IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 111 of 2014

BETWEEN : **VIMLA WATI** of Tagitagi, Tavua, Fiji, Domestic Duties as the Sole Executrix and Trustee of the Estate of **ARNACHALM GOUNDAR aka ARNACHALAM** of Tagitagi, Tavua, Fiji.

PLAINTIFF

A N D : **TEVITA NAILATI** of Rabulu, Tavua, Fiji.

1ST DEFENDANT

A N D : **NELESH PRASAD** of Masimasi, Tavua, Fiji.

2nd DEFENDANT

(Ms) Mohini Devi Pillay for the Plaintiff
(Mr.) Krishnil Patel for the Defendants

Date of Hearing : - 24th May 2016
Date of Ruling : - 23rd September 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 why the case should not be struck out for want of prosecution or as an abuse of the 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) The Plaintiff filed her Affidavit in Answer on 13th May 2016 and the Defendants filed their Affidavit in Reply on 23rd May 2016.

(4) The Plaintiff and the Defendants were heard on the Notice. They made oral submissions to Court.

(B) THE FACTUAL BACKGROUND

(1) 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.

(2) The Plaintiff in her Statement of Claim pleads;

Para 1. *THAT the Plaintiff **VIMLA WATI** of Tagitagi, Tavua, Fiji, Domestic Duties as the Sole Executrix and Trustee of the Estate of **ARNACHALM GOUNDAR aka ARNACHALAM** Tagitagi, Tavua, Fiji, Cultivator/Driver (hereinafter referred to as "the deceased") brings this action in her capacity as the Sole Executrix and Trustee of the Estate of ARNACHALM GOUNDAR aka ARNACHALAM and in her own personal right and capacity in respect of loss and pain she has personally suffered by her husband's death.*

2. *THAT the Plaintiff brings this action on behalf of the deceased estate under the Compensation to Relatives Act Cap 29, Laws of Fiji and under the Law Reforms (Miscellaneous Provisions) (Death and Interest) Act Cap 27, Laws of Fiji and any other Act or enabling her to bring this action and on behalf of the person who was dependant on the deceased and who has suffered loss and damage by his death.*

PARTICULARS PURSUANT TO STATUTE

The person for whose benefit this action is brought, is the deceased's statutorily entitled beneficiary namely:-

a. Ranjay Vikash Goundar [son] born on 26th day of July, 1985.

3. *THAT the 1st Defendant was at all material times the driver of Truck Registration Number BM 372 which was at all material times owned by the 2nd Defendant.*

4. *THAT the 2nd Defendant is the Registered Owner of Truck Registration Number BM 372 and is doing Haulage and Trucking business.*

5. *THAT 2nd Defendant is vicariously liable for negligence of the 1st Defendant both as the owner of the Vehicle Registration No. BM 372 and as the employer of the 1st Defendant.*

6. *THAT on or about the 7th day of August, 2012 at Rarawai Road, Ba Town, Ba, Fiji, the 1st Defendant parked the Truck Registration Number BM 372 with implied consent and/or as servant and agent of the 2nd Defendant so negligently, carelessly, and recklessly and in such a manner that the said vehicle caused to collide with coming Vehicle Registration Number AG 456. The deceased was the Driver of the Vehicle Registration Number AG 456 at all material times.*

PARTICULARS OF NEGLIGENCE OF FIRST DEFENDANT

(a) *Parking on the road and in to the path of Vehicle Registration Number AG 456.*

(b) *Failing to put hazard lights on and/or Park Lights of the said truck as to avoid the accident.*

(c) *Failing to keep to his vehicle property parked.*

(d) *Failing to keep any or any proper lookout.*

(e) *Parking without due and care and attention*

(f) *Failing to heed the presence of the other vehicles on the road.*

(g) *Failing to put Cones on the road at all to avoid the said accident.*

(h) *Failing to steer or control the said truck in time to avoid the accident or at all.*

(i) *Driving below the standard of a careful and prudent driver.*

7. *THAT the Plaintiff will rely on the doctrine of Res Ipsa Loquitor.*

8. *THAT as a result of the said accident the deceased was pronounced dead on arrival at Ba Mission Hospital from injuries sustained in the said motor vehicle accident.*

