IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 149 of 2013

BETWEEN : **SAYLESH SANTU PRASAD** of Cuvu Sigatoka as the **Administrator in the Estate of DIPIKA SULOCHNA** late of Namaka, Nadi.

PLAINTIFF

AND : **EMORI RABO** of Davuilevu Housing, Suva.

FIRST DEFENDANT

AND : **FIJI TIMES LIMITED** a limited Liability Company having its registered Office at Suva.

SECOND DEFENDANT

Mr Janendra Kaushik Sharma with Mr. Kishan Kreetesh Siwan for the Plaintiff
Mr. Ashnil Kumar Narayan for the Defendants

Date of Hearing : - 22nd June 2016
Date of Ruling : - 14th October 2016

RULING

(A) INTRODUCTION

(1) The matter before me stems from the Defendants Summons dated 09th February 2016, made pursuant to Order 25, rule 9 of the High Court Rules and the inherent jurisdiction of the Court for an Order that the Plaintiff's action against the Defendants be struck out and dismissed on the following grounds;

- ❖ The Plaintiff failed to prosecute the proceedings expeditiously without any real interest in bringing matters to trial,

and / or

- ❖ The Plaintiff has abused the process of the Court

and / or

- ❖ Thereby has caused prejudice to the Defendants and a substantial risk of a fair trial.

(2) The Defendants Summons is supported by an Affidavit sworn by one 'Elizabeth Ratu', the Claims Manager for Tower Insurance (Fiji) Limited, which is the Motor Vehicle third party insurer for the Defendants.

(3) Upon being served with Summons, 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 Plaintiff and the Defendants were heard on the Summons. They made oral submissions to Court. In addition to oral submissions, Counsel for the Plaintiff and the Defendants filed a careful and comprehensive written submissions for which I am most grateful.

(B) THE BACKGROUND

(1) On 27th August 2013, the Plaintiff issued a Writ against the Defendants claiming damages pursuant to the **Law Reform (Miscellaneous Provisions) (Death & Interest) Act and Compensation Relatives Act.**

The Plaintiff is the lawful widower and administrator of the estate of Dipika Sulochna who died due to a motor vehicle accident on 30th August 2010

(2) The Defendants filed their Acknowledgement of Service and Statement of Defence on 3rd September 2013 and 17th September 2013 respectively.

(3) The Defendants have denied liability in respect of the Claim made by the Plaintiff on the grounds, *inter alia*, that the accident was caused and/or contributed to by the Plaintiff who was the driver of the Vehicle registration number FL 737.

(4) The Plaintiff filed his Reply to Statement of Defence on 01st October 2013. The pleadings were then closed on 15th October 2013. **Thereafter activity ceased.**

(5) On 08th February 2016, the Defendants Solicitor's issued a Summons for an Order that the action be dismissed for want of prosecution.

(C) THE DEFENDANTS SUMMONS TO STRIKE OUT THE ACTION FOR WANT OF PROSECUTION

(1) The Defendants Summons is supported by an Affidavit sworn by one 'Elizabeth Ratu' the Claims Manager for Tower Insurance (Fiji) Ltd (which is the Motor Vehicle Third Party insurer for the Defendants) which is substantially as follows;

Para 1. *I am the Claims Manager for Tower Insurance (Fiji) Limited (hereinafter referred to as "Tower) which is the motor vehicle third party insurer for the Defendants. I am duly authorised to swear this affidavit on behalf of the Defendants by virtue of the subrogation principles. I now produce and annex copies of the Third Party Policy and an authority from Tower marked as "ER-1" and "ER-2" respectively.*

2. *My duties entail handling of the claims lodged on policies which are issued by Tower. This includes me opening and maintaining files on which claims are made, making decisions on claims, reporting to the management of Tower, briefing and instructing the Defendants' solicitors on matters taken by or against the insured in respect of any claim and maintain such business records as necessary for Tower.*

3. *I am able to depose herein on the basis of my personal knowledge of the matters contained herein from handling this claim or, where the matters are not known to me personally, from information derived from the Defendants' files and the information provided by AK Lawyers.*

4. *The Plaintiff instituted proceedings by way of a Writ of Summons and Statement of Claim on 27th August, 2013.*

