IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION

Civil Action No. HBC 08 of 2002

BETWEEN: NILESH CHAND

Plaintiff

And : YAKESH NAIDU

And : HOMETOWN MOTOR COMPANY

And : SUN INSURANCE COMPANY LTD

Defendants

Before : Master Udit

Counsel : Mr A Kholi for the Plaintiff /Respondent
Ms Watkins for the Defendants/Applicants

Date of Ruling: 7th June, 2007

RULING

(want of prosecution / next of kin)

Introduction

[1] Since the introduction of a Court, as opposed to counsels or litigants, controlled case management system last year, the nature of the summons herein has become one of burgeoning applications of the recent times. In so far as the civil jurisdiction of this Honourable Court is concerned, the people of the Northern Division have had their optimum benefit. Undoubtedly, three days of Court sitting presided by the Master followed by a week of Judge's sitting every month has tempered largely with the lethargic attitude of litigants and legal practitioners. Labasa High Court now has most,

if not all, pending civil cases on the cause list, so that the progress of each of them is monitored by the court on a monthly basis.

[2] Having said that, let me return to the defendants' present application which is to strike-out the plaintiff's claim for want of prosecution under *Ord 25 rule 9* of the *High Court Rules 1988*. In addition, although not included in the summons, Ms Watkins in the written, as well as oral submissions before me argued that the action from its inception was wrongfully constituted, by a minor without a *next of kin* as required under *Order 80 rule 2* as such it ought to be dismissed.

[3] This application is opposed by the plaintiff. One matter, which I must state from the outset, is that on the day of hearing Ms Watkins presented her submissions. However, the plaintiff's counsel was not ready and sought further time to address some of the pertinent issues raised by Ms Watkins. With great reluctance but in the interest of justice, I gave liberty to the plaintiff's solicitors to file written submissions and ordered costs against him.

Chronology

[4] Bearing in mind the nature of the plaintiff's application, it is of cardinal importance to set out the chronology of this proceeding in some detail. The table below sets it out as follows:-

15th February, 2002	Writ and Statement of Claim filed
13th March, 2002	Acknowledgment of Service filed
2nd April, 2002	Defence filed
17th April, 2002	Reply to Defence filed
16th May, 2003	Summons for Directions filed (dismissed on 30th May 2003)
15th July, 2003	Notice of Intention to Proceed filed
17th Feb, 2004	Notice of Discontinuance filed
18th May, 2004	Affidavit Verifying Plaintiff's List of Documents.
19th Sep, 2006	Summons to Strike Out/dismiss issued.
19th Sept, 2006	Affidavit of Elizabeth Saverio in support of Summons issued.

3rd Oct, 2006	Affidavit of Kamal Chand in opposition to the Summons issued.
7th July, 2006	Action listed before the Master for which notice was given 19th June, 2006.
15th Sept, 2006	Action listed before the Master and directions given.
3rd Oct 2006	Ex-Parte Notice of Motions for leave to amend the Writ plaintiff, supported by an affidavit of Kamal Chand Waqele, Labasa, a law clerk.
1st Nov 2006	Solicitors Certificate as required under Ord. 80 rule 3 (8)(C)
1st Nov 2006	Consent of next friend pursuant to Ord. 80 rule 3 (8) (a).
24th Nov 2006	Submission of the plaintiff filed

Background facts

[5] A writ of Summons was issued on 20th February, 2002 against the defendants. It is a claim for personal injuries arising out of a motor vehicle accident. On 26th December 2006, just a day after Christmas on the Boxing Day the first defendant was returning to Labasa from Wainikoro in a car registration No. DQ 847, which he was driving.

[6] On the way, he met the plaintiff who was riding a bicycle, travelling in the opposite direction towards Wainikoro. It is alleged that due to the first defendant's negligent driving the car collided with the infant plaintiff. A detailed particulars of negligence is pleaded in *paragraph 7* of the Statement of Claim, of which one is that he was driving too fast in the circumstances, a phenomenon which is not infrequent for the motorist who are familiar with that portion of the road in Nagigi.

[7] By reason of the accident, the plaintiff, who then was a form six student suffered serious injuries *(see paragraph 8 of the Statement of Claim)*. Consequently, he was taken to the hospital, where he was admitted for four (4) days.

