

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 600 of 2005

BETWEEN : FIJI DAILY POST COMPANY LIMITED (In Liquidation)

PLAINTIFF

AND : WESTPAC BANKING CORPORATION a limited liability company having its
registered office at 1 Thompson Street, Suva in the Republic of the Fiji.

1ST DEFENDANT

AND : ASSOCIATED MEDIA LIMITED a limited liability company having its
registered office at Munro Leys & Co., Level 3, Pacific House, Butt Street, Suva.

2ND DEFENDANT

AND : YASHWANT GOUNDAR of Suva in the Republic of Fiji Islands, Company Director.

3RD DEFENDANT

BEFORE: Master Vishwa Datt Sharma

COUNSELS: Mr. Anand Singh - for the Plaintiff
Mr. Chun Bunn Young - for the Defendant

DATE OF RULING: 04th September, 2017

RULING

[First Defendant's Summons to Strike out the Plaintiff's Writ of Summons and the Statement of Claim pursuant to Order 25 Rule 9 of the High Court Rules, 1988 and the Inherent Jurisdiction of this Honourable Court and Plaintiff's Summons to continue proceedings pursuant to Section 531 of the Companies Act, 2015]

(A) INTRODUCTION

1. There are two (2) Applications pending before this Court for determination as set out hereunder-

First Application

The First Defendant filed a Summons to Strike out Action on 2nd June, 2016 and sought for the following orders-

- (i) An Order that the action against the 1st Defendant be wholly struck out for want of prosecution or as an abuse of the process of the Court;
- (ii) An Order that the Plaintiff pays the 1st Defendant's costs of and incidental to this application and of the action;
- (iii) Such other orders as may seem just to the court.

Second Application

The Plaintiff filed a Summons to continue proceedings and sought for the following orders-

- (i) An order that the Applicant may have leave and be at liberty to continue the action against the Defendants in the High Court Action No. 600 of 2005 on such terms and conditions as the Court deems just and expedient.
2. Above applications were made pursuant to *Order 25, r 9 of the High Court Rules 1988* and *Section 531 of the Companies Act 2015* respectively.
 3. Both parties to the proceedings opposed each other's applications.

(B) THE LAW AND PRACTICE

4. First application by the 1st Defendant is made pursuant to *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.'

5. Second Application by the Plaintiff is made pursuant to *Section 531 of the Companies Act 2015* which provides as follows-

"Actions stayed on winding up order"

When a winding up order has been made or an interim liquidator has been appointed under section 537, no action or proceeding must be proceeded with or commenced against the Company, except by leave of the Court and subject to such terms as the Court may impose.

(C) ANALYSIS and DETERMINATION

6. There are two applications before this Court for determination-
- (a) Summons to Strike out the Plaintiff's Action filed by the 1st Defendant on 02nd June, 2016; and
 - (b) Summons by Company to continue proceedings filed by the Plaintiff on 08th June, 2017.
7. Counsels agreed that both applications be heard and determined together. Hence for determination accordingly.
8. I will firstly deliberate on the 1st Defendant's Summons to strike out the Plaintiff's action followed by the Plaintiff's Summons by Company to continue proceedings.
9. Order 25 Rule 9 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.
10. 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."

11. Basically, the Court of Appeal affirmed the principle enunciated in *Brikett 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."

12. 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. This High Court had tended to strike-out the actions based on delay alone.

13. The first case which went on appeal and decided by the Court 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 *Brikett 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"

(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."

14. 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."

15. 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."

16. 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."

17. 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.*

18. 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 L.J 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."

[29] In Fiji there is as yet no equivalent of the English CPR r 1.1 or 3.4 and therefore the approach exemplified in Securum has not yet become part of our civil procedure.

19. Thus the developments which have been taken in England after the introduction of the new rules do not apply in this instant to Fiji without the introduction of new rules. As such the principle in Birkett v James applies on all fours. This was also confirmed by the Court of Appeal again in 2008; Avinash Singh v Rakesh Singh, Nirmala Devi & Sarojini Kumar Civil Appeal No: ABU 44/06 (8 July 2008).
20. I have perused the court file in terms of the documents filed as required by the set down procedures and the High Court Rules 1988 and set out hereunder the Chronology of Events accordingly.

