CIVIL DIVISION RULES COMMITTEE

FINAL REPORT

PROPOSED AMENDMENTS

THE HIGH COURT AND MAGISTRATES COURT ACTS & RULES

3 June 2024

ACKNOWLEDGMENTS

This Report is the result of His Lordship the Honourable Acting Chief Justice Mr. Salesi Temo's leadership in fulfilling the mandate in Section 15(3) of the Constitution.

We acknowledge the following Judicial Officers who were appointed by the Honourable Acting Chief Justice to constitute the **Civil Division Rules Committee** ('***CDRC***'):

(i) Mr. Justice Anare Tuilevuka (Chairperson)
(ii) Madam Justice Anjala Wati (Deputy Chairperson)
(iii) Mr. Justice Deepthi Amaratunga
(iv) Mr. Justice Vishwa Datt Sharma
(v) Mr. Justice Yohan Liyanage (until end of August 2023)
(vi) Madam Justice Senileba W. Levaci
(vii) Mr. Justice Chaitanya Lakshman
(viii) Madam Justice Waleen George
(ix) Mr. Justice Peni Dalituicama
(x) Mr. Justice Umaru Lebbe Mohamed Azhar
(xi) Chief Registrar Mr. Tomasi Bainivalu
(xii) Master Vandhana Lal
(xiii) SRM Ms. Sufia Hamza
(xiv) RM Ms. Deepika Prakash
(xv) RM Ms. Supreena Naidu
(xvi) RM Ms. Senikavika Jiuta
(xvii) RM. Mr. Krishan Prasad

A special thank you to the Chief Registrar, Mr. Tomasi Bainivalu who not only contributed in the initial discussions and in the development of this Report, but also in mobilizing his staff in providing logistical support to the CDRC.

CDRC wishes to acknowledge the support of Senior Secretaries Ms. Nafiza Bano Sheik and Ms. Torika Tuqiri, Manager IT Mr. Ronald Kumar and his team, and Mr. Esteswa Deo for their administrative and logistical support.

This final Report was produced by the following five members of the CDRC:

(i) Mr. Justice Anare Tuilevuka (Chairperson)
(ii) Madam Justice Anjala Wati (Deputy Chairperson)
(iii) Madam Justice Senileba W. Levaci
(iv) Mr. Justice Umaru Lebbe Mohamed Azhar
(v) RM Ms. Deepika Prakash

FOREWORD

The High Court Rules 1988 (**"HCR"**) and the Magistrates Court Rules 1945 (**"MCR"**) are part of the legacy of Fiji's English colonial history. For years, these Rules have been applied to regulate procedure in their respective civil courts. Are these Rules still serving their purpose well?

According to the Fiji Law Reform Commission Annual Report[1] for the Years 1997, 1998, 1999, 2000 and 2001, the legal profession had some concerns about these Court Rules in the mid - 1990s.

> *"The legal profession has expressed concern about the present civil court rules. An informal rules committee had existed prior to 1995 but had since become inoperative. In 1996, the then Attorney General Ratu Etuate Tavai agreed that such a Committee needed to be resurrected as it was an essential part to ensuring that efficiency be achieved in the administration of the courts".*

Section 15 (3) of the 2013 Constitution of Fiji confers upon every party to a civil dispute the right to have their cases determined within a reasonable time. Corresponding to this right, is a duty on the state to facilitate the fulfilment of that right.

Since 30 January 2023, when I took this job as Acting Chief Justice, I have received many letters from disgruntled litigants. Every complaint has been about the delay in the delivery of a long-awaited judgment.

The complaints prompted me to embark on a series of case management meetings around Fiji with Judicial Officers and their registry-staff. These were complemented by two workshops on case management for Judicial Officers which I hosted in June and November 2023.

Judicial Officers accept that they are personally accountable for how they manage each individual case. On the other hand, the Rules do not equip them with the right tools to control the progress of a case.

[1] https://flrc.gov.fj/wp-content/uploads/2024/04/FLRC-Annual-Report-No.-7-for-1997-2001.pdf

At the June 2023 Workshop, I appointed[2] some Judicial Officers to constitute an *ad hoc* Civil Division Rules Committee (**"CDRC"**). The CDRC's mandate is to:

> *"… look into the existing High Court and Magistrates Court Rules and work out if there is a need to amend the same for better case management of the proceedings in the Civil Division."*

I gave the CDRC six (6) months from 23 June 2023 to investigate and produce a Report of its findings and recommendations. This deadline was later extended to a further six months from 23 December 2023.

