

IN THE HIGH COURT OF FIJI
IN LAUTOKA - WESTERN DIVISION
CIVIL APPELLATE JURISDICTION

Civil Action No. HBC 132 of 2019

BETWEEN : **CHALLENGE ENGINEERING PTE LIMITED**, a Limited Liability Company having its Registered Office at 27, Sautamata Street, Lautoka.
PLAINTIFF

AND : **AVOSER LIMITED**, a Limited Liability Company having its Registered office at Westfield City, Nadi Airport, Fiji (In Receivership)
DEFENDANT

BEFORE - A.M. Mohamed Mackie-J.

COUNSEL - Mr. Krishnil Patel – For the Plaintiff – Applicant- Appellant.
Defendant absent (as it is under Receivership)

HEARING FOR LEAVE : On 23rd July 2025.

HEARING OF APPEAL : On 01st August 2025

JUDGMENT DELIVERED: On 19th September 2025.

JUDGMENT

A. INTRODUCTION

1. This is an Appeal preferred by the Plaintiff -Appellant ('the Appellant'), with leave being obtained on papers filed on 21st July 2025 and supported on 23rd July 2025, against the Orders made by the learned Master ('the Master') of the High Court on 7th July 2025.
2. By the impugned order, the Master struck out the Appellant's action against the Defendant for the reasons stated in the Order by acting on her own motion pursuant to Order 25, r 9 of the High Court Rules 1988.
3. Being aggrieved by the impugned order of the Master, the Appellant on 21st July 2025 filed the Summons, supported by an affidavit sworn by Mr. SURESH BHAI, the Director of the Appellant Company, pursuant to Order 59 Rules 8(2) ,9 (b), 11, 12 of the High Court Rules 1988 and the inherent jurisdiction of this Court seeking, *inter alia*, the following **ORDERS**;
 1. *That leave be granted to the Plaintiff to appeal against the interlocutory judgment / order of Master delivered on 7th July 2025 upon the grounds appearing in the proposed Notice and Grounds of Appeal annexed to the Affidavit of Suresh Bhai.*

2. *That time for filing and service of the Notice and Grounds of Appeal be extended by seven days from the date of the leave.*
3. *That costs of this application be costs in cause.*
4. The impugned Order was pronounced by the Master in the absence of the Defendant Company, as it is said to have been wound up. Hence, the Summons before this Court was also supported ex-parte with undertaking that, if the appeal is allowed and the Plaintiff's action is reinstated, due notice will be given to the Official Receiver/ Liquidator for the continuation of the substantive action.
5. Pursuant to the granting of leave on 23rd July 2025 as aforesaid, the Appellant on the same date filed its Summons for Direction, together with the Notice and Grounds of Appeal moving to set a hearing date.

B. GROUND OF APPEAL

6. Counsel for the Appellant adduced the following as his only Ground of Appeal.

*"The Learned Master erred in law in striking out the Appellant's claim under order 25 Rule 9 by failing to consider and apply the principles enunciated in **Brikett v James (1978) AC 297 (1977) 2 ALL ER** which was cited with approval by the Court of appeal in **Pratap v Christian Mission Fellowship [2006] FJCA 41** and **New India Assurance Co Ltd v Singh [1999] FJCA 69**.*

7. Accordingly, the matter being taken up for hearing on 1st August 2025, learned Counsel for the Appellant made oral submissions in support of the Appeal, by citing the relevant case law authorities on the subject. I am thankful to the Counsel for the Appellant.

C. BACKGROUND:

8. The Appellant on 27th May 2019, instituted this proceedings against the Defendant seeking Judgment in a sum of \$1,107,777.00 as damages and interest:
9. The Defendant filed its Statement of Defence (SOD) on 21st June 2019 with a counterclaim in the sum of \$492,591.11 with pre and post judgment interest.
10. Initially, a default judgment was entered against the Plaintiff, as no Defence to counterclaim had been filed by the Plaintiff. However, on an application being made by the Plaintiff on 15th August 2019 to have the default judgment set aside, on 11th October 2019, the same was set aside by the then Master subject to the payment of \$3,000.00 as costs.
11. Subsequently, further Pleading being duly filed, Summons for Direction was filed on 28th January 2020 and the orders granted in terms of it were duly complied with by the parties, according to which the PTC minutes was filed on 27th January 2022. Thereafter, the matter was referred to the Registrar for allocation and it was allocated to Hon. Lyon

Seneviratne- j (as he then was) before whom the matter was mentioned on 10 occasions from 03rd August 2022 till 17th April 2024 in order to fix for trial, which did not eventuate as the Defendant Company had been wound up.