CHRONOLOGY OF EVENTS

20/12/2005	Writ of Summons filed
18/04/2005	Summons to Enter Default Judgment
04/05/2006	Statement of Defence
22/05/2006	Reply to Statement of Defence
22/05/2006	Summons For Direction [seeking further direction to enter action for trial]
05/07/2006	Affidavit verifying Defendants list of documents
05/07/2006	Affidavit verifying Plaintiffs list of documents
21/08/2006	Summons & Affidavit in support of James Mastapha
21/09/2006	Ex-Parte Summons [Seeking order to issue Third Party Notice]
21/09/2006	Third Party Notice
03/10/2006	Affidavit of service [stating service on R.Patel and Munro leys of Third Party Notice]

03/10/2006	<i>Ex-Parte Summons and Affidavit in Support for leave for substitute service</i>
13/11/2006	<i>Notice of change of solicitor by Naidu Law to act for Plaintiff</i>
16/11/2006	<i>Supplementary AVLD by Plaintiff</i>
24/11/2006	<i>Inter-Parte Notice of Motion [For joinder and Amendment of Writ and Statement of claim]</i>
13/12/2007	<i>Affidavit of service</i>
16/12/2007	<i>Amended acknowledgement of service</i>
16/12/2007	<i>Amended Writ of Summons</i>
22/03/2007	<i>Amended acknowledgement of service by Neel Shivam Lawyers</i>
01/06/2007	<i>Ex-Parte Notice of Motion [For substitute service on the 4th defendants</i>
01/06/2007	<i>Summons [For specific discovery]</i>
30/07/2007	<i>Affidavit verifying Plaintiffs further supplementary list of documents</i>
30/07/2007	<i>Affidavit verifying Defendants list of documents</i>
12/09/2007	<i>Affidavit if service of Notice of Writ by advertisement</i>
14/09/2007	<i>Summons for security for costs and Affidavit of Kamal Kumar [on security for costs]</i>
01/10/2007	<i>Affidavit in Opposition [To 1st defendants application on security]</i>
11/10/2007	<i>Amended statement of defence by 1st defendant [1st Amendment]</i>
05/11/2007	<i>2nd and 3rd defendants' statement of defence</i>
06/11/2007	<i>2nd and 3rd defendants Affidavit Verifying List of Documents</i>
13/11/2007	<i>Amended Reply to 1st Defendants amended defence [1st Amendment]</i>
15/11/2007	<i>Summons [For specific Discovery] and Affidavit in support</i>
20/11/2007	<i>Summons [For Security for costs and further discovery] and Affidavit in support</i>
12/08/2008	<i>Interlocutory Judgment against 4th Defendant</i>
18/11/2010	<i>Notice of Motion [For withdrawal as counsel for 2nd & 3rd defendants]</i>
09/02/2011	<i>Notice of Advertisement [For withdrawal as Counsel]</i>
20/12/2011	<i>Summons for direction</i>
26/01/2012	<i>Notice of Discontinuance [Plaintiff herein wholly discontinues action against 4th defendants]</i>
10/02/2015	<i>Notice of Intention to Proceed</i>
02/06/2016	<i>Summons to strike out action and Affidavit of Lusiano Versoni</i>
20/09/2016	<i>Notice of Change of Solicitor</i>
20/09/2016	<i>Order 34 Summons</i>
08/06/2017	<i>Summons by company to continue proceedings</i>
19/06/2017	<i>Plaintiffs Submissions [Reply to 1st defendants submissions for striking out]</i>

21. I reiterate the abovementioned **paragraph 9** which summarily informs this court the steps taken and the documents filed by the Plaintiff and the Defendants in this proceedings.
22. This case was commenced by the Plaintiff on 20th December, 2005. The Statement of Defence was filed by the 1st Defendant on 04th May, 2006 followed by Plaintiff's Reply on 22nd May, 2006. Orders were made for the parties to file their respective Affidavit Verifying list of documents and were filed accordingly.
23. Hereafter, what proactive actions if any were taken by the parties to the proceedings can easily be ascertained from the Chronology of events at paragraph 9.

