

**IN THE HIGH COURT OF FIJI**  
**IN THE WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 91 of 2020**

**BETWEEN** : **FOUR WHEEL DRIVE SALES [PTE] LIMITED** a limited liability company having its registered office at 9 Leonidas Street, Lautoka.

**FIRST PLAINTIFF**

**A N D** : **SANJEET SINGH** of Leonidas Street, Lautoka, Company Director.

**SECOND PLAINTIFF**

**A N D** : **FIJI REVENUE AND CUSTOMS SERVICE** a statutory authority at Revenue and Customs Services Complex, Corner of Queen Elizabeth Drive and Ratu Sukuna Road, Nasese, Suva.

**DEFENDANT**

**Appearances** : **Mr. Ricky Rajneel Singh for the plaintiffs**  
**Mr Edward Eterika for the defendant**

**Hearing** : **Wednesday, 29<sup>th</sup> July, 2020.**

**Decision** : **Friday, 14<sup>th</sup> August, 2020.**

**DECISION**

**[A] INTRODUCTION**

(01) This is an application filed by the defendant seeking the following reliefs;

1. *Application for an Order to allow the Defendant to file out of time its Affidavit in Response for the above matter.*
2. *Application for an Order from this Honorable Court to allow the Defendant to serve out of time its Affidavit in Response on the Plaintiffs.*

3. *And any further Orders made by this Honourable Court.*
- (02) The application is made by 'notice of motion' dated 15<sup>th</sup> July, 2020 and is supported by an affidavit sworn by 'Laisani Kawanisiga', clerical officer, Lodgment Enforcement Unit, Fiji Revenue and Customs Service. The application is made pursuant to Order 3 rule 4 of the High Court Rules, 1988 and under the inherent jurisdiction of the Court.
- (03) The application was vigorously opposed. An answering affidavit sworn by the second plaintiff on 20<sup>th</sup> July, 2020 was filed. A response to affidavit in opposition was filed on 23<sup>rd</sup> July, 2020.
- (04) The plaintiffs opposed the application on the following grounds; (reference is made to paragraph (03) to (06) of the answering affidavit).
- ***That** regardless of whatever material the defendant now put before the court, they have missed the mandatory time line as contained in Sections 157 and 158 of the Customs Act.*
  - ***That** additionally, the defendant was served with the plaintiffs' affidavit on 27<sup>th</sup> May, 2020 and they failed to take any action.*
  - ***That** again on 8<sup>th</sup> July, 2020 this Court gave them further indulgence of six (6) days and they failed to abide by the time line.*
  - ***That** the present application is an abuse of the Court's grace and is designed to further delay this Court's adjudication on the issues raised by the plaintiff.*
  - ***That** our company has been deprived of the vehicles in question without any reason whatsoever, and I am referring to the detention notices issued by the defendant.*

**[B] BACKGROUND**

- (01) The plaintiffs commenced proceedings by Originating Summons (expedited form) seeking the grant of the following reliefs;
1. ***A Declaration** that on the 10<sup>th</sup> January, 2020 the defendant's seizure and removal of the plaintiffs' motor vehicles particulars whereof is contained in the affidavit of Sanjeet Singh the second named plaintiff herein is or was unlawful and ultra vires the Customs Act.*
  2. ***A Declaration** that the defendant's continued detention of the aforesaid motor vehicles from the period 21<sup>st</sup> January, 2020 and two (2) months and a day thereafter is unlawful and ultra vires the Customs Act.*