9. *THAT at the time of the said accident the deceased was strong and healthy man and was self employed as a driver and was a cane farmer earning $35.00 [thirty five dollars] a day as a driver and his other income was from cultivation of cane and vegetable farming. The deceased's net income at the time of his death was $350.00 [THREE HUNDRED FIFTY DOLLARS] per week. The said loss continues. Full particulars of Loss will be supplied at the trial of this case.*

10. *THAT at the time of the said accident the deceased was 63 years 8 months and 6 days old and was looking after his wife and his son and was cultivating his farm and was also producing vegetables wherein he derives income from his hard work and labour. Full Particulars of Loss will be supplied at the trial of this case.*

11. *AS a consequence of the untimely death of the deceased, his estate has suffered loss of earning capacity and his entitled beneficiary has lost the potential benefit.*

12. *THAT the Estate of the deceased has also suffered damages due to the conduct of the Defendants for which the Defendants are liable for.*

13. *THAT the deceased was the owner of Vehicle Registration Number AG 456 which hep purchased during his lifetime at the sum of $10,000.00 [TEN THOUSAND DOLLARS] and the said vehicle was involved in the accident and suffered extensive damage as a result of the said accident the said vehicle was sold at a market price of $2,000.00 [TWO THOUSAND DOLLARS]. The Estate of deceased lost the sum of $8,000.00[EIGHT THOUSAND DOLLARS] as a result of the said accident which the Defendants are liable for the loss of the said truck.*

14. *THAT the deceased was using the said Vehicle Registration Number AG 456 or cartaging cane and was earning an income thereof. Full Particulars of Loss will be supplied at the trial of this case.*

PARTICULARS OF SPECIAL DAMAGES:-

i.	*Funeral expenses in the sum of*	*$6,000.00*
ii.	*Damaged to clothes and personal effects*	*300.00*
iii.	*Mobile Phone damaged*	*300.00*
iv.	*Cost of obtaining probate*	*750.00*
v.	*Cost of obtaining Police Report*	*22.00*
vi.	*Vehicles search at Land Transport Authority*	*36.00*
vii.	*Medical Report*	*5.63*
viii.	*Vehicle Value of AG 456*	*8,000.00*
ix.	*Usage of cartage by another cane Lorry*	*280.00*
x.	*Towing Charges Paid*	*2,100.00*
xi.	*Income from 29/01/12 to 29/07/13 @ $350.00 per week [82 weeks]*	*28,700.00*
	Total	***$46,493.63***

(3) Wherefore, the Plaintiff claims from the Defendants;

a) ***SPECIAL DAMAGES*** *(as per paragraph 18 herein)* ***$46,493.63***

b) *GENERAL DAMAGES*

c) *Damages under the Compensation to Relative Act Cap, 29 Laws of Fiji for the benefit of the beneficiary of the deceased.*

d) *Damages under Law Reform (Miscellaneous provisions) (Death and Interest) Act Cap 27, Laws of Fiji for the benefit of the beneficiary of the deceased.*

e) *Interest under the Law Reform (Miscellaneous provisions) (Death and Interest) Act Cap 27, on the award of damages at the rate of 10% per centum per annum from the date of the accident till payment in full pursuant.*

f) *Loss of future earning.*

g) *General damages for pain and suffering.*

h) *Costs on indemnity basis.*

i) *Such further and/or other relief that may seem just and proper to this Honourable Court.*

(C) THE STATUS OF THE SUBSTANTIVE MATTER

(1) The action was instituted by the Plaintiff on 08th July 2014, by way of Writ of Summons and Statement of Claim.

(2) The pleadings in the action begun by way of Writ of Summons were closed on 01st December 2014.

(3) On 30th December 2014, the Plaintiff filed her Affidavit Verifying List of Documents.

(4) On 09th February 2016, the Court issued Notice herein pursuant to Order 25, rule (9) of the High Court Rules, 1988.

(D) 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 **Birkett 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 [Girdharimal] 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 principle set out in **Birkett 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.**

(E) ANALYSIS

(1) On 30th December 2014, the Plaintiff filed her list of documents. The Defendants did not file their List of Documents.