24. The notation that I have made from the chronology of events is that the steps taken by parties were snail pace. Various interlocutory applications were filed coupled with change of Counsels until 03rd February, 2012, when the Court made the following orders pursuant to the Summons for Directions filed on 20th December, 2011-
- (i) *That this action be tried before a Judge alone at Suva and be entered for trial within 180 days, the estimated length of trial being ten (10) days;*
 - (ii) *That the Court set the Pre-Trial directions in this case;*
 - (iii) *That the Court gives directions on service of the 2nd and 3rd Defendants;*
 - (iv) *That the action against Malakai Nayaga be discontinued forthwith and any orders made against him be set aside; and*
 - (v) *Costs.*
25. It can easily be ascertained and confirmed from the Court record that the Plaintiff failed to take any **proactive measures** to diligently pursue this matter in terms of the orders made on 03rd February, 2012. Further, no explanation was given and/or offered by the Plaintiff to this Court during the hearing of the 1st Defendant's Striking out application.
26. On 10th February, 2015, the Plaintiff filed a Notice of Intention to proceed with the matter and subsequently filed a Summons to strike out the Plaintiff's action for want of prosecution and abuse of the process of the Court.
27. On 20th September, 2016, the Plaintiff filed a Notice of Change of Solicitors coupled with an Order 34 Summons.
28. The 1st Defendant's contention in terms of the **Striking out Application** is that "The Court pursuant to the Plaintiff's Summons for Directions application made the orders sought that the trial of the action was to be set down within 180 days. This was obviously not done by the Plaintiff and no explanation was offered by the Plaintiff. Thereafter, the Plaintiff then filed its first **Notice of Intention to Proceed** on 25th October, 2012 and later another on 10th February, 2015. Hence, the 1st Defendant submitted that the time frame for consideration for **inordinate and inexcusable delay** should begin from 03rd February, 2012 onwards. He added that nothing of any significance to proceed with this matter to trial was done by the Plaintiff after 03rd February, 2012 or the 25th October, 2012 when the first Notice of Intention was filed and the 10th February, 2015 when the second Notice of Intention to Proceed was filed until the Order 34 Summons filed on 11th October, 2016. Again no explanation was offered by the Plaintiff as to why after 25th October, 2012 or 10th February, 2015 the Plaintiff did not progress the matter."

29. The Plaintiff's contention has been that in anticipation of the 1st Defendant's argument for delay and want of prosecution the Plaintiff maintains:
- (i) That there has not been any inordinate delay by the Court appointed provisional liquidator such as to attract the staying or striking out of the continuation of the proceedings by the provisional liquidator;
 - (ii) The Defendants have been derelict themselves by not bringing the strike out application earlier; and
 - (iii) The legal authorities in terms of Order 25 Rule 9 has been subject to many decisions and relied on *Delzev Limited -v- Flinn Sawmills Limited & Ano HBC 185 of 2014*. These do not aid the Defendants.
30. The onus is on the Plaintiff to provide a cogent and credible explanation for not taking any steps to advance the litigation in this case after the 03rd February, 2012, when the Court made the orders to set down the trial within 180 days.
31. After 03rd February, 2012 Court Order to set down the trial within 180 days and until 20th September, 2016 when the Plaintiff filed the Notice of Change of Solicitors together with the Order 34 Summons, no further action was taken by the Plaintiff to enter the Action for trial which prompted the First Defendant on 02nd June, 2016 to file the current Summons for Strike Out in terms of Order 25 Rule 9 asking the Plaintiff to show cause why this matter should not be struck out.
32. This meant that the time calculated from the last Court Order of 03rd February, 2012 and until the First Defendant filed and served the Order 25 Rule 9 Summons that a period of over 4 years and 4 months had lapsed. In fact the Law requires that the parties to the proceedings must ensure that the pleadings in terms of the Law must be filed and served on the parties to proceedings within a particular time frame provided for to complete the pleadings and allow the case to be heard and determined either before the Master or a Judge of the High Court accordingly.
33. This court is therefore required to deliberate on the following issues in terms of the First Defendant's 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 accordingly:
- (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, (In this case the Plaintiff/Lawyers); and

- (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."*

Default is contumelious

34. "Contumelious" in the context of want of prosecution refers to disobedience of any orders or directions of this court.

