mohammed Hassan & Director of Lands* (supra), the legally acceptable period for inaction in a civil cause in Fiji is 06 months as embodied in Order 25 Rule 9 of the High Court Rules 1988.
60. Any delay exceeding the acceptable period must be satisfactorily explained by the party responsible for such delay. The Plaintiffs attempt in this matter to justify the delay in the guise of the Registries' alleged mistakes and defectiveness of the Notice under Order 25 Rule 9 (as discussed in the foregoing paragraphs of this ruling), are untenable and may be deemed as evidence that the Plaintiffs lacked a genuine intention to bring the proceedings to a conclusion within a reasonable time when initiating these proceedings.
61. In this regard it is helpful to reiterate the words of Lord Justice Parker in *Culbert v Stephen Wetwell Co. Ltd.* (1994) PIQR 5, where it was held,

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

62. In light of the foregoing discussion and findings, my overarching conclusion is that, despite the Plaintiffs initiating this action against the Defendants, the conduct of the Plaintiffs demonstrates a clear lack of genuine intention to bring these proceedings to a conclusion within a reasonable timeframe. Such conduct, in itself, constitutes contumelious behaviour.
63. The House of Lords in "*Grovit and Others v Doctor and Others*" (1997) 01 WLR 640, 1997 (2) ALL ER, 417, held that, commencing an action without real intention of bringing to conclusion amounts to an abuse of the process of the court. It was held as follows,

*The court exists to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have*

*the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in **Birkett v James** [1978] A.C 297. In this case, once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings where there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.*

64. It is noteworthy that, in the context of litigation, certain parties may engage in sporadic pursuit of their cases or default deliberately, with the intention of prolonging proceedings and maintaining the matters pendente against the opposing parties without advancing towards a final resolution.
65. Courts should not overlook such practices or parties. Such conduct must be promptly disallowed, as it constitutes an abuse of the Court's processes and results in an unnecessary expenditure of the Court's finite time and resources.
66. In **Singh v Singh** (supra) it was held,

*The more time that is spent upon actions which are pursued sporadically, the less time and resources there are for genuine litigants who pursue their cases with reasonable diligence and expedition and want their cases to be heard within a reasonable time.*

67. Such practices also infringe upon the fundamental rights guaranteed under Sections 15(2) and 15(3) of the Constitution, which provide, respectively,

(2) *Every party to a civil dispute has the right to have the matter determined by a court of law or if appropriate, by an independent and impartial tribunal.*

(3) *Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.*  
(Emphasis added)

68. In this regard, it is also pertinent to observe recent developments within the English Courts, where judicial considerations of the interest of justice are now approached in a broader and more holistic manner, taking into account the overall fairness of proceedings. Courts are increasingly inclined to dismiss sporadic or unnecessary claims that do not contribute to the substantive finality of the matter.

69. In the case of *Securum Finance Ltd v Ashton [2001] Ch 291 (Securum Finance Ltd)* it was held,

*[30] the power to strike out a statement of claim is contained in CPR r 3.4. In particular, rule 3.4 (2) (b) empowers the court to strike out a statement of case ... if it appears to the court that the statement of case is an abuse of the court's process ... In exercising that power the court must seek to give effect to the overriding objective set out in CPR 1.1: see rule 1.2 (a). The overriding objective of the procedural code embodied in the new rules is to enable the court "to deal with cases justly": see rule 1.1 (1). Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into accounts the need to allot resources to other cases".*

*[31] In the *Arbuthnot Latham*<sup>1</sup> case this court pointed out in a passage which I have already set out that:*

*In *Birkett v James* the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance.*

70. I shall herewith quote the full passage from *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* (supra), for further clarification on this point. Lord Woolf, MR, expressed in no uncertain terms that,

*In *Birkett v James* the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers, must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.*

71. Likewise, such sporadic and contumelious conduct may certainly result in serious prejudice to the opposing party, as the effective administration of justice is compromised when the matter remains pending without any substantive steps taken to achieve finality.

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<sup>1</sup> *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426; [1998] 2 All ER 181*

72. In the context of the present case, the Court observes that the Plaintiffs have instituted this action with regard to a mortgaged property, disputing the debt as restructured by the 1<sup>st</sup> Defendant as against the third party mortgaged property which belongs to the Plaintiffs. They have initially consented and allowed the 1<sup>st</sup> Defendant to mortgage the said property to the 2<sup>nd</sup> Defendant as collateral to the debt obtained by the 1<sup>st</sup> Defendant. Their only grievance is that they were not informed and that they did not consent to the restructured debt of the 1<sup>st</sup> Defendant.
73. However, when the 2<sup>nd</sup> Defendant raised the defence that the debt restructuring was duly conducted with all necessary consents pursuant to the provisions of the mortgage agreement, the Plaintiffs failed to controvert this with any proper particulars. Instead, in their Reply, the Plaintiffs merely claimed that they neither accept nor deny the Defence and stated that their understanding was that the debt was only for \$350,000.00.
74. In this context, the Court finds that, given the Plaintiffs' reliance on the breach of the Mortgage Agreement as the basis of their cause of action against the 2<sup>nd</sup> Defendant, the position taken by the Plaintiffs in their Reply to the Statement of Defence is clearly unacceptable and is legally misconceived.
75. Based on the foregoing discussion regarding the context of the Plaintiffs claim against the 2<sup>nd</sup> Defendant, the Court is of the considered view that the interests of justice do not favour the continuation of this action, as it appears that the Plaintiffs do not genuinely seek to realize finality in these proceedings especially given the factual context of their claim against the 2<sup>nd</sup> Defendant.
76. It is evident to the Court, having carefully considered the pleadings in the matter and the conduct of the Plaintiffs in these proceedings, the Plaintiffs main goal appears to injunct and to delay a mortgage sale of the subject property rather than bringing these proceedings to a finality within a reasonable time frame.
77. Lord Woolf MR in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* (supra) went on to hold,


*Whereas hitherto it may have been arguable that for a party on its own initiative to in effect "warehouse" proceedings until it is convenient to pursue them does not constitute an abuse of process. When hereafter this happens, this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. **If the claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of***

*the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. The courts exist to assist parties to resolve disputes, and they should be used by litigants for other purposes. (Emphasis added)*

78. In its final conclusion, the Court finds that the Plaintiffs has failed to adequately demonstrate cause why the action should not be struck out for abuse of the Court's process or for want of prosecution and that the Plaintiffs conduct in these proceedings is in fact an abuse of the process of the Court and that the delay caused by the Plaintiffs is contumelious and inexcusable.
79. Accordingly, the Court shall order that the Writ of Summons and the Statement of Claim filed on 30/11/2023 be struck out in accordance with Order 25 Rule 9 of the High Court Rules 1988.
80. Consequently, the Court makes the following final orders,
  1. Plaintiffs Writ of Summons and the Statement of Claim filed on 30/11/2023 is hereby struck out pursuant to Order 25 Rule 9 of the High Court Rules.
  2. The Cause is accordingly struck out and dismissed and the file is closed.
  3. Plaintiffs shall pay a cost of \$ 2000.00, as summarily assessed by the Court, to the 2<sup>nd</sup> Defendant within 30 days from this ruling.



**At Suva,  
25/09/2025.**

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