12. However, when the matter was subsequently mentioned before the Hon. Acting Judge Mohamed Azhar on 24th July 2024, having observed that the Defendant Company stood wound up, despite the Appellant's Counsel had moved for time to seek instruction from the plaintiff, Azhar -J made the order directing the Plaintiff to participate at the Creditors' Meeting convened by the Official Receiver and **stayed the proceedings pursuant to Companies Act 2015.**
13. Thereafter, as the matter had remained unmoved for over 6 months period, on the direction of the present Master, a Notice dated 27th May 2025 being sent to the Plaintiff Solicitors returnable on 7th July 2025, to show cause as to why the matter should not be struck out for want of prosecution, the Appellant's Solicitors on 18th June 2025 filed their Affidavit to Show Cause sworn by Suresh Bhai, the Appellant's Director. This Affidavit had accompanied series of email correspondences, that the Appellant's Solicitors had sent and received to obtain the service of the Official Receiver with regard to this matter.
14. Accordingly, when the matter was mentioned before the current Master on 7th July 2025 as per the Notice pursuant to Order 25 rule 9, the Master, having made the observations to the following effect, instantly, struck out the Plaintiff's action.

"The Defendant's Company had been wound up and the matter stayed on 24/07/24".

"Thereafter the Plaintiff has not taken any steps to move the Court for an application for leave to proceed with the same and this court issued its Order 25 Rule 9 Notice. The Affidavit to show cause acknowledge that the Defendant's Company being wound up stalled the matter yet the Plaintiff took no steps to seek leave of the Court to proceed. The proper cause for the Plaintiff would have been to seek leave of the Court to proceed with the matter if the Plaintiff so wished to".

"There is no good cause shown for the delay in this matter".

"The action is hereby struck out".

15. It is the above Order that has led the Appellant to come before this Court, with leave being obtained, seeking to appeal against it.

D. **THE LAW:**

16. This Appeal is made against the Order made by the Master by acting under Order 25 Rule 9 of the High Court Rules 1988, which inter-alia states as follows:

"9 (1) If no step has been taken in any cause or matter for six months then any party on application or the Court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court

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

17. Abovementioned rule was introduced on 13th September 2005. After the introduction of this rule, the Court of Appeal has had the opportunity to review the law on want of prosecution in Fiji both before and after the coming in to effect of the same.
18. Prior to the introduction of Rule 9, the Court of Appeal in **Abdul Kadeer Kuddus Hussein v. Pacific Forum Lime Civil Appeal No. ABU 0024 of 2000s (30th May 2003)** in readopting the principles expounded in **Birkett v. James [1978] AC 297; [1977] 2 All ER 801** and explained that:

"The power should be exercised only where the court is satisfied either (i) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party."

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

*"The power should be exercised only where the court is satisfied either: -
 (i) That the default has been intentional and contumelious e.g. disobedience to pre-emptory order of the court or conduct amounting to an abuse of the process of the court;
 or
 (ii) (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers (in the present case Defendant's lawyers);
 (b) that such delay would give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or is such as it likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between then and a third party."*

20. After the introduction of Order 25 rule 9, **Birkett v. James** was revisited by the Court of Appeal. This largely arose due to the case management system introduced by the Court to agitate those cases which were lying idle in the registry for many years some ranging over 20 years. The High Courts have had a tendency to strike-out the actions based on delay alone.
21. The first case which went on appeal and decided by the Court of Appeal was **Bhawis Pratap v Christian Mission Fellowship Civil Appeal No. ABU 0093 of 2005 (14 July 2006)**, His Lordship Mr. Justice Coventry struck out the action on a number of grounds one of which was delay of 7 years since the action was filed. On appeal, after reviewing the law on want of prosecution, the Court of Appeal affirmed that the applicable law in this country is still as was pronounced in **Birkett v. James**. At para. 23 of judgment the Court unreservedly stated: -

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

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

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

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

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

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

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

25. The issue then is whether delay alone is sufficient for the Court to strike-out an action for want of prosecution. The Court of Appeal in **New India Assurance Company Limited v. Rajesh Kumar Singh Civil Appeal Number ABU 0031/1996** emphasized that while inordinate and inexcusable delay might be established, these factors were not, on their own, sufficient to warrant the striking out of the action,

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

"[28] – **Securum Finance Limited v. Ashton (supra)** is especially instructive since it explains why, following the introduction of the new Rules, the courts in England and Wales have been more ready to strike out actions on the ground of delay alone. At paragraphs 30 and 31 Chadwick LJ wrote that:

