IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 130 of 2014

BETWEEN : **AMELIA DAVETALALA** of Lot 10 Tualesia Subdivision, Vomo Street, Lautoka.

PLAINTIFF

AND : **UPESH KUMAR** of Vomo Street, Lautoka.

1st DEFENDANT

AND : **GRISHMA BHATIA** of Vomo Street, Lautoka.

2nd DEFENDANT

Mr. Vamarasi Tausie Faktaufon for the Plaintiff
Mr. Ifthakhar Iqbal Khan for the Defendants

Date of hearing :- 23rd September, 2016
Date of ruling :- 15th December 2016

RULING

(A) INTRODUCTION

(1) The Court on its own motion issued a Notice to the parties on 09th February 2016 listing the matter for the parties to show cause as to why the case should not be struck out for "Want of Prosecution" or as an "Abuse of Process of the Court" since no action was taken for a period of more than six (06) months.

(2) The notice was issued pursuant to **Order 25, rule 9 of the High Court Rules, 1988.**

(3) Upon being served with "Notice", the Plaintiff filed an Affidavit to show cause as to why the matter should not be struck out for "Want of Prosecution" or as an "abuse of Process of the Court".

(4) The Defendants filed an Affidavit opposing the Plaintiff's Affidavit to show cause followed by an Affidavit in Reply.

(B) THE BACKGROUND

(1) This is an action for specific performance of an agreement.

The Plaintiff claimed *inter alia*;

1. *Against the 1st and 2nd Defendants an Order for Specific Performance of the Agreement of the 29th of November, 2013 and proceed to sell the property to the Plaintiff on the terms and conditions agreed to.*

2. *An Order for an injunction restraining the 1st and 2nd Defendants, their servants and agents, whomsoever and whatsoever from dealing with the property in any manner of from until further order of this Court.*

   (i) Costs;

   (ii) Any other relief this honourable Court may deem just.

(2) What are the facts here? To give the whole picture of the action, I can do no better than set out hereunder the averments/assertions of the Statement of Claim.

The Plaintiff in her Statement of Claim pleads *inter alia*;

Para 1. *That the Plaintiff resides with her family at a property at Lot 10 Tualesia Subdivision Vomo Street Lautoka situated on Native Lease No. 29420 [TLTB Ref No. 4/7/5004] (the Property) being a 3 bedroom concrete house.*

2. *That the Defendants are the registered proprietor of the Property (Native Lease No. 29420 [TLTB Ref No. 4/7/5004).*

3. *That the Plaintiff and her family had, at all material times, resided on the Property under an arrangement with its previous owner KOROTU PROPERTIES LIMITED.*

4. *That on or about the 28th of November, 2012, the Defendants purchased the Property from Korotu Properties Limited.*

5. *That after the Defendants had purchased the Property from Korotu Properties Limited; the Defendants verbally offered the Property for sale to the Plaintiff for $130,000.00 (One Hundred and Thirty Thousand Dollars) and requested a deposit of $45,000.00 (Forty Five Thousand Dollars).*

6. *That the Plaintiff agreed to the Defendants offer and paid the Defendants the sum of $45,000.00 through a loan from Korotu*

Properties Limited and that a Sales and Purchase Agreement was to be entered into.

7. *By a contract in writing dated the 29th November, 2013, between the Plaintiff and the Defendants, (hereafter the "Contract"), the Defendants agreed to sell to the Plaintiff that piece of Native Land for the sum of $130,000 (One Hundred and Thirty Thousand Dollars).*

8. *That the essential terms of the Agreement were :*

   1. *COVENANT TO SELL AND PURCHASE*

      1.1 *The Vendor will sell and the purchaser will purchase the said property will stand on the date of execution of the Sale and Purchase Agreement herein for the price and upon and subject to the terms and conditions hereinafter appearing.*

   2. *PRICE AND DEPOSIT*

      2.1 *The full purchase price for the property shall be the sum of FJD$130,000.00 exclusive of VAT [One Hundred Thirty Thousand Dollars]. The said sum shall be paid and satisfied by the purchaser to the Vendor on the date of settlement.*