[8] The first defendant was charged with the offence of dangerous driving and seven months later, on 31st July, 2001 he was convicted and fined $100.00 in default 100 days imprisonment. The plaintiff is relying upon the said conviction, which is alleged to be relevant to the issue of liability.

[9] On the other hand, the defendants deny liability. In addition the defendants allege contributory negligence on the part of the plaintiff. Amongst other particulars of contributory negligence, it is alleged that the plaintiff was '*riding (bicycle) too fast in the circumstances*'.

[10] By this action, the plaintiff is now seeking special damages of $138-50, general damages for pain suffering and loss of amenities, interests and costs. Let me return to the primary issues, that is, want of prosecution and the proceedings is wrongly constituted.

Want of Prosecution

[11] This application is made pursuant to *Order 25 rule 9* which *inter-alia* provides:-

> "(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".

[12] The strict application and effectiveness of this rule has proved to be very beneficial, particularly for the litigants. I have in considerable detail discussed some of my personal observations of the workings of rule in action, in Sunmukh Investment Ltd – v- Nadi Bay Beach Co-operated Ltd *Suva High Court Civil action No. HBC 0132/91*, a decision delivered on 3rd May 2007; *(see pages 2-8)*

[13] Ms Watkins in her submissions referred me to number of relevant authorities of this Honoruable Court and Court of Appeal. However, recently the Court of Appeal delivered a number of judgments, reversing the decisions of the High Court striking

out proceedings under one or both these grounds; Bhawis Pratap-v-Christian Mission Fellowship, *Civil Appeal No.ABU 0093/2005(14th July, 2006)* NLTB -v- Rap Chand Holdings *Limited Civil Appeal No. ABU 0041/2005 (10th November, 2006),* Thomas(Fiji)Limited-v-Frederick Wimbeldon Thomas & - Anor *Civil Appeal No. ABU 0052/2006,* Trade Air Engineering (West) Limited& **Ors -v- Laisa Taga & Ors,** *Civil Appeal No. ABU 0062/2006(12th March, 2007)* and **Chandar Deo -v- Ramendra Sharma & Anor** *Civil Appeal No. ABU0041/2006(12th March,2007).*

[14] *Has, Order 25 rule 9 impacted upon these principles?* In the last session of its sitting the Court of Appeal in **Trade Air Engineering (West) Ltd. –v- Laisa Taga** *(supra),* the considered this issue at length. At paragraph 16 of the judgment the court concluded:-

> "In our view the *only fresh power given to the High Court under O. 25, r. 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 authorities".
>
> (emphasis added)

And for the applicable principles, in *paragraph 3* of the judgment, the court said:-

> "Although Rule 9 is a new rule, *it alludes to powers which the High Court possessed prior to the Rule's promulgation.* Rule 9 (1) refers to the Court's *inherent jurisdiction to dismiss for want of prosecution (see generally the White Book 1988 paragraph 25/1/4, /5 and /6) and its statutory jurisdiction to strike out proceedings which are abuse of the Court's process (RHC O. 18, r. 19).* Paragraph (2) refers to the Court's powers upon summons for directions being taken out (see RHC O. 25 and especially O. 25, r. 1 (4))".
>
> (emphasis added)

[15] The approach to be taken in an application to strike-out a proceeding for want of prosecution was discussed in detail by the Court of Appeal in Bhawis Pratap (supra).In re-affirming its earlier decision in **Abdul Kadir Kaddus Hussein -v- Pacific Forum Line** Civil Appeal No. ABU 0024/2000, the Court of Appeal emphatically stated that the principles enunciated in **Brickett -v- James** [1978] AC 297 was and still remains the present law in this country. **Lord Diplock** in

Brickett -v- James *(supra)* succinctly stated the principles at page 318 as follows:-

> "The power should be exercised only:-
>
> 1) Where the court is satisfied either that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or
>
> 2). (a) that there has been inordinate and inexcusable delay on the part of plaintiff or his lawyers'
>
> *(b)* that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party".

[16] In **Lovie –v- Medical Assurance Society Limited, (1993) 2 NZLR 244,** in the New Zealand Court of Appeal, His Lordship, Eichelbaum CJ after reviewing the authorities on this subject at page 248 summarised the law as follows:-

> *"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 Anderson 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. "*
>
> (emphasis added)

[17] It is not decipherable from Ms Watkins submission as to whether she relies on first or second or both the limbs of *Brickett -v- James (supra).* But for the sake of completeness, I will consider both the limbs.