"30 the power to strike out a statement of claim is contained in CPR r3.4. On particular, rule 3.4 (2) (b) empowers the court to strike out a statement of case ... if it appears to the

court that the statement of case is an abuse of the court's process. ...In exercising that power, the 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 case this court pointed out in a passage which I have already set out that:

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

E. ANALYSIS and DETERMINATION:

27. I have carefully perused the case record , particularly the impugned instant Ruling pronounced by the Master , the contents of the written submissions filed and those of the authorities cited by the Appellant's learned Counsel.
28. This action was filed 27th May 2019. Parties had duly filed their pleadings. The Defendant had made a counter claim for an amount in a sum of \$492,591.11, which was much higher than the sum claimed by the Plaintiff from the Defendant. The plaintiff's claim was \$1,107,777.00. The Summons for direction being filed and Orders on it being made, parties had complied with the Orders and finally filed the PTC Minutes and Copy Pleadings as well. The final steps taken by the Plaintiff was the filing of the Order 34 Summons on 14th June 2022.
29. Orders being made on it, the matter was mentioned before Seneviratne-J for a period more than 2 years to fix a trial date, but due to the absence of the Defendant's Solicitors, the trial date was not fixed. The reason for the absence of the Defendant and its solicitors was said to be the defendant's winding up proceedings before the Suva High Court. When the matter was finally mentioned before Azhar-J, on 24th July 2024, after hearing the Plaintiff's counsel, the matter was stayed by directing the Plaintiff to participate at the creditors meeting.
30. Thereafter, when the matter was found to be idling without any steps being taken by the Plaintiff, the present Master, having sent Notice under Order 25 rule 09 and after entertaining the show cause Affidavit from the Plaintiff Company, on 7th July 2025 proceeded to strike out the Plaintiff's action.
31. As per the case record, the Plaintiff had not taken any steps at the Court in order to proceed with the action. Obviously, it was impossible for the Plaintiff to take any steps before the Court as the Defendant Company had stood wound up. The winding up process was not within the control of the plaintiff Company. The proceedings thereof were said to be at the High court of Suva. The appointment of the Official Receiver and holding of Creditors meetings were to be eventuated only after the termination of the winding up proceedings.

32. As per the e-mail correspondences attached to the show cause affidavit by the Plaintiff, it is clear that the Plaintiff has continuously communicated with the Office of the Official receiver on obtaining his leave and services commencing from 27th October 2023 till 23rd July 2024. It shows that the Plaintiff had diligently acted for the prosecution of the matter.
33. Further, when the Master made the impugned Order, the fact that the Defendant had made a counterclaim for a larger sum, which also needed adjudication with no delay, seems to have had escaped the attention of the Master. The Defendant's claim against the Plaintiff was very much higher than that of the Plaintiff against the Defendant. The Defendant, though stood wound-up, it should not have been deprived of its right to proceed with the counterclaim with an official Receiver/ Liquidator being appointed. Thus, by striking the action in this manner, both parties have been prejudiced and adversely affected.
34. Further, when there was no any order by the Court directing the plaintiff to take at the Court in order to prosecute the matter, the plaintiff, in my view, should not have been penalized under Order 25 Rule 09 of the High court rule. No steps could have been taken by the plaintiff until and unless the winding up proceedings was over and the official receiver/ Liquidator was appointed pursuant to the winding up Order by the Suva High court.
35. The time gap between the Order made by Azhar-J on 24th July 2024 to stay the proceeding and the date on which the Master made the Order to strike out on 7th July 2025, was barely one year.
36. The onus was on the Plaintiff to provide a cogent and credible explanation for not taking any steps to advance the litigation in this case after the matter was stayed by Hon. Azhar-J on 24th July 2024. The Master was required to deliberate on the following issues in terms of the impending Order 25 Rule 9 application to arrive at a determination whether to dismiss the cause or deal with the application as if it were a summons for directions.
- (i) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amount to an abuse of the process of the court; or
 - (ii) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers,
 - (iii) that such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party.

I. Default is Contumelious:

37. "Contumelious" in the context of want of prosecution refers to disobedience of any orders or directions of this court. In this case, the action was stayed by the Court on 24th July 2024. There was no any active step to be taken by the Plaintiff before the Court, other than waiting for the termination of the winding up proceedings and the appointment of

O/R or Liquidator. I don't find any disobedience on the part of the Plaintiff. For the above rational, the first arm of the test does not apply herein.

ii. Delay

38. The test for delay is both 'intentional' and 'inordinate'.

Intentional Delay:

39. For this purpose, the Court has to be satisfied that the delay was intentional on the part of the Plaintiff. In other words, the Plaintiff has filed an action with having no intention to proceed with the same. The Plaintiff, through the documents annexed to its Affidavit to show cause, has shown that it was in the act of moving the matter at the Official Receiver's office. No delay was show on the part of the appellant.