(2) On 09th February 2016, the High Court Registry issued a Notice pursuant to Order 25, rule 9 of the High Court Rules, for the Plaintiff to show cause as to why the action should not be struck out for Want of Prosecution or as an abuse of the process of the Court.

(3) Between 30th December 2014 and 09th February 2016, no further steps were taken by either side to advance the litigation.

(4) The onus is on the Plaintiff to provide a cogent and credible explanation for not taking steps to advance the litigation after 30th December 2014.

(5) As I understand the evidence, the Plaintiff's explanation as to the delay in the prosecution of her claim is;

Reference is made to paragraph (04), (05) and (06) of the Plaintiff's Affidavit in Answer;

Para 4. *THAT I have written several letters to get information from the Pathologist and/or with the Medical Council to get information and assistance but till to date I am not receiving any information from them in relation to the Pathologist Dr Ponsami Goundar.*

5. *THAT the Defendant is not proceeding to file their Affidavit Verifying List of Documents and are not moving the file in order for us to proceed to trial stage and are using delay tactics in prolonging the determination of within action.*

6. *THAT my Solicitors have further sent draft PTC Minutes to Defendants Counsel and still have not received any response from them till to date.*

(6) As against this, the Defendants respond;

Reference is made to paragraph (03), (04) and (05) of Defendant's Affidavit in Reply.

Para 3. *As to paragraph 4 of the said affidavit, I say as follows:*

i) *The Plaintiff through her solicitors had obtained the post mortem examination report of Arnachalam Goundar, the deceased, prepared by Dr Ramaswamy Ponnu Swamy Goundar. Dr Goundar had conducted the post mortem on the deceased. The Post Mortem Report (Report) has been disclosed to us on behalf of the Defendant by the Plaintiff's solicitors and relied on to support the Plaintiff's claim. I now produce a copy of the Report marked as "**NS-1**".*

ii) *The cause of death of the deceased according to the report was due to coronary artery disease.*

iii) *The Plaintiff's solicitors had written to AK Lawyers vide their letter dated 2nd June 2016 advising that they had sought clarification of injuries on the deceased from Dr Goundar and were awaiting his response. It appears the Plaintiff is fishing for evidence after instituting the action to maintain and continue with her frivolous claim.*

4. *As to paragraph 5 of the said affidavit, I say that the Defendants are under no obligation under the Rules to file an Affidavit verifying list of documents as the claim is for damages arising out of a motor vehicle accident on land.*

5. *As to paragraph 7 of the said affidavit, I say as follows:-*

(i) *The Plaintiff alleges that her solicitors had sent draft PTC minutes to AK Lawyers. No details are provided as to when they allege this was sent and is made to appear as if this was provided sometime ago and the Defendants' solicitors have sat on it. However, the PTC minutes were only enclosed and first sent with their letter dated 29th December 2015 which was received by AK Lawyers vide fax on 9th May 2016. I now produce a copy of the faxed documents and an extract of the AK Lawyers register which recorded the date and time of faxes received marked "**NS-2**".*

ii) *AK Lawyers also received original of the letter and enclosures on 11th May 2016 by hand delivery by the Plaintiff's solicitor's clerk. I now produce copies of the documents marked "**NS 3**" bearing the endorsement of the date of receipt by the Managing Partner Mr Adish Kumar Narayan on the documents and an extract of the mail register marked "**NS 4**" which recorded the date and time the documents were hand delivered to AK Lawyers office.*

iii) *I further note that the faxed copy of the documents bears the details of the date of the transmission and the sender. The transmission date is wrong as it appears the Plaintiff's solicitors fax machine has not been properly set.*

iv) *AK Lawyers did not proceed to comment on the draft PTC minutes as the Court had already issued a Notice under Order 25 rule 9 against the Plaintiff to strike out the action for want of prosecution.*

(7) Let me now move to consider the **first ground** adduced by the Plaintiff.

Para 4. THAT I have written several letters to get information from the Pathologist and/or with the Medical Council to get information and assistance but till to date I am not receiving

any information from them in relation to the Pathologist Dr Ponsami Goundar.