First Limb

[18] What constitutes *'intentional'* and *'contumelious'* default? *Lord Diplock,* in **Brickett -v- James** *(supra)* did not define 'contumelious,' save for citing disobedience to peremptory order of the court or conduct as an example of contumely (see page

318). The Court of Appeal in **Chandar Deo -v-Ramendra Sharma & Anor.** Civil Appeal No. ABU0041/2006 at paragraph 12 of the judgment defined *contumely* as follows:-

> *"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."*

[19] It is worth mentioning that Ms Watkins at page 6 of her written submissions which she repeated in the oral submissions cited the High Court decision in the aforesaid matter. The Court of Appeal in reversing the decision in respect of the categorisation of 'contumely' by the High court said:-

> "[13] The Judges' explanation for finding the Appellant's conduct to be contumely was that :-
>
> > *"Bearing in mind the case as pleaded in the statement of claim and the explanation given for not proceeding with the mater in a timely manner it would seen to me that not only is the delay intentional but that it is also contumelious. "*
>
> With respect, we find that reasoning unconvincing".

[20] The contumacious conduct complained of by Ms Watkins is directed solely to the delay. Certainly, the House of Lords, in Brickett –v- James *(supra)* did not express the rule in the widest possible term that delay on its alone to a contumelious conduct. In Chandar Deo-v-Ramendra Sharma, *(supra)* at least a dictionary definition was adopted.

[21] Neither from the Court file nor was the counsel able to identify any peremptory orders been made and not complied with. Having read the affidavit of Kamal Chand sworn and filed on 3rd October, 2006, and the supporting affidavit, I cannot ascertain any conduct which is insolent, reproach or abusive, or disgraceful. Of course, the proceeding has not been pursued with the vigour it should have been but that alone does not amount to intentional and contumelious default. Therefore, I hold that there

is no intentional and contumelious default; as such the first limb of the Brickett –v- James *(supra)*, is not satisfied.

Second Limb

[22] The second limb of ***Brickett –v- James*** is a composite of two factors, both of which needs to be proved. The onus rests on the applicant. These are (1) *inexcusable and inordinate delay* and (2) *prejudice to the defendant.* The Court of Appeal in **Owen Clive Potter -v- Turtle Airways Limited** *Civil Appeal No. 49/1992* at *page 4* of the judgment defined *"inexcusable"* as meaning :-

> *"that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time".*

[23] *Inordinate delay* means a delay which is materially longer than the time which is usually regarded by the courts and the profession as an acceptable period; **Tabeta - v- Hetherington** *(1983) The Times,15th December, 1983.* Any delay by the solicitor is not excluded. The litigant is responsible for the solicitor's default.

[24] Ms Watkins submits that since the plaintiff was injured in 2000, there is a delay of six years. However, the length of delay for the purposes of the application runs from the date of the institution of the suit and not crystallisation of the cause of action. Therefore, from the date of the commencement of the proceedings to the filing of the present application over 4 years has elapsed. Mr Kohli submitted that prior to the case management by the Court, ordinarily civil cases at Labasa High Court used to take over 5 years to finalise. But this action is at not yet ready for trial thus not reflective of the explanation proffered. Applying Mr Kohli's explanation, coupled with the fact that a Judge only sits in Labasa High Court once a month for a week, it cannot be denied that there still is considerable delay. Looking at the substantive action, it is an ordinary personal injury claim. These actions even in Labasa High Court could have been tried within three (3) years. Apart from the Magistrates' Court record, there is no evidence of any other matters hampering a speedy resolution of this action. Taking all the circumstances of the case, I find that there is inordinate and inexcusable delay as defined above.

Prejudice

[25] Now, has that inordinate or inexcusable delay resulted in any prejudice to the defendants? Intimately linked with prejudice is also the question of a fair trial. I am now required to consider whether the defendant is prejudiced by this finding of "*inexcusable and inordinate*" delay. "*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;*" **New India Assurance Company Ltd. –v- Rajesh K. Singh & Anor**, *Court of Appeal Civil Appeal No: ABU 0031/1996 at page 6* of the judgment.

[26] In Brickett –v- James *(supra)*, their Lordships suggested factors relevant for the exercise of the Courts unfettered discretion are duration of time lapsed, cogency of explanation for delays, the probable impact of procrastination on fading recollection, disappearance or death of witnesses, availability of any applicable records, past and future cost, the substantive merits of the case and so forth.