This Court made the orders on 03rd February, 2012 pursuant to Summons for Directions dated 20th December, 2011 that this action be tried before a Judge alone at Suva and be entered for trial within 180 days, the estimated length of trial being 10 days and that the other orders included that the Court set pre-trial directions and the action against Malakai Nayaqa be discontinued. This was not done by the Plaintiff and the order of the Court was not adhered to move the matter further and ensure that the same is brought to conclusion. I find as a fact that the actions of the Plaintiff had been a deliberate one in knowingly not complying with the Court Orders of 03rd February, 2012 accordingly.

For the above rational, the **first arm** of the **test** does very much apply herein.

Delay

35. The test for delay is both '*intentional*' and '*inordinate*'.

Intentional

For these **two elements** to be satisfied, the **First Defendant** must establish 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's submissions together with the First Defendant's submissions has been taken into consideration.

*The Substantive action was filed and commenced in 2005. This Court noted from the chronology of events what pleadings, documents and applications were filed and that the matter moved at a Snail pace. The relevance of the Court orders made on 03rd February, 2012 in particular that the trial of this action was to be set down within 180 days including that the Court set pre-trial directions obviously was not done and/or adhered by the Plaintiff for the reasons best known to him since no explanation was provided at the hearing for not complying with this court orders. This non action by the Plaintiff tantamount to nothing more than **disobedience of a peremptory order of the Court dated 03rd February, 2012.** May be the Plaintiff had filed the Order 34 Summons but only after the First Defendant had filed his Summons to Strike out the*

Plaintiff's Action. This was done so by the Plaintiff to counter the striking out application of the First Defendant. Upon a careful perusal of the Court file it would reveal and is very obvious that the Plaintiff filed and commenced this proceedings with no intention of bringing the matter to its conclusion once and for all. The matter was commenced in 2005 and remains pending in the Court system to the current in 2017 for almost 12-13 years. The period of pendency in court of this matter in itself is evident that the Plaintiff was not serious about expediting his case and bring it to the conclusion. Hence the delay on his part was intentional.

36. The other requirement is the 'inordinate' delay.

Inordinate

This relates to the **length of delay**. The issue for consideration here is if there was **inordinate delay**.

The **Plaintiff** explains that the answer to whether there has been an **inexcusable delay** by the Plaintiff is immaterial since the **Plaintiff Company was wound up** by the Court on 25th August, 2010 and therefore the Plaintiff did not have the **locus standi** then to continue with this proceedings. The real issue according to the Plaintiff is, has the Provisional Liquidator been guilty of inexcusable delay since she became aware of the existence of the within proceedings. The Provisional Liquidator has consented to the continuation of these proceedings in the interest of the Plaintiff Company.

On the other hand the **First Defendant** submitted that the obligation of the Plaintiff is to provide a cogent and credible explanation for not taking any steps to advance the litigation. The 1st Defendants affidavit deposed by Lusiano Versoni refers to three issues: Winding up Order made on 25th August, 2010, Notice of Intention to Proceed filed on 10th February, 2015 and Patel's Response affidavit dated 23rd June, 2015, '*that we have not received further instructions from our client.*' The First Defendant says that Alan Hickling's affidavit lacks credibility since he does not explain why the Plaintiff has not complied with the Master's orders of 03rd February, 2012 to have this matter entered for trial within 180 days which he was aware of.

This Court finds that the last order was made on **03rd February, 2012** had the relevance and in particular that the trial of this action was to be set down within 180 days including that the Court set pre-trial directions obviously was not done and/or adhered by the Plaintiff. The **Plaintiff** filed the **Notice of Intention to proceed** on 10th February, 2015. No steps were taken in the proceedings after the 10th February, 2015 until 20th September, 2016 when an application under Order 34 was filed by the Plaintiff.