In July 2023, the Prime Minister announced that Cabinet had endorsed the holistic reform of the law and the rules governing civil procedure in the High Court and the Magistrates Court. I have been in talks with the Honorable Attorney-General with a view to coordinating our efforts from this point onwards.

In England, an extensive review headed by Lord Wolf which began in 1994 led to reforms which resulted in the complete overhaul of their Civil Procedure Rules. Fiji's HCR has been modelled after the "old" Rules which are now redundant in England.

In most common law jurisdictions, reforms have been influenced by the following factors:

(i) excessive delay;
(ii) access to the civil justice system;
(iii) reduction in the costs of civil litigation;
(iv) simplification of the rules; and
(v) alignment with modern concepts of case management.

The CDRC's Report also focuses on the above factors with emphasis on addressing the issue of delay.

The first part of the Report attempts to diagnose the root causes of delay in the civil justice system. The second part proposes a new structure to minimize delay.

This Report lays out the ideal groundwork for reforms of Fiji's civil rules and procedure. It is based on the collective experience of Judicial Officers who administer the HCR and the MCR in their Courts on a daily basis.

[2] vide a Minute dated 23 June 2023.

I look forward to collaborating with the Office of the Attorney-General in the development of an *Issues Paper* and later a *Discussion Paper* for public consultation on the basis of the CDRC's Report.

Ultimately, I hope to see a set of "home grown rules" develop from this exercise.

I congratulate the members of the CDRC for a job well done!

Salesi Temo
Acting Chief Justice
3 June 2024

TABLE OF CONTENTS

PART A. INTRODUCTION

1. In his opening remarks at the Judicial Officers Workshop held at the Intercontinental Fiji Golf Resort and Spa from 21 to 24 June 2023 (**"2023 Workshop"**), the Acting Chief Justice, Mr. Salesi Temo, noted with concern the high number of cases pending in the civil courts at all levels throughout Fiji.

2. His Lordship said:

> *"Ever since starting this job as Acting Chief Justice, on 30 January 2023, it was not unusual to start my work in the morning by reading numerous letters of complaints from disgruntled litigants and/or users of the Court system.*
>
> *The main complaints center on the delays in the delivery of judgments in their cases. We all know the phrase "justice delayed is justice denied". Numerous litigants complain that it was taking too long for the courts to deliver their judgments.*
>
> *To deliver justice on time, it is important for us to master the art and techniques of Case Management – the theme of this 4-day Workshop.*
>
> *In the past, the Courts used to let litigants control the pace of legal proceedings. That is no longer valid now. Today, the courts had to control the pace of legal proceedings. That is why in the next four days, you will listen and learn from others on how to manage your cases, so that judgments are delivered on time."*

3. His Lordship then reminded all Judicial Officers that section 15 (3) of the Constitution of Fiji confers upon every party to a civil dispute the right to have their cases determined within a reasonable time. Section 15 (3) states:

> *"Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time."*

The State's Responsibility under Section 15 (3)

4. The litigant's right under section 15(3) corresponds with the duty on the State to take positive action(s) to fulfill that right.

5. In May 2023, whilst making submissions to the Fiscal Review Committee, the President of the Fiji Law Society, Mr. Wylie Clarke, urged the Government to[3]:

> *"…carry out a major review of Fiji's judiciary and invest more resources in our judges and court system to modernize and make it effective and efficient."*

6. Mr. Clarke said that a well-resourced judiciary is essential to upholding the rule of law and public confidence. He said that significant delays in the hearing of cases and delivery of judgments are a systemic problem.

7. Mr. Clarke strongly recommended that alternative dispute resolution programs be mainstreamed and integrated into the judicial process. He said:

> *"ADR is an essential and cost-effective way of improving access to justice. It will also serve to reduce the workload of our courts."*

8. The CDRC endorses these views. However, unless the HCR and MCR are realigned to modern case management practice, the purpose in section 15 (3) may be difficult to achieve.

The Role of the Judiciary

9. The judiciary cannot exist without the trust and confidence of the people. Its authority is founded on public faith. To maintain that faith, judges must therefore be accountable to the highest legal and ethical standards. A common complaint of ethical misconduct is the failure to execute judicial duties in a timely manner. Value 6.5 of the Bangalore Principles of Judicial Conduct 2002 states as follows:

> *"A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness."*

10. Delay undermines public confidence in the judiciary. This threatens the rule of law. It is thus the duty of the judiciary to put in place practices and measures to address delay for better case management. Without a proper case management structure in place, it is difficult to hold judicial officers accountable for delay.