[27] What is certain is that delay alone is insufficient to make a finding of prejudice; Bhawis Pratap – v- Christian Mission Fellowship *(supra)*. In any event, the onus of proving prejudice lies with the applicant. Generally, it is accepted that where there is disputed evidence and oral testimony of witnesses is the sole basis of addressing evidence, prejudice may be shown if there is inordinate or inexcusable delay. Lord Diplock in Allen -v- Sir Alfred McAlpine& Sons Ltd *(1968) 2QB 229* at 289 aptly said:-

> *"Where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they can recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chance of the Courts being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard."*

[28] Although, it is an acceptable presumption that the longer the delay the more difficult it can be for the witnesses to accurately remember the events, more so when it happens to be material evidence. Where the evidence is written down or where

records are available (as long as the written document is available) witnesses will be able to refresh their memory. This an acceptable means of overcoming any prejudice occasioned by delay.

[29] In the New India Assurance Company Ltd –v- Rajesh Singh *(supra)* their Lordships *(Sir Maurice Casey, JA, Salvage JA and Tompkins JA)* considered this issue. This case involved a claim under a fire insurance policy. As a result of a fire the insured property was destroyed. The insurance company engaged its own assessors to investigate. In addition, due to the nature of the damages, police were also involved. In both these investigations, the respective investigators took detailed witnesses' statements contemporaneously. Further, insurance assessors provided written report, which would have formed the basis of the defence. Having stated the above at page 9 of the judgement, the court said:-

> "These steps may well largely overcome the problem caused by the passage of such time. Witness who would otherwise be unable to recall relevant events can frequently do so, when they are able to refresh their memory by reading detailed statements they made shortly after the event".

[30] ***What is the prejudice in this matter?*** In paragraph 8 of the supporting affidavit, Elizabeth Saverio deposes:-

> *"That the delay in bringing of the matter to trial has resulted in difficulty of maintaining contact with witnesses for the defendants. As such, the defendants will suffer prejudice without the personnel appearance of the witnesses. Even if the witness are located the delay of would no doubt affect their recollection."*

[31] With respect, this affidavit fails to prove material prejudice. None of witnesses of the defendants are identified. Nor is their nature of evidence? There is no evidence of non-availability of the witnesses. If so, what efforts if any were made to locate the witnesses? When was the last occasion the defendants contacted the witnesses? Not an iota of evidence of any such impediment is deposed. At least one of the important witnesses is the Police Officer who investigated the accident. Where is he now? Has any effort being made to contact him? A bare statement that the witness cannot be traced is unconvincing; The New India Assurance Company Ltd -v- Arun Kumar and Anor *(supra)* at page 7.

[32] On the other hand, written evidence is available. There is the court record and Police record. These records should still be available, if not with the parties surely with the respective public offices. They are not to be destroyed; *S 7* of *Public Records Act* (Cap 108). Further, although not in evidence, but it can necessarily be inferred that an insurance company is also involved. This is by virtue of a compulsory Third Party Insurance under the *Motor Vehicles (Third Party Insurance) Act (Cap 172)*. Normally, Insurance companies undertake their independent investigation of any such claims. Insurance investigators and assessors submit written reports.

[33] As to the witnesses' recollection, the Police would have done a detailed investigation, which resulted in the conviction of the first defendant. All I am saying is that there is a possibility of a plethora of written evidence readily available from which the witnesses will be able to refresh their memory.

[34] In that regard, even though there is inordinate and inexcusable delay, the defendant has failed to establish prejudice. No doubt the plaintiff has not strictly complied with the rules, which was forcefully contended by Ms Watkins. This reminds me of what Lord Justice *Thomas Bingham MR*, in Costellow -v- Somerset Country Council *(1993) IWLR 256 at 264* para F said:-

> *"But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. ... Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensate by an award of costs.*
>
> [emphasis added]

Conclusion on 'want of prosecution'

[35] When I weigh all the various factors discussed above, I am not persuaded the delay will result in any material prejudice to the defendants. Also, I am not persuaded at all

that the plaintiff's delay gives rise to any substantial risk of conducting a fair trial, even from the defendants' perspective. The defendants' argument of not keeping contact with the witnesses is not strong enough evidence for me to exercise discretion in their favour. In any event, it is the Court which moved this proceedings and not the defendant. Even from the case management perspective, I concur with the views expressed in the High Court of Australia, in the State of Queensland and another -v- J.L Holdings Pty Ltd *(1997) 189 CLR 146 at 154* where Dawson, McHugh and Gourdon said:-

> *"case management is not an end itself. It is an important and useful aid for ensuring for prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times that the ultimate aim of a court is attainment of justice and no principle of case management can be allowed to supplant that aim.*

[36] Accordingly, I will dismiss the application for want of prosecution.