5. *The Plaintiff pleads that the present action is instituted on behalf of the deceased by virtue of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap 27) and himself by virtue of the Compensation to Relatives Act (Cap 29). He further alleges that the accident and death of Dipka Sulochna Nand was a result of the 1st Defendant's negligence whilst in the empty of the 2nd Defendant. Consequently the Plaintiff commenced the within action alleging negligence against the Defendants.*

6. *Since the proceedings commenced in 2013, the matter has not been prosecuted by the Plaintiff with any real interest to put it before the Court. This lack of interest has caused delay which is inordinate and inexcusable and as such is an abuse of the process of this Court and/or has created a substantial risk that there will not be a fair trial on the issues thereby causing prejudice to the Defendants.*

7. *The last activity in this matter was when the Plaintiff filed his Reply to Defence on 1st October, 2013. There ahs been no movement*

and/or interest in prosecuting this matter since that date by the Plaintiff.

8. *Tower and the Defendants are desirous of closing their file in the matter to avoid the costs of it having to maintain a contingency reserve fund in the event of an adverse judgment at trial. The Plaintiff has not provided any or any valid excuse for the delays.*

9. *The Defendants and Tower have been put to the inconvenience and cost of having to retain solicitors to defend the action including further investigations into the current whereabouts of the witnesses, not knowing whether the Plaintiff intends to prosecute the action with any certainty.*

10. *I have been advised by AK Lawyers that the Plaintiff is under a duty to the Court and the Defendants to progress the action without undue delay and given the premises, his failure to prosecute the matter with due diligence and any real interest, is an abuse of the process of the Court and poses a substantial risk to a fair trial and/or prejudice to the Defendants.*

11. *Witnesses for the Defendants will be required to recall events which occurred on 30th August, 2010 which is more than 5 years ago. Their recollection of events due to the passage of time will affect their reliability.*

12. *In the premises, pursuant to the Inherent Jurisdiction of this Honourable Court, the Defendants pray for an order that the action be struck out and dismissed on the grounds of failure on the Plaintiff's part to prosecute the proceedings expeditiously without any real interest in bringing this matter to trial and has abused the process of this Honourable Court thereby causing the substantial risk of an unfair trial and/or prejudice to the Defendants and that the Plaintiff pay the cost of this application.*

(2) The Plaintiff filed an Affidavit in answer sworn on 15th April 2016, which is substantially as follows;

Para 1. *That I am the Plaintiff in the action herein*

2. *That in so far as the contents of this affidavit are within my personal knowledge it is true and so far as it is not within my personal knowledge it is true to the best of my knowledge, information and belief.*

3. *I filed a personal injury suit against the Defendants on an administrative capacity on the 27th August, 2013, seeking damages suffered by me and* ***Estate of DIPIKA SULOCHNA*** *due to the Defendant's negligence.*

4. *The 2nd Defendant's vehicle has a Third Party Insurance Policy with Tower Insurance.*

5. *The Deceased was my wife, who died on the 30th of August, 2010 and I was granted the Letters of Administration by the High Court of Fiji on the 05th day of August, 2013.*

6. *The Summons was filed and the Defendant filed their Defence whereupon Reply to the Defence was filed by Solicitors on the 01 October, 2013.*

7. *Towards the end of 2013 I started experiencing health problems, visited my GP, Dr. R.K.Reddy of Nausori Town and he referred me to the Suva Private Hospital but my ailment was not diagnosed.*

8. *By this time I was not in a position to interact with my Solicitors as I was extremely sick and was unable to comply with the procedures.*

9. *I moved to Auckland, New Zealand in 2014 and continued to consult Doctors and attend Hospital for my medical issues.*

10. *I had been going through a very difficult time in my life with my health since my arrival to Auckland. I was admitted to hospital wherein I was diagnosed with bowl disease (sigmoid diverticulitis, colovesicular fistula) which required surgery.*

11. *The surgery was carried out sometimes in March, 2015 however, it did not go well. Two days after the said Operation, I was transferred to another hospital and underwent another Operation by their emergency team.*

12. *The Second operation was to clean up and stop a leak that had occurred in my bowel joint and to save my life. It was much bigger than the first and has had a massive impact in my life. I spent three weeks in the Intensive Care Unit after the surgery during which time my lungs also collapsed.*