   3. *NO ENCUMBRANCES*

      3.1 *The Property is sold free of leases mortgages charges and any other encumbrances whatsoever.*

   4. *SETTLEMENT*

      4.1 *The date of settlement shall be within ninety [90] days of the date of grant of consent by the iTaukei Land Trust Board to this dealing or such later date as the parties may agree in writing.*

9. *That upon signing the Agreement, the Plaintiff had made repeated requests to the Defendants to comply with the Agreement but the Defendants had advised the Plaintiff that the Agreement was unenforceable.*

10. *That Plaintiff denies that the Agreement is unenforceable and seeks its enforcement.*

11. *That the Defendants have breached its Contract with the Plaintiff and the said breach continues until this day by failing to honour and complete the agreement.*

(3) On 12th August 2014, the Defendants filed Acknowledgement of Service of Writ of Summons and notice of Intention to Defend under Order 12, rule 4 of the High Court Rules, 1988. Therefore, activity ceased.

(C) THE LAW

(1) Against this factual background, it is necessary to turn to the applicable law and the judicial thinking in relation to the principles governing the striking out for want of prosecution.

(2) Rather than refer in detail to the various authorities, I propose to set out very important citations, which I take to be the principles in play.

(3) Provisions relating to striking out for want of prosecution are contained in Order 25, rule 9 of the High Court Rules, 1988.

I shall quote **Order 25, rule 9,** which provides;

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

(4) Order 25, rule 09 expressly gives power to the court on its own motion to list any cause or matter, where no step has been taken for at least six (06) months.

(5) The Court is allowed to strike out an action on the failure of taking of steps for six (06) months on two grounds. The first ground is for **want of prosecution** and the second is an **abuse of process of the Court.**

(6) The principles for striking out for **want of prosecution (first ground)** are well settled. Lord **"Diplock" in "Birkett v James" (1987), AC 297,** succinctly stated the principles at page 318 as follows:

> *"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; (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 it 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."

(7) The test in **"Birkett vs James"** (*supra*) has two limbs. The first limb is **"intentional and contumelious default"**. The second limb is **"inexcusable or inordinate delay and prejudice."**

(8) In, **Pratap v Chirstian Mission Fellowship, (2006) FJCA 41, and Abdul Kadeer Kuddus Hussein V Pacific Forum Line, IABU 0024/2000,** the Court of Appeal discussed the principles expounded in **Brikett v James** (*Supra*).

The Fiji Court of Appeal in **"Pratap V Chrisitian Mission Fellowship"** (*supra*) held;

*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 Line – ABU0024/2000 – FCA B/V 03/382)** the court, readopted the principles expounded in **Birkett v James [1978] A.C. 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 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, 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'."

(9) The question that arises for consideration is what constitutes **"intentional and contumelious default"** (First Limb). The term **"Contumely"** is defined as follows by the Court of Appeal in **Chandar Deo v Ramendra Sharma and Anor, Civil Appeal No, ABU 0041/2006,**

"1. Insolent reproach or abuse, insulting or contemptuous language or treatment; despite; scornful rudeness; now esp. such as tends to dishonour or humiliate.

2. Disgrace; reproach."

(10) In **Culbert v Stephen Wetwell Co. Ltd,** (1994) PIQR 5, Lord Justice Parker succinctly stated,

> *"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."*

Lord Justice Nourse in Choraria [Girdharimall v Sethia (Nirmarl Kumar) Supreme Court Case No. 96/1704/B, C.A. 15.1.98 said;

> *"However great does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground."*

It has been further stated by ***Nourse J:***

> *"That is the principle on which the court must now act. Whether it is identified as being comprehended within the first limb of **Birkett v James** or as one having an independent existence appears to be a point of no importance. I have already said that it is clear that the relevant ground of decision in **Culbert** was based on the first limb of **Birkett v. James**. In other words, it was there effectively held that the plaintiff's conduct had been intentional and contumelious.*
>
> *In my view that conclusion was well justified on the facts of the case, which demonstrated not only the plaintiff's complete disregard of the*

rules but also his full awareness of the consequences. He had, at the least, been reckless as to the consequences of his conduct and, on general principles that was enough to establish that the defaults had been intentional and contumelious."