Abuse of Process

[37] Further, Ms Watkins advanced submissions that the action be dismissed for abuse of process relying on Grovit -v- Doctor [1997] 2 ALLER 417, as the plaintiff has shown no interest in pursuing this matter to trial.

[38] It is trite law that, it is an abuse of the process of the court to file an action with no intention of proceeding with it; Grovit -v- Doctor [1997] 2 ALLER 417. See also **Barton Henderson Rasen v Merret [1993] 1 Lloyd's Rep 540** per *Saville J.* It is an abuse in that in contentious matters the court and its procedures exist for the purposes of determination of disputes. Even 'parking proceedings' for the purposes of settlement amounts to an abuse of process; **Sodeca SA -v- NE Investments Corporation [2002] EWHC 1700 (QB).**

[39] The Court of Appeal in **Thomas Fiji Ltd -v- Bank of Hawaii** (supra) affirmed the principle of **Grovit -v- Doctor** as a ground for striking out a claim, in addition to, and independent of the principles set out in **Brickett -v- James** *(supra) (see paragraph 16 of the judgment).* Their Lordships held:-

"[16] It maybe 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.

(emphasis added)

[40] However, there is no evidence of the fact that the plaintiff has no intention of proceeding with this action to conclusion. Yes, indisputably there is delay, but that cannot be equated to the plaintiff having no intention of proceeding with this action. Contrary to Ms Watkins submissions, there is explanation for the delay. In paragraph 5 of the Affidavit, Kamal Chand deposes:-

"As to paragraph 3,4,5,6 and 7 of the said affidavit I say:-

a) In the year 2002 we moved the matters fairly expeditiously.

b) On 13th of January, 2003 our office was destroyed in Cyclone Ami. We lost most of the files.

c) On 11th of August, 2005 we wrote to the Defendants Solicitors enclosing our draft minutes.

d) On 5th September, 2005 we received their reply wherein they requested for a copy of Court record and annexed hereto and marked 'A' is a copy of the letter.

e) We made several requests to the Court for a copy of Court records which has not been made available to us, Annexed hereto and marked 'B' is a copy of letter dated 22nd May, 2006 finally making a written request for Court records.

f) On 31st May, 2006 we received a letter from the Defendants solicitors.

g) I am informed by Ami Kholi and verily believe that on 7th of June, 2006 he spoke to Mr. Adish Narayan asking him if he was serious about allegations of vexation proceedings. I am informed by Mr. Kholi that Mr Narayan informed him that he had not seen that file for a while and would look into it and reply. Annexed hereto and marked 'C' is a copy of Defendants letter with Mr. Kholi's notation at the bottom and annexed hereto and marked 'D' is a copy of phone bill showing the Defendants solicitors number dialled on 7th of June, 2006."

[41] In anything the counsels, Mr Kholi and Mr Narayan spoke following the letter of 8th February, 2006. This clearly depicts that the defendants' solicitors were to respond to the Mr Kholi's telephone call of 7th June, 2006. Be that as it may, over the period of inactivity in court, the counsels were attending to the issues of pre-trial. At least there is clear and cogent evidence of the plaintiff's intention that he has and still insists on continuing with this action to finality. As such this action is not a candidate for abuse of process under *Grovit-v-Doctor (supra).*

Next of Kin

[42] The second ground for dismissal is that the writ is instituted by a minor, contrary to Order 80 rule. 2. Initially I was of the view to summarily dismiss this ground for two reasons. Firstly, this is not a ground pleaded in the summons which is issued pursuant to the *Ord 25 rule 9.* Secondly, there is no evidence of the age of the plaintiff before the court. However, after considering the documents which was later filed by Mr Kohli, and the concessions he made, I only presume that the plaintiff was at all material times a minor. A single piece of material fact which must be adduced as evidence is the age of the alleged minor, preferably the date of birth, as the law prescribes the definition of a minor. In any event, the order which I propose to make will not prejudicially affect the plaintiff.