3. *A Declaration that the plaintiffs are entitled to the possession and control of the aforesaid motor vehicles forthwith.*
  4. *A Declaration that the plaintiffs are entitled to general damages for the wrongful seizure and/or unlawful continued detention.*
  5. *An Order that the defendant do pay costs on a solicitor/client indemnity basis.*
  6. *AND such other Orders as would expeditiously dispose of the issues raised in these proceedings.*
- (02) The plaintiffs' application is made pursuant to Order 7, 28 and 32 of the High Court Rules and under the inherent jurisdiction of the Court.
- (03) I note with concern that the plaintiffs have adopted expedited (form 4) Originating Summons as they please.
- (04) Order 7, rule 2(1) provides;
- “Every Originating Summons (other than an ex parte summons) shall be in Form No. 3 or, if so authorized or required, in Form No. 4 in Appendix (1), and every ex parte Originating Summons shall be in form No. 5 in Appendix (1).*
- (05) Therefore, unless ‘authorised or required’ under the Rules, no party to Civil proceedings in the High Court may use the expedited Originating Summons<sup>1</sup>.
- (06) In this case, the absence of the usual reference to the authorizing rule on the face of the originating summons clearly shows that the plaintiffs have irregularly and unilaterally adopted the expedited procedure to the prejudice of the defendant which ought not to be countenanced or sanctioned by this court.
- (07) In form, the plaintiffs’ summons did not comply with Form 4 of the rules. Had they done so, it would have required the defendant to return an accompanying acknowledgment of service<sup>2</sup> within 14 days after service of the summons<sup>3</sup>.
- (08) On 24-06-2020, the plaintiffs applied to the court for a hearing date to be fixed<sup>4</sup>. This is clearly of some one month and thirteen days from the date of the filing of originating summons (expedited form). This is not in accordance with the correct procedure under Order 28. Clearly under Order 28, the process of filing and serving affidavit evidence

<sup>1</sup> Halsbury Laws of England, 4<sup>th</sup> ed, Vol 37 para 3. For example, Order 17, rule 3(3) & Order 80, r.9(3) of the High Court Rules, 1988 clearly require the use of the expedited Form.

<sup>2</sup> Order 12, r.8.

<sup>3</sup> Order 12, r.4.

<sup>4</sup> Order 28, r.3

can take anything up to two (02) months to complete before the plaintiffs may apply to the court for a hearing date to be fixed<sup>5</sup>.

The plaintiffs have 14 days within which to serve their affidavit evidence [Order 28, r.2 (3)] and after receipt of the copies of the plaintiffs affidavits, the defendants have 28 days within which to serve their own affidavits [Order 28, r.4] and upon receipt of the defendants affidavits the plaintiffs have a further 14 days to file further affidavits in reply (Order 28, r.5) and that then closes the filing of affidavit evidence.

The above are the normal minimum time frames for a general (Form 3) originating summons and must be complied with unless the plaintiff applies for and obtains a hearing date before or at the same time as the issuance of the originating summons. This latter process is the only feature that differentiates an expedited (Form 4) originating summons from a general originating summons.

- (09) I note with concern, there is a serious irregularity in the expedited procedure adopted by the plaintiffs.

[C] **THE JURISDICTION AND THE LEGAL PRINCIPLES**

- (01) The application for extension of time to file and serve a pleading (the affidavit in response) is made under Order 3, rule 4 of the High Court Rules, 1988.
- (02) For the sake of completeness, Order 3, rule 4 is reproduced below in full.

*Extension, etc., of time (O.3, r.4)*

- 4.(1). *The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.*
- (2). *The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.*
- (3). *The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.*

*Provided that wherever the period for filing any pleading or other document required to be filed by these rules or by the Court is extended whether by order of the Court or by consent a late filing fee in respect of each extension shall be paid in*

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<sup>5</sup> Order 28, r.3

*the amount set out in appendix II by the Party filing the pleading or other document unless for good cause the Court orders that some or all of the same be waived.*

- (03) I will pause here to consider the principle underlying the exercise of the courts discretion when an extension of time is sought under Order 3, rule 4 (Order 3, rule 5 in U.K).
- (04) In Costellow v Somerset<sup>6</sup>, the plaintiff was seeking an extension of time for the service of his writ, claiming damages for personal injuries, which had been issued just within the three-year limitation period but not served until after the expiry of the four-month period allowed for service.
- (05) The following passage of “Bingham” M.R in “Costellow v Somerset”<sup>7</sup> is illuminating;