However, in terms of Order 3 Rule 5 of the High Court Rules, 1988, a Notice to proceed must give not less than one month's notice of their intention to proceed. Reference was made to the case of Deo v Ascot Motors Proprietary Limited [2011] FJHC 453; HBC331.2008 (18 August 2011) Justice Calanchini on the issue of Notice of Intent made this observation-

"This no doubt was a reference to Order 3 Rule 5. I do not consider that this observation adds a great deal to the principal issue of the **delay** between April 2009 and January 2011. Even if a notice under **Order 3 Rule 5** had been filed and served it would have made no difference to the issue of **delay** unless the Plaintiff had taken a **further step in the action.**'

In this case, I note that the matter didn't proceed despite filing a notice to do so. No attempts were made by the Plaintiff to explain inactivity since the Master's orders of 03rd February, 2012 or the first Notice of Intention to Proceed filed on 25th October, 2012 or second Notice filed on 10th February, 2015. The Plaintiff only acted when the First Defendant filed the Summons to Strike out the Plaintiff's action and filed a change of Solicitors together with an Order 34 Summons.

In summary, what constitutes **inordinate delay** is a question of fact to be determined from the circumstances of the case herein. In all the circumstances placed before the court, it is clear that there has been an **inordinate delay** on the part of the **Plaintiff**. In other words the **delay** was such that it attracted **negative sanction** of the court.

Further, the **delay** herein has been of a kind that can be classed as **inexcusable**. The alleged delay even if **inordinate** is **inexcusable** in this case on the ground that the Plaintiff was prosecuting and defending proceedings connected with the subject matter of these proceedings which the Plaintiff is very well aware of.

I find that there is deliberate **delay** on the part of the **Plaintiff** in concluding its case in terms of the pleadings and to ensure that it was brought to its conclusion. This was not done as there is clear evidence before this Court and therefore I find that the **delay** was both **inordinate** and **intentional** and that it is **inexcusable** for obvious reasons as discussed hereinabove.

Prejudice

37. It is trite law that the **Defendant** must establish that he is prejudiced by the delay.
38. The **First Defendant** submitted that the **Plaintiff** cannot assert there is no prejudice. **Firstly**, the legal costs that had been incurred by the **First Defendant** as per the affidavit deposed. **Secondly**, the fact that the proceedings were instituted in 2005 should be taken into account that in the best of human ability witnesses cannot be asked to recall with accuracy events that occurred in between 2001 to 2003, a period of not less than 15 years. He made reference to case of *New India Assurance Co Ltd v Singh* [1999] FJCA 69 ABU31u.96s.

He submitted further that these considerations are also relevant to whether it is possible to have a fair trial of the issues in the action. **Firstly**, the longer the delay the more difficult it can be for witnesses to accurately remember events that occurred several years before. **Secondly**, that same difficulty which are considerations for

prejudice are also relevant to whether it is possible to have a fair trial of the issues in the action.

He submitted that prejudice has been made out because there is irrefutable evidence that the 1st Defendant has to incur legal costs of a large amount which exacerbated by the fact that the Plaintiff Company is wound up.

39. The Plaintiff's contention on this prejudice issue was that no prejudice to accrue to the Defendants if the action were allowed to continue and the reason for this assertion are several. The action is largely based on documentary evidence. The real issue of contention is the signed mandate given by the Plaintiff to the Defendants. The issue is whether proper registered directors and signatories rendered the mandate was lawfully given and binding on the Plaintiff. Other issues are the legality of the honouring of cheques totaling \$3,066,415. The purported delay has not affected the defendants and the documentary evidence to be adduced in the trial. The Plaintiff further submitted that the defendants plead that several witnesses are not available to it. The documentary evidence speaks for itself and does not require supplementary oral evidence to support the documentary evidence. Therefore he says that the Defendants will not be prejudiced because of the non-attendance of the witnesses.
40. The parties to this proceedings cannot deny the fact that this matter has been pending in the system since 2005. After carefully perusing the court record I come to one conclusion that the matter in terms of completing the pleadings has in fact moved at a Snail pace. This is evident from the **chronology of events** set out at paragraph 20 hereinabove. The Plaintiff should have pursued the matter **expeditiously** in the best interest of his client (Plaintiff) if it had a case at hand. This was not done. Even when this Court made the orders and directions on 03rd February, 2012, the Plaintiff without any difficulty should have pursued with the matter expeditiously and concluded all the necessary pleadings. I reiterate, this was also not done until later when the **First Defendant** filed the **Summons to Strike out** the Plaintiff's action that the Plaintiff decided to file a **Change of Solicitors and Order 34 Summons**. This could have been done in the early stages when the Court made orders on 03rd February, 2012. If that was done then the Plaintiff would not have seen this day in Court defending the First Defendant's Striking Out application. Calculating the lapse of time frame from the commencement of this proceedings in 2005 and until the Summons to Strike Out filed it adds up to nearly 12-13 years. The witnesses may not be available now. The Plaintiff says that the Defendants plead that several witnesses are not available to it. The documentary evidence speaks for itself and does not require supplementary oral evidence to support the documentary evidence. Therefore he says that the Defendants will not be prejudiced because of the non-attendance of the witnesses.