[43] The plaintiff, Nilesh Chand at the time of the commencement of this action was presumably a minor. In law, a person *"**under twenty one years of age**"* is an *"**infant**"*; *Section* 2 of *Interpretation Act (Cap 7).* For the purposes of court proceedings, an infant is a person under disability; *Order 80, rule 1.* A disability of this nature prohibits commencement of proceedings in the infants own right and name; *Order 80, rule 2. Order 80, rule 2 (1)* provides:-

> *"A person under **disability may not bring**, or make **a claim**, in **any proceedings** except by **his next friend** and may not acknowledge service, defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings under a judgment, order, notice of which has been served on him, except by his guardian ad litem."*
>
> (emphasis added)

[44] *A next friend or guardian ad litem* needs to be appointed; *Order 80, rule 3.* An order is not always necessary; *Order 80, rule 3 (1).* Save for appointments made by court, the *"name of any person shall not be used in a cause or matter as next friend of a person under disability..... unless and until the documents listed in paragraph 6 has been filed in the appropriate office"; Order 80, rule3(5). Order 80, rule 3(6) prescribe the* documents which need to be filed. These documents are as follows:-

> (a) a **written consent to be next friend or guardian ad litem**, as the case may be, of the person under disability in the cause or matter in question **given by the person proposing to be such friend or guardian;**
>
> (b) a certificate made by the solicitor for the person under disability certifying—
>
> (i) that he knows or believes, as the case may be, that the person to whom the certificate relates is an infant or a patient, giving (in the case of a patient) the grounds of his knowledge or belief; and
>
> (ii) where the person under disability is a patient, that there is no person authorised as aforesaid; and
>
> (iii) except where the person named in the certificate as next friend or guardian ad litem, as the case may be, **is the official solicitor** that the person so named has no interest in the cause or matter in question adverse to that of the person under disability"

[45] The law relating to appointment of *"next friend"* or *"Guardian ad litem"* has a long history. Its origin is traceable back to the prerogative powers of the crown to protect mentally incapacitated litigants; **Howell -v- Lewis** *(1891) Ch 89.* They were known as *procheim amy.*

[46] There are many and varied reasons for appointment of a next friend. **Kennedy LJ**, in **Masterman Lister -v- Brutton Co.** *(Nos. 1 and 3) [2003]1 WLR 1151* at paragraph *31* said that *"In the context of litigation, rules as to capacity is designed to ensure that plaintiff's and defendants who otherwise be at a* ***disadvantage are protected*** *and in some cases that* ***parties to litigation are not pestered*** *by other parties who should be to some extent restrained".* **Chadwick LJ**, at paragraph 65, said *"The pursuit and*

defence of ***legal proceedings are juristic acts which*** *can only be done by persons having the* ***necessary mental capacity,*** *and the* ***court*** *is concerned not* ***only to protect its own process*** *but to* ***provide protection for both parties*****.....".** It is also to ensure that there is a person who would be ***answerable to the costs*** of litigation; NSW Insurance Ministerial Corporation -v- Abualofaul *[1999] FCA 433.* The next friend is liable to pay all costs incurred in the action brought by an infant; Bligh –v-Tredgett *(1851) 64 ER 1024.*

[47] The next friend is not a party to an action Pink -v- J A Sherwood & Co Limited [*1913] 2 Ch 286 at 289.* S/he is an officer of the court; Rhodes -v- Swithenbank *[1889] 22 QBD 577* at *579,* and derives the authority from the court and not the infant; Stephenson -v- Geiss *[1998] 1 Qd R. 542 at 557.* As an officer of the court he is entitled to bind the infant in any cause or matter; Dey -v- Victoria Railways Commissioners, *[1948-49] 78 LLR 68* at *113.* It is trite law that an infant is "*as much bound by a judgment in his own action, as if of full age*" Gregory -v- Molesworth *[1747] ER 1160 at 1161.*

[48] Undoubtedly, the above exemplifies the position of a next friend is a special one. For that, even though *Order 80, rule 2* is expressed directorially, it is in fact interpreted in the mandatory. In other words, where there is disability, the action ***shall*** and only be commenced by a ***next friend*** or ***guardian ad litem***; *Supreme Court Practice 1999 Vol. 1 at p.150 6 paragraph 80/2/2.*

[49] In so far as this action is concerned, it was not instituted in accordance with the mandatory rule; *Order 80, rule 2.* Mr Kohli in his submissions concedes this fact.