40. For these reasons, I find that the delay was not so lengthy and intentional on the part of the appellant as it is still waiting for the outcome of the winding up proceedings and the appointment of the official receiver/ Liquidator.

41. In the above circumstances, I am of the finding that the appellant has not intentionally contributed to the delay in prosecuting his case.

42. Even if the Plaintiff at this stage of the proceedings, appeared to have contributed for any inordinate and inexcusable delay, these factors would not, on their own, be sufficient to warrant the striking out of this action.

Prejudice

43. It is trite law that the Court should have been satisfied that the opposing party, namely, the Defendant in this matter was prejudiced by the delay. The Defendant was not before the court when this Order was made. There was no application by the Defence calling upon the Court to exercise its power under Order 25 Rule 09. The move was on Court's own motion. It would not have been prejudicial to the Defendant, if the matter had proceeded. The wounded-up Defendant Company could have been represented in court to proceed with its counterclaim, through the official receiver or liquidator.

44. I find, there is no prejudice to any party in this proceeding bearing in mind the status quo of the matter before me.

Interest of Justice

45. Even if the Court is satisfied of the requirements in **Birkett v James** (Supra), the courts in exercise of its jurisdiction must decide as to whether a fair trial is still possible. The Court of Appeal in **Chandar Deo v Ramendra Sharma and anor; Civil Appeal No. ABU 0041 of (23 March 2007)** (Unrep) stated as follows: -

[15] A more fundamental difficulty for the Respondent is that the judge failed to make any finding at all on the final question to be asked when applying the Birkett v. James principles namely: 'In view of the delays which have occurred, is a fair trial now possible?' (Also case of Department of Transport v. Chris Smaller (Transport Limited [1989] AC 1197 refers.

In **Lovle v Medical Assurance Society Limited** [1992] 2 NZLR 244 at 248. Eichelbaum CJ reviewed the authorities and concluded:

'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 defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.'

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

'26. This principle was restated by the Court of Appeal of Fiji in Pratap v Kristian Mission Fellowship [2006] FJCA 41. Also refer to; New India Assurance Co Ltd v Singh [1999] FJCA 69.

The principle as enunciated in these cases reflects the principles on this topic in other common law jurisdictions. These decisions include; Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210; Dey v. Victorian Railway Commissioners (1949) HCA 1; (1949) 78 CLR 62; Birkett v James [1978] AC 297; Lovle v Medical Assurance Society Limited [1992] 2 NZLR 244; Agar v Hyde [2001] HCA 41; (2000) 201 CLR 552. Indeed the passage from Abdul Kadeer Kuddus Hussein v Pacific Forum Line reflects closely Birkett v James (above). These authorities also make the point that in exercising a peremptory power of the kind under contemplation in these proceedings, the court must be cautious and to put the matter in another way, the court must stand back and ensure that sufficient regard is ahead of the interests of justice.'

47. I have carefully perused the contents of the case record , including the affidavit to show cause filed by the Plaintiff , the pleadings filed so far, the written and oral submissions of the Appellant's counsel coupled with the applicable laws and the case authorities I find that:-

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

48. Further, the outcome in the pending winding up action may allow the Appellant in this action to prosecute the case with the presence of the Official Receiver/ Liquidator representing the Defendant, not only in defending the Appellant's claim, but also prosecuting the Defendant's counterclaim hereof,

F. FINAL ORDERS:

49. For the aforesaid reasons, I make the following orders: -

- a. The Appeal is allowed.
- b. The impugned Order pronounced by the Master on 7th July 2025 pursuant to Order 25 Rule 09 of the High Court Rules 1988 is hereby set aside.
- c. The Plaintiff's action is hereby reinstated.
- d. The Plaintiff shall take necessary steps forthwith to make the Official receiver as a party to these proceedings, by making the appropriate application.
- e. This case to take its normal cause.
- f. Costs in cause.


A.M. Mohamed Mackie
Judge



At the High Court of Lautoka on this 19th day of September 2025.

SOLICITORS:

For the Plaintiff/ Appellant:

Messrs. KRISHNIL PATEL LAWYERS- Barristers & Solicitors

For the Defendant:

No Representation.