(11) Therefore, the failure to comply with peremptory orders and/or flagrant disregard of the High Court Rules amounts to contumaciousness.

(12) The next question is what constitutes **"inexcusable or inordinate delay and prejudice".**

In **Owen Clive Potter v Turtle Airways LTD**, Civil Appeal No, 49/1992, the Court of Appeal held,

"(Inordinate)....means so long that proper justice may not be able to be done between the parties. When it is analysed, it seems to mean that the delay has made it more likely than not that the hearing and/or the result will be so unfair vis a vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties."

And at page 4, their Lordships stated:

"Inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It simply allows the Judge to put into the scales the Plaintiff's conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him opportunity from pursing his action or perhaps any action against the defendant."

In **Tabeta v Hetherigton** (1983) The Times, 15-12-1983, the court observed;

"Inordinate delay means a delay which is materially longer that the time which is usually regarded by the courts and the profession as an acceptable period."

(13) The Court of Appeal, in **"New India Assurance Company Ltd, V Rajesh k. Singhand Anor, Civil Appeal No, ABU 0031/1996,** defined the term "prejudice" as follows,

> *"Prejudice can be of two kinds. It can be either specific that is arising from particular event that may or may not occur during the relevant period or general, and prejudice that is implied from the extent of delay."*

(14) 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" (Second ground in Order 25, rule 9) as follows,**

> *"This conduct on the part of the appellant constituted an abuse of process. 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".*

(15) The Court of Appeal in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor, Civil Appeal No. ABU 0052/2006** affirmed the principle of **Grovit –v- Doctor** as ground for striking out a claim, in addition to, and independent of principles set out in **Brikett v James** (see paragraph 16 of the judgment). Their Lordships held:-

> *"It may be helpful to add a rider. 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"

(16) **It seems to me perfectly plain that under "Grovit and Others v Doctor and Others" (*supra*) there is no need to show prejudice any more for it says that maintaining proceedings without a serious intention to progress them may amount to "abuse of process" which justifies for want of prosecution without having to show prejudice.**

(D) ANALYSIS

(1) Before I pass to consideration of substantive submissions, let me record that Counsel for the Plaintiff and the Defendants in their written submissions have done a fairly exhaustive study of the judicial decisions and other authorities which they considered to be applicable. I interpose to mention that I have given my mind to the oral submissions made by the parties as well as to the written submissions and the judicial authorities referred to therein.

(2) At the oral hearing of the matter, Counsel for the Plaintiff and the Defendants sought to read and rely on the following Affidavits;

- Affidavit of 'Amelia Davetalala' (the Plaintiff) sworn on 19th April 2016 **(The Plaintiff's Affidavit to show cause).**
- The Affidavit of 'Upesh Kumar' and 'Grishma Bhatia' (the Defendants) sworn on 30th June 2016 **(The Defendant's Affidavit in Opposition to the Plaintiff's Affidavit to show cause)**
- The Affidavit of 'Amelia Davetalala' (the Plaintiff) sworn on 09th August 2016. **(The Plaintiff's Affidavit in Reply).**

(3) Now let me turn to the substantive matter.

As I mentioned earlier, on 12th August, 2014, the Defendants filed Acknowledgement of Service of Writ of Summons and Notice of Intention to Defend under Order 12, rule 4 of the High Court Rules, 1988. Thereafter, activity ceased. The action went to sleep for 1½ years. The Plaintiff did absolutely nothing to obtain Judgment. The

Plaintiff did nothing whatsoever until spurred on by the Courts Notice pursuant to Order 25, rule 9.

The word **"proceed"** is used in the existing High Court Rules, it refers to some **"proceeding"** while the matter is still in controversy, or there is still some further step to be taken before Judgment is obtained.

On the other hand if Judgment has not been obtained then any step taken towards obtaining it would appear to be a step in those proceedings which are covered by the rules.