13. *The second surgery left me with temporary attachments (Hartmanns) to keep me alive. I will need to go through two further operations to reverse the procedure and get back my life.*

14. *I suffered from depression while recovering and have been receiving treatment from a psychiatrist since August, 2015. I have lost a lot of strength and can no longer physically exert myself to do a lot of things I used to. I am also currently receiving physiotherapy to regain as much strength as possible before my next surgery which could take place in the next month.*

15. *Annexed herein marked as "SSP 1" are copies of my medical reports that I have been able to collect, showing my medical situation. My medical condition was difficult to diagnose.*

16. *Due to my health issues I was unable to follow up emails and maintain contact with my Solicitors.*

17. *In such circumstances, I was not been able to fully and adequately instruct my Solicitors to enable them to proceed further with the within matter.*

18. *Such delay to the current proceeding is not inordinate or intentional and any delay has been due to my ill health and the delay is not contumelious and I have not disobeyed any orders of the Honourable Court.*

19. *The Defendant in this matter has not suffered any prejudice or great injustice or any injustice at all.*

20. *It will be in the interest of justice that I am permitted to proceed with my matter.*

21. *I have read the affidavit of Elizabeth Ratu filed herein on the 08th of February, 2016. Save to admit paragraphs 4 and 5 of Elizabeth Ratu's affidavit and admissions herein I deny the other allegations in Elizabeth Ratu's affidavit.*

22. *Hence, it is my Humble Plea to the Honourable Court that the matter not to be struck out for want of prosecution.*

(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 **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 [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 **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.**

(E) ANALYSIS

(1) Before I pass to consideration of the 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) As I mentioned earlier, on 27th August 2013, the Plaintiff issued a Writ against the Defendants claiming damages pursuant to the **Law Reform (Miscellaneous Provisions) (Death & Interest) Act and Compensation Relatives Act.**

The Plaintiff is the lawful widower and administrator of the estate of Dipika Sulochna who died due to a motor vehicle accident on 30th August 2010

The Defendants filed their Acknowledgement of Service and Statement of Defence on 3rd September 2013 and 17th September 2013 respectively.

The Defendants have denied liability in respect of the Claim made by the Plaintiff on the grounds, *inter alia*, that the accident was caused and/or contributed to by the Plaintiff who was the driver of the Vehicle registration number FL 737.

The Plaintiff filed his Reply to Statement of Defence on 01st October 2013. The pleading were then closed on 15th October 2013. **Thereafter activity ceased.**

On 08th February 2016, the Defendants Solicitor's issued a Summons for an Order that the action be dismissed for want of prosecution.

(3) Between 01st October 2013 and 08th February 2016, that is for 02 years and 04 months (**after issuing the Writ**) the Plaintiff did nothing. In point of fact he did nothing for 02 years and 04 months **after issuing the Writ**. The onus is on the Plaintiff to provide a cogent and credible explanation for not taking steps to advance the litigation after 01st October 2013.

(4) The real point is whether the Plaintiff, having done nothing for 02 years and 04 months (after issuing the Writ), should now be allowed to revive it? An Affidavit is put in on his behalf, in which he says;

- *Towards the end of 2013 I started experiencing health problems, visited my GP, Dr. R.K.Reddy of Nausori Town and he referred me to the Suva Private Hospital but my ailment was not diagnosed.*
- *By this time I was not in a position to interact with my Solicitors as I was extremely sick and was unable to comply with the procedures.*
- *I moved to Auckland, New Zealand in 2014 and continued to consult Doctors and attend Hospital for my medical issues.*
- *I had been going through a very difficult time in my life with my health since my arrival to Auckland. I was admitted to hospital wherein I was diagnosed with bowl disease (sigmoid diverticulitis, colovesicular fistula) which required surgery.*
- *The surgery was carried out sometimes in March, 2015 however, it did not go well. Two days after the said Operation, I was transferred to another hospital and underwent another Operation by their emergency team.*
- *The Second operation was to clean up and stop a leak that had occurred in my bowel joint and to save my life. It was much bigger than the first and has had a massive impact in my life. I spent three weeks in the Intensive Care Unit after the surgery during which time my lungs also collapsed.*
- *The second surgery left me with temporary attachments (Hartmanns) to keep me alive. I will need to go through two further operations to reverse the procedure and get back my life.*