[3] A Chand, Fiji Times (1 May 2023) - Refer to - https://www.fijitimes.com/review-judiciary-fls-an-efficient-court-system-vital-to-uphold-public-trust/

11. A *fortiori,* proper case management is fundamental to upholding the rule of law.

12. Having this in mind, the Honorable Acting Chief Justice, upon his appointment, made case management his priority.

13. His Lordship appointed the **CDRC** to review the current **HCR** and **MCR.**

14. *Vide* his Minute dated 23 June 2023, the Acting Chief Justice tasked the CDRC to:

> *"…look into the existing High Court and Magistrates Court Rules and work out if there is a need to amend the same for better case management of the proceedings in the Civil Division."*

15. At the outset, the CDRC identified potential areas for reform. It then allocated research work in these areas to the Judicial Officers as follows:

(i)	Originating Processes in the High Court	Justice A. Tuilevuka
(ii)	Pleadings and Discoveries in the High Court	Justice U.L.M. Azhar and Master V. Lal
(iii)	Mandatory Mediation in the High Court	Justices A. Wati, V. D. Sharma and Y. Liyanage
(iv)	Virtual Hearings	Justices A. Wati, V.D. Sharma & Y. Liyanage
(v)	Commercial Court	Justice D. Amaratunga
(vi)	Interlocutory Appeals	Justice A. Tuilevuka
(vii)	Master's Court	Justice A. Wati
(viii)	E-filing and Case Management Approach	RM K. Prasad
(ix)	Magistrates Court Act 1944 and Magistrates Court Rules 1945	Justices C. Lakshman, S. Levaci, P. Dalituicama, W George; Chief Registrar T. Bainivalu; SRM S. Hamza; RMs D. Prakash, S. Jiuta, S. Naidu and K. Prasad
(x)	Uniform Rules	RM K. Prasad
(xi)	Costs, Interests and Fees	Justice U.L.M. Azhar

16. In 22 September 2023, a working draft of the Discussion Paper was presented to a group of High Court Judges in the Judges Common Room at the Government Buildings in Suva. Comments received from that mini-consultation provided valuable feedback to the CDRC.

Better Case Management of Proceedings in the Civil Division

17. Case management is a court-driven initiative. It is aimed at ensuring that cases are efficiently and effectively progressed and/or fast-tracked through the Court system to a final resolution.

18. For better case management, the Courts must have control over its processes. The ***Civil Procedure Volume I (White Book 2011)*** at page 9, paragraph 1.4.2:

> *"In the common law world, the expression "case management" is used in various senses. The significance of case management procedures is that they mark a change from the traditional position under which the progress of cases was left largely in the hands of the parties. In its narrow sense, "case management" means the exercise by the court of powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedure applicable during the stage are complied with promptly and not abused. Under the CPR, the expression "case management" is used in a much wider sense. The powers given to the court go far beyond those necessary merely to ensure the avoidance of unnecessary delay and include powers to manipulate the application of pre-trial procedures on a case by case basis, principally in the interest of saving costs and reducing delays. Case management in its narrow sense is encapsulated by rule 1.4(2)(g) which states that active management includes the "controlling" of "the progress of the case" by the court by "fixing timetables or otherwise"".*

CDRC's Observations - Current Civil Rules & Procedure

19. From the Research Papers received from its members, and the ensuing discussions around these Papers, the CDRC has formulated the following observations and questions.

20. The CDRC hopes that these observations and questions will guide future discussion and work in the reform of Fiji's civil rules and procedure.

Originating Processes in the High Court

Fact	Order 5 Rule 4 of the HCR stipulates that civil proceedings in the High Court may be begun either by: (i) Writ of Summons and Statement of Claim; (ii) Originating Summons; (iii) Originating Motion; or (iv) Originating Petition.
Issue	Should all proceedings be commenced by one uniform originating process? Alternatively, should some of these originating processes be consolidated into one (e.g. Originating Summons and Originating Motion)?

A Returnable Date on the Writ of Summons

Fact	Most number of cases pending in the High Court Civil Division are Writ actions. When a Writ of Summons is issued by the High Court Registry, no returnable date is given.
Issue	Should the Writ of Summons be issued with a returnable date?

Period of Validity of Writ of Summons

Fact	A Writ, once issued, is valid for twelve months.
Issue	Is this validity period too long? Should the period of validity be reduced?

Delay

Fact	Delay in the High Court often occurs: (i) in the filing and service of documents (pleadings and affidavits); (ii) in non-compliance with timelines (in the Rules and/or directions e.g. discovery orders, AVLD, Pre-Trial Conference); and (iii) through unnecessary interlocutory applications. **The same applies in the Magistrates Court.**
Issue	How can the Rules be revised to minimize delay?