From 12th August 2014 to 09th February 2016, that is for 1 ½ years the Plaintiff had all the time to take procedural steps to obtain judgment. The Plaintiff did absolutely nothing. To make matters worse, the Plaintiff failed to file a Notice of intention to proceed, under Order 3, rule 5 to terminate the delay.

The real point is whether the Plaintiff having done nothing for a period of 1 ½ years, i.e. between 12th August 2014 and 09th February 2016, (after issuing the Writ) should now be allowed to revive it? An Affidavit is put on her behalf in which she says;

(Reference is made to paragraph 08 to 13 of the Plaintiff's **Affidavit to show cause** sworn on 19th April 2016).

Para 8. *I was not aware of the procedural steps taken to pursue my action.*

9. *It took me sometime and had difficulties in search of a new law firm to represent me in this matter with reasonable costs.*

10. *Now, I have engaged the services of Faktaufon & Bale Lawyers, Solicitors Suva who will now be representing me in this matter.*

11. *I meant no disrespect to this Honourable Court of such delay caused from my part as I really need this matter to be afoot still.*

12. *I believe that my claim has merits before the Court and it must not overlook the cause of justice to exercise its discretion to restore my case back to its normal cause and have this matter go to trial.*

13. *The Defendant has not even filed a Statement of Defence.*

As I understand the Plaintiff's Affidavit to show cause, the explanation was that;

- **The self-represented Plaintiff was ignorant of process of the law.**
- **Due to her non-representation during the inaugural period after having filed and served her Writ of Summons, she was**

not able to receive proper advice on the legal and proper procedures of her actions.

- **The Defendants too sat back and allowed so much time to elapse by not filing the Statement of Defence.**

In deciding whether or not it is proper to strike out, the Court asks itself a number of questions:- First, has there been inordinate delay? Secondly, is the delay nevertheless excusable? And thirdly, has there in consequence been prejudice to the other Party?

But these questions are, as it were, posed en route to the final test which overrides everything else and was enunciated by the Master of Rolls in **Allen v Sir Alfred McAlpine & Sons Ltd, (1968) 2. QB 229**, in the words at p.245;

> *"The principles upon which we go is clear; when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the Court may in its discretion dismiss the action straight away...."*

So the overriding consideration always is whether or not justice can be done despite the delay.

As I said earlier, between 12th August 2014 and 09th February 2016, the Plaintiff did absolutely nothing to obtain Judgment in default of pleadings. To make matters worse, the Plaintiff failed to file a Notice of Intention to proceed under Order 3, rule 4 to terminate the delay.

The delay is inordinate. The delay can be explained but not excused. So far as the Plaintiff is concerned, it is explained by her **non-representation and her ignorance of process of the law; but I fear not excused.**

I must confess that I remain utterly unimpressed by the Plaintiff's explanation as to why she let her action sleep for 1½ years. To be more precise, I cannot accept these explanations. Because;

- The Court cannot rely on the Plaintiff's **bare assertion** that she had difficulties in search of a law firm. (See; **Bidder v Bridges, 1884, Ch.D. Vol-26, Page-01**).

- The self-represented Plaintiff remains responsible for the conduct of the proceedings.

- ❖ The Court is impartial and independent and does not offer privilege or provide legal advice to self-represented Plaintiff.

- ❖ The Court has to ensure as far as possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.

- ❖ The Court does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent. The perception of impartiality should be maintained.

- ❖ The public confidence in the Court exists because there is a presumption that the Court is independent, impartial, fair and competent.

- ❖ In an adversary system, it is up to the parties to run their case.

- ❖ Legislation is often complicated and sometimes incomprehensible even to Judges. The law is there to govern all of society, not just lawyers. It is therefore important that all of society, not just lawyers, understand the law.

It is incumbent upon the Plaintiff to provide an adequate excuse for such delay. It is not for the Defendants to demonstrate its inexcusability. **I am not by any means satisfied that Counsel for the Plaintiff has succeeded in explaining away his client's inactivity for a period of 1½ years.**

This is not a criminal case in which I am called upon to allow my imagination to play upon the facts and find reasonable hypothesis consistent with innocence. A balance of probability is enough. And when the greater probability is that the Plaintiff did not care at all to take procedural steps to obtain Judgment in default of pleadings with expedition after the issue of the Writ, why should this Court hesitate to find accordingly against the Plaintiff?