- *I suffered from depression while recovering and have been receiving treatment from a psychiatrist since August, 2015. I have lost a lot of strength and can no longer physically exert myself to do a lot of things I used to. I am also currently receiving physiotherapy to regain as much strength as possible before my next surgery which could take place in the next month.*

- *Annexed herein marked as "SSP 1" are copies of my medical reports that I have been able to collect, showing my medical situation. My medical condition was difficult to diagnose.*

- *Due to my health issues I was unable to follow up emails and maintain contact with my Solicitors.*

- *In such circumstances, I was not been able to fully and adequately instruct my Solicitors to enable them to proceed further with the within matter.*

(5) A fine state of affairs!! I must confess that I remain utterly unimpressed by the Plaintiff's explanations/excuses as to why he let his claim sleep for 02 years and 04 months (after issuing the Writ). To be more precise, I cannot accept these explanations and excuses, due to the following reasons; (as was correctly highlighted by Counsel for the Defendants in his written submissions as follows)

- *There is no medical evidence or otherwise any evidence to show that the Plaintiff was unable to interact with his solicitor (especially since the 'end of 2013') nor is there any evidence to suggest that he was receiving treatment or was consulted by his G.P. in Fiji or Suva Private hospital.*

See paragraphs 7 and 8 of Plaintiff's Affidavit

- *There is no evidence to support that the Plaintiff was required to undergo another operation by an "emergency team".*

See paragraph 11 of the Plaintiff's Affidavit

- *There is no evidence to suggest that the Plaintiff was being treated by a psychiatrist since August, 2015. This appears to be self-diagnosed after the Defendants filed the current action;*

See paragraph 14 of the Plaintiff's Affidavit

- *There is no evidence to support that he was unwell to respond to follow up emails and maintain contact with his solicitors. In fact there are no emails annexed to the Affidavit to show that the solicitors had been attempting to follow up via emails. Surely the Plaintiff could have produced this given that these emails would have remained in his account or could otherwise have been supplied by his solicitors at the time of filing the affidavit.*

See paragraph 16 of the Plaintiff's Affidavit

- *The Plaintiff at paragraph 8 of his Affidavit says that at this stage he was not in a position to interact with his solicitors. Again there is no mention of why he was unable to interact with his solicitors. There is no medical evidence or otherwise any evidence to support these allegations. Was the Plaintiff unable to speak to his solicitors over telephone or otherwise?*

- *The Plaintiff at paragraph 9 of his Affidavit says that he then moved to New Zealand in 2014. It is again significant to note that vagueness of the Plaintiff's allegations. When did the Plaintiff move to New Zealand? What particular month had he moved, or what part of the year did he roughly move? Why was he still unable to provide instructions to his solicitor? There is no evidence disclosed to show his immigration stamp on his passport, or any evidence to show that even at this stage he was unable to converse with his solicitor even via telephone.*

- *At paragraph 10 and 11 the Plaintiff says he was diagnosed with bowel disease and that the surgery was carried out in March 2015. In essence this is now one year and six months after the last step was taken in Court by him. During this lapse, was he unable to speak his family, his friends or his solicitors whether by telephone, email or skype? Could he not have authorised some family member to assist on his behalf? He could also have asked his solicitors to file an application for stay given his health issues;*

- *At paragraphs 12 to 16 the Plaintiff says amongst other things that he suffered from depression and that he had been receiving treatment from a psychiatrist since August 2015. No evidence from a psychiatrist has been disclosed. The Plaintiff has however annexed copies of medical reports to support his allegations which appear as annexure "SSP 1". We will consider the contents of those reports hereunder.*

(6) The Plaintiff has not given a satisfactory explanation. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable. For the reasons which I have endeavoured to explain in paragraph (5) above, I completely reject the explanations and excuses presented in the Plaintiff's Affidavit in Answer. I am disposed to agree with what Counsel for the Defendants highlighted in his written submissions.