41. The documentary evidence which the Plaintiff has in his possession if needed to be tendered into evidence will require witnesses through whom those would be tendered. It cannot be just handed over to the judicial officer whilst proving his case. The First Defendant had submitted that three of his witnesses are not in the Jurisdiction.
42. The First Defendant has also complained of incurring unnecessary legal costs in having to defend this matter which has been pending in the system since 2005. Why should he be penalized at the conduct of the Plaintiff in not pursuing with this matter with the necessary pleadings and bring it to its conclusion?
43. Permitting this action to continue would not be in anyway just and fair to the First Defendant who has been waiting this long to defend the Plaintiff's case.
44. The overriding objective of the procedural rule and the requirement in '*Birkett v James*' is to enable the court "to deal with cases justly". Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".
45. The Plaintiff has been found guilty of *inordinate and intentional delay* and that such delay is *inexcusable*. (Paragraph 36 hereinabove refers).
46. I find that the First Defendant has made out a case for *prejudice* against him since there is irrefutable evidence that the First Defendant has to incur legal costs of a substantial amount bearing in mind the matter has been pending before this Court since 2005 and the Plaintiff has *deliberately* not pursued this matter but only woke up when the first Defendant served the Summons to Strike Out the Plaintiff's Action.

This will certainly not *alleviate* any *prejudice* to the First Defendant.

Interest of Justice

47. Even if the Defendant satisfies the requirements in *Birkett v James*, 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).

48. In *Lovie 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.'

49. 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; *Lovie v Medical Assurance Society Limited* [1992] 2 NZLR 244; *Agar v Hyde* (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.**'

50. I find that it would not be possible to have a fair trial in this case bearing in mind the time frame from the commencement of this proceedings to the current and even if witnesses are available whether the natural ability to recall evidence from the memory after all these years is possible?
51. The Plaintiff has not given any **genuine reason** why the matter should not be struck out only to say that the Plaintiff Company was wound up in 2010 and they did not have the locus standi then to continue with the proceedings. The Plaintiff did not move the matter in terms of the Court order of 03rd February, 2012 and it can be implied that the Plaintiff chose to dishonor the Court Orders and the Rules of the High Court within this action. Nothing estopped the Plaintiff from pursuing this action.

52. I have carefully perused the substantive application, the pleadings filed so far, the written and oral submissions coupled with the applicable laws and the case authorities and find as follows:-
- (i) *The delay is inordinate and intentional, and there has been a disobedience of a Peremptory order of the Court dated 03rd February, 2012;*
 - (ii) *Explanation has not been satisfactorily provided by the Plaintiff for the delay as such the Plaintiff has not overcome the factor of not inexcusable;*
 - (iii) *The default is contumelious and the Plaintiff has disobeyed the Court orders of this court dated the 03rd February, 2012;*
 - (iv) *the first Defendant has suffered real prejudice; and*
 - (v) *In the interest of justice, a fair trial is still impossible to the current.*
53. Above rational and finding now brings an end to the Plaintiff's action in this proceedings and is accordingly **Struck Out** for want of Prosecution against the First Defendant in terms of *Order 25 Rule 9 of the High Court Rules, 1988.*

Second Application (By the Plaintiff)

54. The Plaintiff has also filed an application seeking an order that the Applicant may have leave and be at liberty to continue the action against the Defendants in the High Court Action No. 600 of 2005 on such terms and conditions as the Court deems just and expedient.
55. This Court then has a duty to deal with the Plaintiff's application as well in terms of their argument and submissions before this Court and show reasons of its decision.
56. This application is made pursuant to *Section 531 of the Companies Act, 2015* which provides as follows-

Actions stayed on winding up order

'When a winding up order has been made or an interim liquidator has been appointed under section 537, no action or proceeding must be proceeded with or commenced against the Company, except by leave of the Court and subject to such terms as the Court may impose.'