It is in the public interest that, once a Writ is issued, the action should be brought to trial as quickly as possible.

The fact of more than 1½ years having lapsed since the last proceedings and the Plaintiff's failure to file Notice of Intention to Proceed to terminate the delay tend to show that the Plaintiff had intentionally abandoned the prosecution of the action or there is either the inability to pursue the claim with reasonable diligence and expedition or lack of interest in bringing it to a conclusion.

(4) The underlying principle of Civil litigation is that the Court takes no action in it of its own motion but only on the application of one or other of the parties to the litigation,

the assumption being that each will be regardful of his own interest and take whatever procedural steps are necessary to advance his cause.

The High Court Rules give to the Plaintiff the initiative in bringing her action for trial. The pace at which it proceeds through the various steps of issue and service of Writ, or pleadings and discovery, order for directions and setting down for trial is in the first instance within her control.

The rules also provide machinery whereby the Plaintiff can compel the Defendants to take promptly those steps preparatory to the trial which call for positive action on her part and provide an effective sanction against unreasonable delay by the Defendants.

It is thus inherent in an adversary system which relies on the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the Defendant, instead of spurring the Plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the Court to dismiss the Plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.

(5) Returning back to the case before me, it is the contention of the Plaintiff that the Defendants did not file the Statement of Defence and the Defendants too sat back and allowed so much time to elapse as to make a fair trial of the action impossible, and now seek to profit from this by escaping liability to the Plaintiff. This argument does not attract me. To accede to this argument would be an encouragement to the careless and lethargic. It would mean that the Plaintiff can neglect her claim for years without any risk to herself, until a warning shot is fired.

In any event, this is a matter of little consequence because the High Court Rules give to the Plaintiff the initiative in bringing her action on trial.

It would be unrealistic to expect a Defendant in an ordinary action for specific performance to take steps to hasten on for trial an action in which the Plaintiff's prospect of success appears at the outset to be good.

(6) Finally, Counsel for the Plaintiff asserted that the Defendants have not shown **'specific serious prejudice'**

I must confess that I am not impressed at all by the effort of the Counsel for the Plaintiff. It is wrong to say that in order to strike out the action for want of prosecution, the Defendants should show specific prejudice. I interpose to mention that the proposition advanced by Counsel for the Plaintiff demonstrates a clear misconception on his part as to the scope and width of doctrine of "prejudice". Having said that I wish to emphasize that prejudice is generally regarded as inherent in substantial delay.

In the context of the present case, I cannot help but recall the rule of law enunciated in the following judicial decisions;

"*Prejudice can be of two kinds. It can either specific, that it is arising from particular events that may or may not have occurred during the relevant period or general, that is prejudice that is implied from the extent of the delay*"; per Hon. Sir Maurice Casey, **New India Assurance Company Ltd v Singh**, (1999) FJCA 69.

The prejudice will generally be regarded as inherent in substantial delay: **Green v CGU Insurance Ltd** [2008] NSWCA 148; (2008) 67 ACSR 105 and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

In an era when the need to ensure the efficient use of judicial resources has become increasingly important, delay may also be significant in that regard. **Town & Fencott & Associates Pty Ltd v Eretta Pty Ltd** [1987] FCA 102; (1987) 16 FCR 497, 514, and **Christou v Stanton Partners Australasia Pty Ltd** [2011] WASCA 176 (10 August 2011).

"*We now turn to consider whether prejudice should be inferred from the extent of the delay. It has long been recognized that the longer the delay the more difficult it can be for witnesses accurately to remember events that may have occurred years before. Such events may be forgotten, and there may be an increased possibility that a witness may, by virtue of the passage of time, come to believe an event or a happening that in fact did not occur, or did not occur in the manner he or she now believes.*" per Hon. Sir Maurice Casey, **New India Assurance Company Ltd v Singh**, (1999) FJCA 69.