The Plaintiff had disclosed the **'Post Mortem Report'** to the Defendant and according to the 'Post Mortem Report' the cause of death of the deceased was due to **coronary artery disease.** Therefore, I do not see any need for the Plaintiff to seek a clarification from the Pathologist. Thus, I completely reject the first ground presented in the Plaintiff's Affidavit.

(8) Let me now move to consider the **second ground** adduced by the Plaintiff.

Para 5. *THAT the Defendant is not proceeding to file their Affidavit Verifying List of Documents and are not moving the file in order for us to proceed to trial stage and are using delay tactics in prolonging the determination of within action.*

The Defendants are under no obligation under the High Court Rules to file their list of documents as the claim is for damages arising out of a motor vehicle accident.

Therefore, I completely reject the second ground adduced by the Plaintiff.

(9) Now let me move to consider the **third and final ground** adduced by the Plaintiff.

Para 6. *THAT my Solicitors have further sent draft PTC Minutes to Defendants Counsel and still have not received any response from them till to date.*

When did the Plaintiff's Solicitors sent the Defendant's Solicitors draft 'minutes of a pre –trial conference?' No details are provided as to when this was circulated.

Let me assume for a moment that the Plaintiff has circulated draft PTC minutes and the Defendants neglected to forward their comments. I do not think that the Plaintiff or her Solicitors be entitled to derive any benefit from it.

Why did not the Plaintiff file a Summons to dispense with Pre-Trial Conference? No explanation was offered. It is for the Plaintiff to get on with the action and to see it is brought to trial with reasonable dispatch. It is not for the Defendants to stimulate action on the file. Therefore, I reject the third and final ground adduced by the Plaintiff.

(10) Between 30th December 2014 to 09th February 2016, no steps were taken by the Plaintiff to advance proceedings to trial. The action has been laying in abeyance until the Court issued Notice on 09th February 2016, pursuant to Order 25, rule (9) of the High Court Rules.

From 30th December 2014 to 09th February 2016 that is for 13 months the Plaintiff had all the time to take the following steps;

- File Notice of intention to proceed under Order 3, rule 5
- File Summons to dispense with Pre-Trial Conference
- File Summons to enter Action for Trial.

I must stress here that no steps were taken by the Plaintiff to advance proceedings to trial.

I must confess that I remain utterly unimpressed by the Plaintiff's explanations/reasons as to why she let her claim sleep for 13 months and her failure to prosecute the action with due diligence.

In the result, I certainly agree with the sentiments which were expressed inferentially in the Defendant's submissions.

I conclude that the Plaintiff cannot establish that she had a good reason for;

- Not filing a Notice of Intention to Proceed under Order 3, rule 5
- Not filing Summons to dispense with Pre-Trial Conference.
- Not filing Summons to enter action for Trial.

The Plaintiff's failure to establish that she had a cogent and credible reason for;

- Not filing a Notice of Intention to Proceed under Order 3, rule 5
- Not filing Summons to dispense with Pre-Trial Conference.
- Not filing Summons to enter action for Trial, **does not leave a good impression.**

Emanating from this issue alone, the fundamental question is "**whether the Plaintiff is serious about pursuing her claim when she let her claim sleep for 13 months?**"

After reviewing the long and unhappy history of the litigation and in view of the Plaintiff's failure to file "Notice of intention to proceed", and Summons to dispense with Pre-Trial Conference, I interpose the view that there is either the inability to pursue the claim with reasonable diligence and expedition or lack of interest in bringing it to a conclusion.

Leave that aside for a moment!

As I understand the Pleadings, the Plaintiff brings this action in her capacity as the sole Executrix and Trustee of the Estate of 'Arnachalam Goundar'. The Plaintiff by Writ of Summons and Statement of Claim filed on 08th July 2014 claims damages from the Defendants in respect of loss and pain she has suffered by her husband's

death. Her claim is for damages arising out of a motor vehicle accident. However, according to the Post Mortem Report, the cause of death of the deceased was due to coronary artery disease. Thus, the Plaintiff's claim is obviously hopeless and 'doomed to fail'. At this moment, I cannot resist in saying that it would be an affront to justice to allow the Plaintiff's case to continue any further. The Plaintiff's action is an abuse of legal procedure. It is unquestionable that, under the inherent power of the court, the court has a right to stop this action at this stage since it is wantonly brought without the shadow of an excuse. So that to permit the action to go through its ordinary stage up to trial would be to allow the Defendants to be vexed under the form of legal process when there could not at any stage be any doubt that the action is baseless.