*‘We are told that there is some uncertainty among practitioners and judges as to the appropriate practice in situations such as this. It is plainly desirable that we should give such guidance as we can. As so often happens, this problem arises at the intersection of two principles, each in itself salutary. **The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed.** The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, Ord 24, r 16(1), Ord 25, r 1(4) and (5), Ord 28, r 10(1) and Ord 34, r 2(2) are examples. This principle is also reflected in the court’s inherent jurisdiction to dismiss for want of prosecution. **The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.** This principle is reflected in the general discretion to extend time conferred by Ord 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings. **Neither of these principles is absolute.** If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff’s default had caused prejudice to the defendant. But the court’s practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule. **The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb. A rigid, mechanistic approach is inappropriate.** Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff’s application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the court to hear both summonses together, since, in considering what justice requires, the court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. In the present case, there was before the district judge no application by the plaintiff for extension, although there was before the judge. It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the court considering the defendant’s application to dismiss will inevitably consider the plaintiff’s position and, if the court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application is made or not. Cases involving procedural abuse (such as *Hytrac Conveyors Ltd v Conveyors International Ltd* [1982] 3 All ER 415, [1983] 1 WLR 44 or questionable tactics (such as *Revici v Prentice Hall Inc* [1969] 1 All ER 772, [1969] 1 WLR 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff’s action for want of prosecution unless*

<sup>6</sup> (1993) (1) ALL.E.R 952

<sup>7</sup> (1993) (1) ALL.E.R. 952 at 960

*the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Ords 19, 24, 25, 28 and 34. The approach to applications under Ord 3, r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord 3, r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.'*

(Emphasis added)

(06) In **"Mortgage Corp Ltd v Sandres"**<sup>8</sup>, the plaintiff was seeking an extension of time for the exchange of witness statements and experts reports. The appeal was from the decision of Astill J, who had refused leave on the footing, as described by Millett LJ, that **unless there were good reasons for the failure to comply with the rules or directions of the court the discretion to extend time would not be exercised. Millet LJ, with whom Potter LJ and Sir Christopher Slade agreed, expressly rejected the argument based on Astill J's approach that the absence of good reason was always and in itself sufficient to justify the Court in refusing to exercise its discretion, and held that the true position was that once a party was in default, it was for him to satisfy the court that despite his default, the discretion should nevertheless be exercised in his favour, for which purpose he could rely on any relevant circumstances.**

(07) The Court laid down the general guideline as follows<sup>9</sup>;

*'The court was acutely aware of the growing jurisprudence in relation to the failure to observe procedural requirements. There was a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules or directions of the court. What his Lordship said now went beyond the exchange of witness statements or expert reports; it was intended to be of general import. Lord Woolf, Master of the Rolls and Sir Richard Scott, Vice-Chancellor, had approved the following guidance as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court: 1 Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed. 2 At the same time the overriding principle was that justice must be done. 3 Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation. 4 In addition the vacation or adjournment of the date of trial prejudiced other litigants and disrupted the administration of justice. 5 Extensions of time which involved the vacation or adjournment of trial dates should therefore be granted only as a last resort. 6 Where time limits had not been complied with the parties should cooperate in reaching an agreement as to new time limits which would not involve the date of trial being postponed. 7 If they reached such an agreement they could ordinarily expect the court to give effect to that agreement at the trial and it was not necessary to make a separate application solely for that purpose. 8 The court would not look with favour on a party who sought only to take tactical advantage from the failure of another party to comply with time limits. 9 In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions. 10 In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.'*

(08) As I understand the authorities, the grant of an extension of time under this rule is not automatic. **The object of the rule is to (as I understand the rule), ensure that those rules which fix times for doing acts do not become instruments of injustice. The discretion to extend time is given for the sole purpose of enabling the Court to do justice between the parties.**

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<sup>8</sup> (1996) TLR 751

<sup>9</sup> at page 752

**[D] The factors to be considered for an enlargement of time**

In application of this kind, the courts consider four (4) factors to ensure principled approach to the exercise of a judicial discretion. Those factors are<sup>10</sup>;

- (A) The reason for the failure to file within time.
- (B) The length of the delay.
- (C) Whether there is a ground of merit justifying the court's consideration.
- (D) If time is enlarged, will the other party be unfairly prejudiced?