57. It is not in dispute that a Winding up Order was made against the Plaintiff Company on 25th August, 2010, File Reference *HBE 47 of 2010*. The Official Receiver was constituted as the Provisional Liquidator of the Company.
58. This order meant that the Directors of Fiji Daily Post Company Limited after the grant of the winding up order by the Court on 25th August, 2010 did not have any powers to

carry on with or continue with the proceedings since the control of the Plaintiff Company's affairs is then upon a winding up taken from the Directors and vested in the liquidator. That is the Plaintiff did not have the locus to prosecute the current proceedings once the Winding up Order was made and the Official Receiver constituted the Provisional Liquidator of the Plaintiff Company.

59. The Plaintiff filed its **Order 34 Summons** to enter this action for trial on 20th September, 2016 after the **First Defendant** had filed his Summons to Strike out the Plaintiff's Action against the **First Defendant**.

60. After the grant of the Winding up order, the Plaintiff admits that he did not have the locus to prosecute the current proceedings since the powers were vested with the Provisional Liquidator appointed by the Court.

Then the question arises, how and under what circumstances did the Plaintiff Company **Fiji Daily Post Company Limited** which was already under liquidation succeed to proceed with the Action by filing the change of Solicitors and the **Order 34 Summons**?

61. Upon a further perusal of the Court File, it reveals that the **Order 34 Summons** was filed by the Plaintiff on the 20th September, 2016 and the Consent of the Provisional Liquidator to continue with the proceedings was obtained and/or approved on 24th November, 2016 and a subsequent letter supporting the consent on 08th December, 2016.

62. If **Section 531 of the Companies Act, 2015** is read and understood properly, it deals with Actions stayed on Winding up Order and no action or proceeding must be proceeded with or commenced against the Company, except by leave of the Court.

Section 531 of the Companies Act, 2015 does not mention anything about obtaining the Consent from the Provisional Liquidator to proceed with the Matter as has been raised by the Plaintiff's Counsel.

63. If the Provisional Liquidator had made a decision to proceed with the action on behalf of the Plaintiff Company after the grant of the Winding up Order, then the Provisional Liquidator should have filed an application in terms of **Section 531 of the Companies Act, 2015** seeking the Leave of this Court and not the Plaintiff and/or his Counsel as is the case now before this Court. Further, the Application does not mention that the application for leave is sought by /or on behalf of the Provisional Liquidator and /or the Official Receiver.

64. This apprised Court of the fact that after this Court made the Order on 03rd February, 2012, that this action be tried before a Judge alone at Suva and be entered for trial

within 180 days including that the Court set Pre-Trial directions, the Plaintiff went off to sleep and took no subsequent steps to comply with the Court's order until the First Defendant Filed his Summons to Strike Out the Plaintiff's Action against him.

65. It took the Directors of the Plaintiff Company to make a Decision only to continue with this proceedings after a lapse of 4 years 4 months from the time of the Winding -Up Order made on 25th August, 2010. The Directors woke up in 2016 and filed their Change of Solicitors and the Oder 34 Summons accordingly. There has been no explanation of the delay of 4 years and 4 months explained and/or furnished to this Court yet they are now applying for leave of this Court to continue with this proceedings.
66. Reference is also made to the case of *Khan v Official Receiver [1999] FJ Law Rp 37; [1999] 45 FLR 220* (17 September 1999) wherein Pathik J. said When leave is sought to continue proceedings by a Company in liquidation , there are two factors to be taken into consideration:
- (i) *the nature of the plaintiff's claim*
 - (ii) *the balance of convenience and the demands of justice*
67. The only material question to be considered here are-
- (i) Whether there are any circumstances which render it necessary that the action should be continued, or
 - (ii) Whether the claim of the Plaintiff is not which can easily be dealt with in the Winding up as in any other way?