The public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are fairly used and that they do not lend themselves to oppression and injustice. The justification for the extreme steps of staying a prosecution or striking out a statement of claim is that the Court is obliged to do so in order to prevent the abuse of its processes. See; **Reid v New Zeland Trotting Conference (1984) 1 NZR 8p**.

In **Hunter v Chief Constable of the West Midlands Police [1982] AC 529** Lord Diplock began his Lordships judgment, which was concurred in by the other members of the House, with these words:

> *"My lord this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless ne manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right – thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely ne unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."*

(11) I am of course mindful that, fundamentally, courts are required to determine cases on merits rather than dismissing them summarily on procedural grounds.

It is a fundamental principle of any civilized legal system that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representative are present and heard.

At this juncture, I bear in mind the "**caution approach**" that the court is required to exercise when considering an action of this type.

I remind myself of the principles stated clearly in the following decisions.

In **Dev. v. Victorian Railways Commissioners** [1949] HCA 1; (1949) 78CLR 62, 91 Dixon J said:

> *"A case must be very clear indeed to justify the summary intervention of the court ... once it appears that there is areal question to be determined whether of fact or of law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."*

In **Agar v. Hyde** (2000) 201 CLR 552 at 575 the High Court of Australia observed that:

> *"It is of course well accepted that a court ... should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way and after taking advantage of the usual interlocutory processes."*

(12) As I said earlier, between 30th December 2014 to 09th February 2016, the Plaintiff had all the time to;

- File a Notice of Intention to proceed under Order 3, rule (5).
- File Summons to discharge with Pre-Trial Conference.
- File Summons to enter action for Trial.

The Plaintiff on her own volition chose not to do so. Broadly speaking, the Plaintiff has adopted a "**sitting on the hands**" approach and allowed the proceeding to lay dormant. The Plaintiff by her conduct has clearly demonstrated that she has no regard to the primary policy of the High Court Rules.

It is worth remarking that, a delay of 13 months in any Civil Action in the High Court constitutes both inexcusable and inordinate. It must be remembered that the Plaintiff delayed for 2 years before filing the action.

The delay of around 13 months could not possibly be described as "reasonable" even in the most generous minded and indulgent view. To my mind, 13 months is a long

time to sleep on a matter. It seems to me perfectly plain that the Plaintiff slept on the matter and did not wake up at all from her slumber.

Already 13 months have elapsed since the last formal step in the proceedings. To allow the action to be without a single step of any kind being taken for 13 months resulted in a delay that is both inordinate and inexcusable.

I am required to take into account the likely prejudice to the Defendants. Clearly the Defendants will be prejudiced by the inordinate delay in prosecuting the claim and the stress of having unresolved court proceedings hanging over their heads for 13 months.

In this, i am comforted by the rule of law expounded 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)

(13) 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 grounds of abuse of process irrespective if 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 dilatory and protracted manner in which the litigation has been conducted is a clear abuse of the Court process. After reviewing the history of the litigation and specifically in view of the Plaintiff's failure to file Notice of intention to proceed and Summons to dispense with Pre-Trial Conference, it seems to me perfectly plain that, there is either 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"

(F) 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 having it heard.

This conduct on the part of the Plaintiff constituted an abuse of process. Having said that, I wish to emphasise that the limited resources of this Court will not be used to accommodate sluggish litigation.

(G) FINAL ORDERS

(1) The Plaintiff's action against the Defendants is dismissed for want of prosecution.

(2) The Plaintiff is ordered to pay costs of $1500.00 (summarily assessed) to the Defendants which is to be paid within 14 days from the date hereof.

HIGH COURT OF FIJI LAUTOKA

23/09/2016.

Jude Nanayakkara
Master

At Lautoka

23rd September 2016.