**[E] THE LENGTH OF THE DELAY**

- (01) According to the affidavit of service filed by the plaintiffs on 01-06-2020, the plaintiffs on 27-05-2020 served the Office of the Fiji Revenue and Customs Services with a true copy of the Originating Summons, the affidavit of Sanjeeet Singh and the accompanying acknowledgment of service.
- (02) That would require the defendant to return the accompanying acknowledgment of service within 14 days after the service of the originating summons<sup>11</sup>. It was thus necessary for the defendant to file acknowledgment of service by 10-06-2020.
- (03) However, the acknowledgment of service was not filed until 07<sup>th</sup> July, 2020. It was as a result some 27 days late.
- (04) After receipt of copies of the plaintiff's affidavit, the defendant has 28 days within which to serve their own affidavit<sup>12</sup>. It was thus necessary for the defendant to file their affidavit by 27-06-2020. However, the defendant did not file and serve the affidavit.
- (05) The defendant's application seeking an extension of time to file their affidavit came before the court on 16<sup>th</sup> July, 2020.
- (06) Turning to the period of delay, it was at least some 19 days, which is on any view of it is not substantial.

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<sup>10</sup> NLTB v Khan (2013) FJSC1; CBV 2 of 2013. Mohammed Shaheem Khairati v Mohammed Fareed Khairati and Mohammed Hassan, Civil No. ABU 67 of 2018, Decision 23-02-2019.

<sup>11</sup> See, Order 12 r.8 and Order 12 r.4

<sup>12</sup> Order 28, r.4

**[F] THE REASON FOR THE FAILURE TO FILE WITHIN TIME**

- (01) The application was supported by the affidavit of (Ms) Laisani Kawanisiga, the Clerical Officer, Lodgment Enforcement Unit, Fiji Revenue and Customs Service states that; (Reference is made to paragraph (6))

(6) *That I was advised by our Legal Officers that directions were issued by this Honourable Court on the 08<sup>th</sup> of July for the defendants to file their Affidavit in response to the Originating Summons filed by the plaintiffs on the 24<sup>th</sup> June, 2020 within 3 days.*

- (02) It is not accurate for (Ms) Laisani Kawanisiga to say that the court gave directions for them to file the affidavit within three (03) days.

According to the affidavit of service filed by the plaintiffs on 01-06-2020, the plaintiffs on 27-05-2020 served the Office of the Fiji Revenue and Customs Services with a true copy of the Originating Summons, the affidavit of Sanjeeet Singh and the accompanying acknowledgment of service. That would require the defendant to return the accompanying acknowledgment of service within 14 days after the service of the originating summons. It was thus necessary for the defendant to file acknowledgment of service by 10-06-2020. However, the acknowledgment of service was not filed until 07<sup>th</sup> July, 2020. It was as a result some 27 days late. After receipt of copies of the plaintiff's affidavit, the defendant has 28 days within which to serve their own affidavit. It was thus necessary for the defendant to file their affidavit by 27-06-2020. However, the defendant did not file and serve the affidavit.

- (03) The defendant having allowed the time period for the filing of affidavit to lapse, made an oral application in court on 08-07-2020 for an extension of time. Despite the objections of the plaintiffs for their being no proper formal application before the Court, the Court exercised its inherent jurisdiction and granted **an extension of time** by three days for the defendant to file the affidavit. This is not a new time limit to deliver a pleading.
- (04) Therefore, it is a complete mis-statement of the position for (Ms) Laisani Kawanisiga to say that the Court gave directions for them to file the affidavit within three (03) days.
- (05) Having allowed the time period for the filing of affidavit to lapse, the defendant has to seek the indulgence of the Court to exercise a discretionary relief to permit a late filing of affidavit<sup>13</sup>.
- (06) It is necessary in order to enliven the Court's discretion in the defendant's favour that the defendant condescend to particulars in the supporting affidavit so as to explain the true reason for the lapse.
- (07) As stated, the defendant should have filed and served the affidavit within 28 days from the service of the plaintiff's originating summons and the affidavit; i.e; from 27-05-2020.