Does this render the proceedings null and void?

[50] The defendants in their written submission conceded that non-compliance with the rule does not necessarily make it '*a bad action*'. Brown –v- Brown *2 Rob. Ecc 302,* was an instance, where an action was commenced by the wife who was an infant. Later her uncle adopted the proceedings by becoming a guardian. When the wife attained a majority age she carried the proceeding on her own. It was *held* that

petition was not null and void from its initiation even though it was commenced by a minor.

[51] Also unconditional appearance by the defendant may waive the irregularity; Zycklinski -v- Zycklinski *2 SWS R. 420* cited in Meuburn -v- Meubrun *[1934] WN 170.* The procedure for raising such an objection is that:-

> *"A defendant should give notice to the defend and take out a summons under O.12, r.8 asking that a next friend should be added or the writ be set aside." (see: The Supreme Court Practice 1999 p 1506 para 80/2/2)*

Order 12 rule 8 provide as follows:-

> "Dispute as to jurisdiction (O.12, r.8)
>
> *8.—(1) A defendant who wishes to dispute the jurisdiction of the court in the proceedings by reason of any such irregularity as is mentioned in rule 7 or on any other ground shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence, apply to the Court for—*
>
> *(a) an order setting aside the writ or service of the writ on him, or*
> *(b) an order declaring that the writ has not been duly served on him, or*
> *(c) .....*
> *(d) the discharge of any order extending the validity of the writ for the purpose of service,*
> *(e) .....*
> *(f) a declaration that in the circumstances of the case the court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action, or*
> *(g) such other relief as may be appropriate.*

[52] That being the case, the Court can order an amendment with or without conditions; McNamora -v- Bodkin & ors *[1959] 1 FLR 35.* Proceedings may be *stayed* pending rectification, that is, the appointment of a next friend; Julian Moti -v- S (and infant) *Civil Appeal No. 3/2000 (1215/200),(per Robertson JA, Van Doussa JA, Fatiaki JA & Coventry JA).* Also see Hutchinson -v- Giatazis *(supra)* or stayed to await the infant becoming an adult; Wallace -v- Wallace *(1897) 24 VR 859.* It can as also be struck out.

[53] Once a proceeding is stayed, the infant by leave may proceed with the action upon attaining a majority age. With leave s/he may adopt and carry on with the proceedings; Baile -v- Baile *[1872] Eq 497* at *508 per Wickens V.C.* In this latter circumstance, the steps which the infant plaintiff should take was aptly described by *Philip ACJ in* Feeney -v- Pieper [1964] *Qd WN 55:-*

> *"When an infant plaintiff attains majority during the proceedings the authority of the next friend in relation to the action ceases and he and his solicitor proceed at their peril. The solicitor upon the plaintiff attaining majority should require instructions from him as to whether he elects to continue the action and if he does, notice that the plaintiff has attained majority should be filed in the Registry and given to the other parties. Subsequent proceedings should be entitled as follows:*
>
> *'A.B. late an infant, but now of full age, Plaintiff'."*

See also Carberry (formerly an infant but now of full age) –v- Davies [1968] 2 ALLER 817 at 818 *per Harman LJ.*

[54] In light of the authorities cited above, I hold that although the writ of summons is irregular, it is not null and void.

[55] Ms. Watkins, submits that the defendants will be prejudiced, since the limitation period has now expired. The plaintiff had no reply to this submission. But, I beg to differ with this submission. If the proceeding is merely irregular procedurally and not substantively, it is not void. The defect is a remedial one, unlike the situation which was prevalent in Josaia Nainoka –v- Ba, Tavua Drainage Board and anor *Lautoka High Court civil action No: 237/1978,* an authority cited by Ms. Watkins. These are a class of cases which cannot be salvaged. They are governed by a general principle that where a party dies intestate an administrator can only institute or continue with an action after the grant of the letters of administration. The *'incurability'* is aptly described by Lord *Justice Scott* in Ingall v. Moran *(supra)* stated;

> *"It is true that, when he got his title by the grant of administration, he prima facie became entitled to sue, and could have then issued a new writ, but that*

was all. An application by him to treat the original writ..... as retrospectively valid from that date would have been refused by the court, not only because it might prejudice existing rights of defence, but because it would not be permissible under the Rules of the Supreme Court or the Judicature Act. The old writ was in truth incurably a nullity".