The Plaintiff submitted that its claim is inter alia the dealings by the 1st Defendant with the Plaintiff's account and withdrawal there from of large amount of cash without mandate, and the cashing and honouring of cheques which prima facie appear to be irregular.

The Plaintiff further submitted that the balance of convenience and justice require that the maters be ventilated in Court and a proper adjudication made by the Court on the subject.

The 1st Defendant submitted that the Plaintiff's submissions only addresses the nature of the Plaintiff's Claim which is not enough. The Plaintiff must establish since it is trying to persuade the Court to give leave to continue proceedings, the balance of convenience and the demands of Justice. No evidence has been led on the issue of balance of convenience by the Plaintiff and neither has not satisfied the second limb of establishing the balance of convenience along with the demands of Justice.

68. I find that the Plaintiff has only prima facie satisfied this Court on the 1st limb of the nature of the Plaintiff's claim but has failed to satisfy this Court with any evidence on

the 2nd limb of balance of convenience and the demand of justice in order to allow this Court to accede to its application in granting leave to continue with the proceedings.

69. The Plaintiff has also failed to provide court with any satisfactory explanation on delay on the Plaintiff's part as to why the Plaintiff did not take any pro-active measures for more than 4 years and 4 months to ensure this proceedings is brought to an end rather let it remain impending in the Court system for the period of 4 years and 4 months' time frame.

70. Also, this court can on its own inherent jurisdiction strike the matter out for abuse of process. Case hereunder Refers-

Lord "Woolf" in "Grovit and Others v Doctor and Others" (1997) 01 WLR 640, 1997 (2) ALL ER, 417, has discussed the principles for striking out for "Abuse of process" (The second ground in Order 25 Rule 9 (1)) as follows:

"The Court had power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied. Accordingly, since the commencement and continuation of proceedings with no intention of bringing them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to establish want of prosecution by showing that there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant. It followed, on the facts that the deputy judge had been fully entitled to strike out the action. The appeal would therefore be dismissed."

71. On the other hand, no doubt the Provisional Liquidator has given the consent to the Plaintiff to initiate proceedings on behalf of Fiji Daily Post Company Limited but not to continue with the proceedings.

72. **Section 543 of the Companies Act 3 of 2015 deals with the "Powers of a Liquidator".**

Section 543 (1) (c) states that "the liquidator in a winding up by the Court must have power, with the sanction either of the Court or of the committee of inspection—

"To appoint a barrister and solicitor to assist the liquidator in the performance of his or her duties".

73. In this case no appointment of Barristers and Solicitors including Singh & Singh Lawyers has been made by the Provisional Liquidator to assist the Liquidator in continuing with this proceedings.

Further, the Provisional Liquidator has not even by itself brought or filed any application to seek leave of this Court to continue with this proceedings on behalf of the Plaintiff Company, Fiji Daily Post Company Limited-

Section 543 (1) (a) of the Companies Act refers which states that the liquidator in a winding up by the Court must have power, with the sanction either of the Court or of the committee of inspection "to bring or defend any action or other legal proceeding in the name and on behalf of the Company."

74. This Court has taken into consideration the parties submissions and affidavit evidence together with the case authorities and find that it has not been sufficiently persuaded to grant leave to the Plaintiff to allow the Company to continue with the proceedings against the 1st Defendant.
75. For the aforesaid rational, I make the following orders on both applications before this Court:-
- (a) First Defendant's Application seeking Striking Out of the Plaintiff's substantive action for want of prosecution hereby succeeds against the First Defendant;
 - (b) The action is struck out against the First Defendant accordingly;
 - (c) The Plaintiff's Summons seeking leave to continue with the proceedings against the First Defendant fails and is hereby Dismissed accordingly.
 - (d) The Plaintiff to pay the First Defendant summarily assessed Costs of \$1,000 within 14 days' time frame.

Dated at Suva this 04th Day of September, 2017



VISHWA DATT SHARMA
Master of High Court, Suva

cc: Singh & Singh Lawyers, Suva
Young & Associates Solicitors, Lautoka.