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<sup>13</sup> Gatti v Shoosmith (1939) 3 ALL.E.R. 916



The formal application for extension of time for filing of the affidavit came before the court on 16-07-2020. The defendant should have filed and served the affidavit by 27-06-2020.

The delay was at least 19 days.

- (08) Has there been a satisfactory explanation for this delay? **In my judgment, the delay has not been explained at all.**

There was an attempt to provide an explanation in the affidavit of (Ms) Laisani Kawanisiga for not filing the affidavit within three days, it was not relevant to excuse the non-compliance with the time limit in the Order 28 r.4.

- [G] **Is there a ground to seek the indulgence of the Court to exercise a discretionary relief to permit a late filing of affidavit?**

- (1) As I understood Mr Singh, his oral submissions were as follows;

- In accordance with the correct procedure under Section 157(1) of the Customs Act 1986, the second plaintiff claimed the seized vehicles by notice in writing to the Comptroller.
- The Comptroller, within a period of two months from the receipt of such claim, has failed to ; (1) inform the claimant in writing to institute proceedings for the recovery of goods or to (2) institute proceedings by himself or herself for the condemnation of the goods. Section 158 (1).
- Therefore, pursuant to Section 158(2), the seized vehicles should be released to the claimant (the plaintiff).
- Therefore, the defendant should not be allowed to file any pleading now.

- (2) The above is adequately reflected in the oral submissions of Mr Singh, Counsel for the plaintiffs. The following quotations are taken from page (5) and (20) of the transcript of hearing.

*Mr Singh: That is our argument based on the Customs Act, yes my Lord that is what we are submitting. That is the provisions of the Customs Act otherwise there is no other way to interpret that, that is in breached of that. How else the plaintiff come to the court asking for them time to release the vehicle. They should have done that at the earliest says, now we submit that they cannot do that. If they want to file any claim, they can do that*

*separately. For now, we whole heartily submit that they have to release the vehicles and at the moment that don't have the justification my Lord based on 158 as to why they detained the vehicle. They were sitting on it. Even the explanation provide the account for the fact, that is to whatever reasons they were holding on to, they had the whole 2 months to do that, to do the investigation, in fact I submit my Lord that the investigation are done prior before they seize the vehicle hence the reason for research warrant. They should have, that is the preliminary stage, but whatever the reasons they are now providing for an extension of time. We submit it does not hold*

*Mr Singh: That is what we are arguing my Lord, that there is no point now in filing the documents, the pleadings whatsoever, they have lost that opportunity my Lord. They have lost that right by breaching this particular provision because whatever they have draft now in the affidavit will form part of the notice of claim, whatever they addressing like that.....whatsoever. That is what we are going to address in response and they should have done that 2 months ago when the notice was serve, that is what we are arguing my Lord. The notice of claim or whatever they were arguing. So now they have lost that opportunity, they cannot come to this honorable court, we submit with dirty hands asking this court to give them time. They have already breached the required period, they have not obeying the order of the court and this court has granted them time my Lord. Even if they filing the pleadings, this court granted them time. On the eve of the day my Lord, eve of hearing when the matter was set for hearing on the 8<sup>th</sup> of July, then the notice was serve for vacate of hearing my Lord. We submit whatever reasons the Defendant had, they should communicated to us in writing to this honorable court well before the date, they did not do that. So now when we file an action, the matter is ready for hearing, they cannot come to this honorable court asking the courts time to give them time to given them time whatever pleadings they want to.*

- (3) Stripped off the skillful advocacy of Counsel for the plaintiffs, his argument is this, “*You did not give us notice in writing to institute proceedings for the recovery of goods. You did not institute proceedings for the condemnation of the goods. Therefore, you cannot defend the proceedings we have instituted*”.

- (4) In reply, the defendant says that it has not received the plaintiffs' notice in writing claiming the seized vehicles. The plaintiffs say that they gave the notice by way of an email and the defendant has acknowledged the receipt of the email.

Be that as it may, what concerns this court is whether the plaintiffs have duly served the notice as required by Section 188 of the Customs Act which requires sending notice to the defendant by registered post or handing over notice to the defendant personally.

I reserve this issue for substantive hearing.