(7) The impression produced on my mind by the Plaintiffs reasons and excuses for his delay is that I have here the evolution of a myth, and not a gradual unfolding of real facts. The Plaintiff is not merely clutching at a non- existent straw but expecting to

be carried by it. No amount of hair splitting with regard to the assertions of the Plaintiff, by counsel, will be of any avail to him. Anything more shadowy, anything more unsatisfactory, anything more unlikely to produce persuasion or conviction on the mind of the Court, I can scarcely imagine.

(8) One word more. Despite the skilful advocacy of Counsel for the Plaintiff, I am still at a substantial loss to understand;

(1) Why was the Plaintiff unable to respond via email and/or telephone during the course of the last 3 years (at least from time to time) to either stay the matter given his health needs or otherwise to proceed with ancillary steps such as PTC?

(2) The Plaintiff's Solicitors were on record all the time. Why did the Plaintiff not put any effort to recommence litigation after he had already started part time work over one year ago?

(3) Why was the Plaintiff unable to file 'Notice of Intention to Proceed' to terminate the delay?

(4) How long would the Plaintiff have laid in abeyance, had it not been for the Defendants initiative to file the current application?

There is not a word there in the Plaintiff's Affidavit in answer. Those challenges put flesh on the bones of the Plaintiff's proposition and make plain the unfairness of it.

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 proceed with his action 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 two 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.

(9) As I said earlier, already two years and four months have elapsed since the last formal step in the proceedings. The pleadings in the action begun by way of Writ of Summons were closed on 15th October 2013. From 15th October 2013 to 08th February 2016 that is for two years and three months the Plaintiff has failed to take the following procedural steps;

- ❖ File a Notice of Intention to proceed to terminate the delay under Order 3, rule 4.
- ❖ Proceed to Pre-Trial Conference.
- ❖ File and serve his Summons to enter action for trial.

(10) 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 his action for trial. The pace at which it proceeds through the various steps of issue and service of Writ, or pleadings and discovery, of order for directions and setting down for trial is in the first instance within his control.

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

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.

Returning back to the case before me, it is the contention of the Plaintiff that 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 his claim for years without any risk to himself, 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 his action on trial.

It would be unrealistic to expect a Defendant in an ordinary action for damages, particularly in accident cases, 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.

(11) The Plaintiff's cause of action, if he has one, arose on 30th August 2010. The Writ was not issued until 27th August 2013. The Plaintiff waited until the last three days of the three years. The Plaintiff has no legal right to delay for that period. The Plaintiff had made full use of the three years allowed by the Limitation Act.

The Plaintiff brings this action;

- On behalf of the deceased's Estate by virtue of the Law Reform Miscellaneous Provisions (Death and Interest Act)

AND

- On his own behalf by virtue of the Compensation to Relative Act.

The Plaintiff says that he was granted Letters of Administration by the High Court of Fiji on 05th day of August 2013. The accident took place on 30th day of August 2010. The Plaintiff's Affidavit in answer lack essential particulars as to when he applied for Letters of Administration (the particular month and the year) and whether it was contested.

I am not prepared to accept that it is sufficient explanation for delay to make the bare statement that he was not granted Letters of Administration until the last 3 weeks of the three years. In every event, the delay (if any) in granting Letters of Administration is a matter of little consequence, because the Plaintiff does not require Letters of Administration to institute proceedings as the Compensation to Relative Act allows him to do so in the absence thereof.

(12) It is the totality of the delay from the time of the accident to the time of the application to strike out which matters, and the ultimate question is – has the total delay from the accident down to the application to strike out been such as to make a fair trial of the action between the parties impossible?

In the case before me, the Writ was only issued 03 days before the limitation period of 03 years ran out. One word more, the accident took place on 30th August 2010. After 02 years and 11 months and 27 days, the Writ was sprung on the Defendants.

After the Writ was issued, the Plaintiff inexcusably delayed for another 02 years and 04 months.

There is a delay of 05 years and 03 months from the accident, 02 years and 11 months before issuing the Writ and another 02 years and 04 months after issuing the Writ. At the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened 5 years ago, memories grow dim, witnesses may die or disappear.

It is often during the first three or four years that witnesses die or disappear or forget what happened and that records and notes are lost or destroyed. Thus, every year that passes prejudices the fair trial. It would be impossible to have a fair trial after all these years. The Plaintiff has lasted so long as to turn justice sour.