Lord Denning summed up prejudice in **Biss v. Lambeth, Southwark & Lewisham Health Authority**, [1978] 2 All E.R. 125, as follows:

> *"The prejudice that might be suffered by a defendant as a result of the Plaintiff's delay was not to be found solely in the death or disappearance of witnesses, or their fading memories, or in the destruction of records,* ***but might also be found in the difficulty experienced in conducting his affairs with the prospects of an action hanging indefinitely over his head in the circumstances, by having the action suspended indefinitely over their heads****, the defendants have been more than minimally prejudiced by the Plaintiff's inordinate and inexcusable delay and contravention of rules of court as to time since the issue of the Writ, and that, added to the Plaintiff's great and prejudicial delay before the issue of the Writ, justified the court in dismissing the action for want of prosecution."*
>
> (Emphasis Added)

At this point, I cannot resist in saying that the proposition advanced by the Plaintiff in relation to "prejudice" flies on the face of the rule of law enunciated in the aforementioned judicial decisions.

(7) Leave all that aside for a moment! It is not essential that the Defendants demonstrate prejudice ***(Grovit v Doctor & Others* [1997] 2 ALL ER 417)**. The Court still has the power under its inherent jurisdiction to strike out or stay actions on the ground of abuse of process irrespective of whether the classic tests enunciated in ***Birkett v James*** (supra) for dismissal for want of prosecution have been satisfied.

"The circumstances in which abuse of process can arise are varied and the kinds of circumstances in which the court has a duty to exercise its inherent jurisdiction are not limited to fixed categories. The dual principles are well settled. It is a matter of determining on the facts whether the continuation of the present proceedings will be an abuse of process of the court" **(Richardson J in the New Zealand Court of Appeal decision of *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 at page 10).**

The fact of more than 1½ years having lapsed since the last proceedings tends to show that the Plaintiff had intended to abandon her claim or there is either the inability to pursue the Claim with reasonable diligence and expedition or lack of interest in bringing it to a conclusion.

I must stress here that it is an abuse of Court process if actions are commenced or maintained without the intention to pursue them with reasonable diligence and expedition.

Certainly, this case falls within the category of "abuse of process" held in "***Grovit and Others v Doctor and Others"*** (*supra*). As earlier mentioned, it seems to me perfectly plain that under "***Grovit and Others v Doctor and Others***" (*supra*) there is no need to show prejudice any more for it says that maintaining proceedings without a serious intention to progress them may amount to "abuse of process" which justifies for want of prosecution without having to show prejudice. I echo the words of Lord "Woolf" " in "***Grovit and Others v Doctor and Others***" (*supra*)

> *"This conduct on the part of the appellant constituted an abuse of process. 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".*

It has further stated by **Lord Woolf**:

"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."

(Emphasis Added)

Similar sentiment was expressed in **Thomas (Fiji) Ltd –v- Frederick Wimheldon Thomas & Anor,** Civil Appeal No. ABU 0052/2006;

"It may be helpful to add a rider. 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".*

(E) CONCLUSION

Having regard to the facts of this case, I apply the legal principles laid down in the case of **Grovit and Others v Doctor and others** (*Supra*). Accordingly, I conclude that the Plaintiff maintained the action in existence notwithstanding that she had no interest in bringing it to a conclusion.

This conduct on the part of the Plaintiff constituted an abuse of process of the court. In these circumstances, I am driven to the conclusion that this is one of those rare cases where the court is obliged to strike out the proceedings in order to prevent an abuse of process of the court. I cannot resist in saying that it would be an affront to justice to allow the proceedings to carry any further.

This should be made clear; *the limited resources of this Court will not be used to accommodate sluggish litigation.*

Essentially that is all I have to say !!

(F) ORDERS

(1) The Plaintiff's action against the Defendants is dismissed for want of prosecution and abuse of process of the Court. **Civil Action No- HBC 130 of 2014 is hereby struck out.**

(2) I make no order as to costs.

HIGH COURT OF FIJI LAUTOKA

15/12/2016.

Jude Nanayakkara
Master.

At Lautoka
15th December 2016.