The defendant says that it has the every right to defend the proceedings and summed up the grounds for defending the matter as follows;

- (a) That the vehicles belonging to the plaintiffs have been seized and detained by the defendant subject to investigations in relation to non- customed goods as per Section 129(2) (d) of the Customs Act of 1986.
  - (b) That the defendant is of the view that the vehicles must still be detained to prevent tampering of the evidence (the vehicles itself) by the plaintiffs.
  - (c) Furthermore, the defendant's investigations into the issue of non - customed goods is still ongoing and as such warrants as a reasonable cause for the detention of the motor vehicles until the investigations and subsequent prosecution of the matter is completed.
  - (d) Also, the fact that the issue of the investigation is a subject matter that is of the interest of the public and that the allegation itself on non-customed goods is serious.
- (5) It is true that the defendant has the every right to defend the plaintiffs' action.

At the end of the day, the guiding principle is this:

The object of the rule is to give the Court discretion to extend time with a view to avoidance of injustice to the parties. When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not to be listened to and any injury caused by delay may be compensated for by the payment of costs<sup>14</sup>.

The overriding principle is that justice should be done.

- (6) The principles are more fully canvassed in **Finnegan v Parkside Health Authority**<sup>15</sup> in its reference to a number of other authorities. The theme emerges that *whilst the rules are*

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<sup>14</sup> Supreme Court Practice 1999, P18, citing Bramnell LJ in Atwood v Chichester (1878) 3 QBD 722 at 723

<sup>15</sup> [1978] 1 All ER 595

devised to promote expedition and are requirements to be met, **procedural default should not stand in the way of judgment on the merits unless the default causes prejudice which cannot be compensated by an award of costs.**

- (7) In the present case, there are no special circumstances, such as an excessive delay. Have the plaintiffs being irreparably injured by the delay? Indeed, Counsel for the plaintiffs did not seek to persuade the Court by way of affidavit evidence that **irreparable mischief** would be done to the plaintiffs by allowing the defendant to take the next step. It is not shown by way of affidavit evidence that the plaintiffs have suffered **irreparable damage** as a result of the defendant's delay in filing a pleading. Of course, I do not deny for a moment that any delay in filing a pleading is prejudicial. All I am saying is that any prejudice caused by the delay in filing a pleading by the defendant may be compensated for by the payment of costs because it is not shown by affidavit evidence that the other side have **suffered irreparable damage** as a result of the delay in filing a pleading.
- (8) The delay should not bar the defendant from the door of the Court. I do not consider that the door of the Court should, at this stage, be closed to the defendant by visiting the sins of the investigators on the defendant. Our courts are open to all and it is only in very exceptional circumstances that the doors of the Court will be closed upon anyone who is serious about defending the proceedings. A refusal will have a devastating effect upon the defendant's right to defend the proceedings. On the facts of this case, it would not be unreasonable to give the defendant an indulgence. **This court would not look with favour on a party who seeks only to take tactical advantage from the failure of another party to comply with time limits.**
- (9) The Court thinks it is just to extend the defendant time to file a pleading upon them paying costs, which is a sufficient punishment and will prevent the rules from becoming a dead letter.
- (10) In my view, the plaintiffs cannot stand against the powerful tide of logical and judicial reasoning of;
- (A) **Branwell LJ in *Atwood v Chichester***<sup>16</sup>
- (B) **Hirs LJ in *Finnegan v Parkside Health Authority***<sup>17</sup>

## **ORDERS**

- (01) An extension of time is granted to the defendant to file its affidavit in response upon them paying costs of \$750.00 to the plaintiffs.

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<sup>16</sup> (1878) 3 QBD 722 at 723

<sup>17</sup> (1978) 1 All E.R. 595.

- (02) The costs of \$750.00 to be paid to the plaintiffs within seven days from the date of this decision.
- (03) The defendant's affidavit in response to be filed and served on the plaintiffs within seven days from the date of this decision.



  
.....14/08/2020  
**Jude Nanayakkara**  
**[Judge]**

**At Lautoka**  
**Friday, 14<sup>th</sup> August, 2020**