Therefore the chances of the Court being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard.

Just consider the position of the Plaintiff. If the claim is allowed to proceed for trial, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the Court as to what happened generally lies. At the trial itself, the lapse of time will tell more heavily against the Plaintiff than against the Defendants. Thus, there is no real possibility of prejudice to the Plaintiff by dismissing the action. The Plaintiff may be better off than if the action is allowed to continue. There can be no injustice in his bearing the consequences of his own fault.

When the trial of the action is prolonged, there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed.

In the present case, the accident took place nearly 05 years ago. Clearly the inexcusable lapse of time for which the Plaintiff is responsible has given rise to a substantial risk that the issue whether the accident occurred in the way alleged by the Plaintiff cannot now be fairly tried. It is impossible to have a fair trial after so long a time. This Court should not wear blinkers. I cannot shut my eyes to the fact that the Defendants too sat back and adapted a 'blame storming' approach. Clearly no Defendant can successfully apply for an action to be dismissed for want of prosecution if he has waived or acquiesced in the delay. However, the mere inaction on the part of the Defendants cannot in my view amount to waiver or acquiescence in the delay in which the Defendants found their application.

In all the circumstances, I think that the delay is so great as to amount to a denial of justice. The condition precedent to the Defendants right to have the action dismissed is thus fulfilled.

(13) The Plaintiff is not entitled to delay as of right for 05 years and 03 months from the accident, 02 years and 11 months before issuing the Writ and another 02 years and 04 months after issuing the Writ. He has no such right. The delay is inordinate and inexcusable.

If the Plaintiff is guilty of inordinate and inexcusable delay before issuing the Writ, then it is his duty to proceed with it with expedition after the issue of the Writ. He must comply with all the rules of the Court and do everything that is reasonable to bring the case quickly for trial.

Even a shorter delay after the Writ may in many circumstances be regarded as inordinate and inexcusable, and give a basis for an application to dismiss for want of prosecution. This is a stern measure; but it is within the inherent jurisdiction of the Court. So, in the present case, the delay of 02 years and 04 months after the Writ is inordinate and inexcusable.

It is a serious prejudice to the Defendants to have the action hanging over their head even for that time. On this simple ground, I think this action should be dismissed for want of prosecution.

Moreover, the prejudice to a Defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a Defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

This kind of prejudice is a very real prejudice to a Defendant and when this prejudice is added to the great and prejudicial delay before the Writ then I find it hard to believe that this Court should be powerless to intervene to prevent such a manifest injustice.

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

> "*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)

(14) 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 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 two years having lapsed since the last proceedings tends to show that the Plaintiff had intended to abandon his 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".*

(F) CONCLUSION

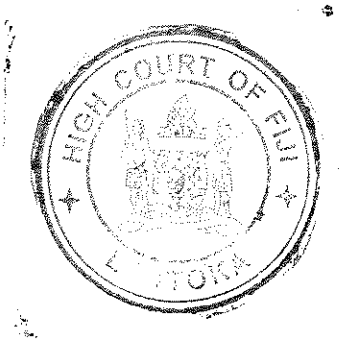
Having regard to the facts of this case, I apply the legal principles laid down in the case of **Grovit and Others v Doctor and others** (*Supra*). Accordingly, I conclude that the Plaintiff maintained the action in existence notwithstanding that he had no interest in bringing it to a conclusion.

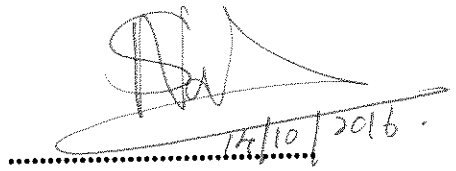
This conduct on the part of the Plaintiff constituted an abuse of process.
This should be made clear; the limited resources of this Court will not be used to accommodate sluggish litigation.

(G) FINAL ORDERS

(1) The Plaintiff's action against the Defendants is dismissed for Want of Prosecution and abuse of process of the Court.

(2) The Plaintiff to pay costs of $500.00 to the Defendants within 14 days hereof.





Jude Nanayakkara
Master.

At Lautoka

14th October 2016.