[56] In suits instituted by minors, apart form setting aside the writ, the court alternatively has power to stay the proceeding, even to wait for the defendant to attain the majority age. There is neither a rule nor any prohibition as to when the minor may adopt a proceeding and seek leave of the court to proceed with the action. Hence, the issue of a limitation defence does not arise, provided the original action is filed within the limitation period. Even the deferred limitation period for minors has no application, if there is already an action afoot. Yes, of course if this writ was set aside and the plaintiff did not institute a fresh proceeding after attaining a majority age until the limitation period was allowed to go by, the defendant is then accorded the benefit of a limitation defence.

[57] Nor is **Davies –v- Elshby Brothers Ltd [1960] 3 ALLER 672** of any assistance to the defendants. That case involved two different entities. In the head note it is evidently stated *`the amended involved the addition of a new defendant, the limited liability company, and was merely not a correction of a misnomer, for there had to been two different entities the firm and the company, the writ correctly described the firm...'*

[58] To the contrary in this case the plaintiff was at all material times a minor. As already stated, a next friend is not a party to an action, *(see para 47 above)*. S/he is an officer of the court. Furthermore any decision made neither binds nor benefits the next friend. It is all for the benefit or detriment of the minor.

[59] From the totality of the evidence, it is clear that the defendants after filing the acknowledgment of service did not oppose the writ. The defendant ought to have taken out a summons under *Ord.12 rule 8* to set aside the writ immediately after filing the acknowledgment of service. There is nothing in evidence that the irregularity was brought to the plaintiff's attention from the outset. Nor did Mr.

Watkins refer me to the same. Had there been any such evidence, the plaintiff would have been the author of his own misery.

[60] To the contrary at all material times the defendants' solicitors actively participated in the proceedings. Even that was not the end of it. The defendants' solicitors were pressing upon the plaintiff's to proceed with the action. In furtherance of that pursuit they have now issued a summons to strike-out the writ for want of prosecution. Certainly, the aforesaid leads me to draw a clear inference that the defendant by remaining silent on this issue waived the irregularity. It is now inequitable for them to resile from that position, more so, when the limitation period for commencing a fresh action by the infant plaintiff attaining the majority age has expired. Further, although the action was issued irregularly, it is not incurable. In fact, the plaintiff has now filed the necessary documents required under ***Ord 80 rule 3 8(a) and (b).*** Mr. Kohli submitted that the plaintiff seeks to adopt the proceeding. I see no difficulties with it; **Brown -v- Brown** *2 Rob. Ecc 302,* and **Zycklinski -v- Zycklinski** *2 SWS R. 420* discussed above. Accordingly, I will grant leave for the plaintiff to adopt the proceeding. I have taken this step to hasten this proceeding, which is also desirable from the defendants' perspective, as they too want to see the end of this action.

[60] The plaintiff is to amend the intitul to read as *'Nilesh Chand, (late an infant, but now of full age), father's name Daulat Ram of Nagigi, Labasa, formely a student and now (occupation)'*

Conclusion

[61] For the foregoing reasons, the defendants' summons is dismissed with costs in cause. Further, I order that there be a speedy trial and subject to discussion with the counsel, I will fix this action for trial in August. Under O.25 rule 9(b), the court is vested with the power to treat the summons as Summons for Direction. In exercise of my discretion, the directions which I issue are as follows:

(a) The plaintiff is to file and serve the amended writ of summons by 14th June, 2007.

(b) Both parties to exchange documents by 22nd June, 2007.

(c) Parties to convene a pretrial conference by 29th June and the minutes are to be filed by 4th July, 2007.

(d) The plaintiff's counsel is to obtain a fresh medical report and submit the same to the defendants' solicitors before 29th June.

(e) If the defendants' are desirable of having the plaintiff examined by a doctor of their own choice, a request for the same is to be forwarded in writing before 20th June, 2007 to the plaintiff's solicitors.

Accordingly, so ordered.

J. J. Udit
Master

HIGH COURT OF FIJI
SUVA

7th June 2007