Parties' Control of Litigation

Fact	The HCR is based on the old English Supreme Court Rules. Under these Rules, the progress of a case was left in the hands of the parties.
Issue	How can the Court gain control?

Mediation

Fact	Mediation can assist greatly in the disposal of cases. Under HCR Order 59 Rule 2(h), the Master has jurisdiction to conduct mediation. Section 28 of the MCA imposes a duty on the Court to promote and facilitate settlement. These powers are rarely exercised. This is due largely to the high volume of cases initiated each year, the unwillingness of the parties to explore ADR, and given that mediation is not mandatory, there is hardly any incentive to the parties to submit to this ADR process.
Issue	1. Should mediation be made compulsory for civil cases begun by Writ? If so, at what stage of the proceedings should it be introduced? 2. Should virtual mediation be allowed for a non-resident litigant or for a party living outside the District where proceedings are on foot? 3. Should a non-resident litigant be allowed to engage a non-resident lawyer to represent him for virtual mediation? 4. Should the non-resident lawyer have a Fiji Practicing Certificate to be able to assist his client virtually?

Arbitration

Fact	Claims for breach of contract are often initiated, and then languish in the Court system, without parties having exhausted the arbitration clause.
Issue	Should the Court be empowered to stay and refer a case to arbitration at any stage of the proceedings? Should a recommendation be made to Parliament to amend section 5 of the Arbitration Act accordingly?

Discoveries

Fact	The parties approach to the discovery process often delays the progress of a case. Applications for further and better particulars, interrogatories and specific discoveries are often abused for tactical advantage.
Issue	Should the Rules be made more stringent to accelerate the process?

Pre-Trial Conference

Fact	The Pre-Trial Conference is designed to identify the agreed facts and the real issues. If utilized properly, the PTC could facilitate an early resolution of cases. In any event, the PTC should help in narrowing down the issues and save trial time and costs.
Issue	How should the HCR be amended to maximize the use of PTC?

Uniform Rules

Fact	The Family and Employment Court Divisions have uniform rules. Currently, HCR and MCR are not uniform. In their Research Paper, the Magistrates recommend that they be given the same procedural powers as the High Court. On the other hand, High Court Judges envy certain procedures/rules in the Magistrates Court for simplicity and control.
Issue	Should we abolish the HCR and the MCR entirely and have one set of Uniform Rules including rules on enforcement proceedings? Should the time period for enforcement of judgments be reduced?

Interlocutory Applications & Appeals

Fact	The HCR does not preclude parties from filing interlocutory applications at any time before judgment. Such applications often lead to interlocutory appeals. This delays the finality of cases. In the Criminal Division, the right to appeal an interlocutory decision accrues after sentencing.
Issue	(i) Should the Rules place a limit on the nature of interlocutory applications allowable? (ii) Should the Rules prescribe the stage at which specific interlocutory applications ought to be made? (iii) Should the right to appeal an interlocutory decision be postponed until the matter is finalized? (c.f. this is the practice in the Criminal Division as stated in section 21 of the Court of Appeal Act 1949 and in section 246 (7) of the Criminal Procedure Act 2009).

Master's Court

Fact	This Court was created to handle most chamber applications to assist Judges and reduce the backlog of cases. However, the volume of cases initiated has steadily increased over the years. The current Rules have not assisted the Masters to effectively manage these cases.
Issue	(i) Is the Masters Court serving its intended purpose? Should it be removed completely? If so, should all cases filed be directly allocated to Judges from initiation to disposal? (ii) If the Masters Court is retained, should its jurisdiction be redefined for better case management? *(e.g. all appeals from Magistrate's Court and Tribunals, section 169 applications, all winding-up matters, and all judicial review matters etc.)* (iii) Should the appeals from the Master lie to the Court of Appeal instead? If so, should the HCA and Court of Appeal Act be amended accordingly?

E-Filing

Fact	The Judiciary launched an e-filing software on 30 January 2023. The introduction of e-filing will affect the rules on the service of documents, the format of applications, and the manner in which proceedings are initiated and handled by the registry and judicial officers. E-filing is relevant to how we approach case management.
Issue	Should the HCR and MCR be adapted to support e-filing?

Virtual Hearings

Fact	Order 38 Rule 1 HCR requires evidence to be heard by oral examination in open court. There is no express power to allow virtual hearings. However the High Court has exercised its inherent power for due administration of justice. There are inconsistencies in the way Courts in Fiji deal with applications for virtual hearings. This creates uncertainty and injustice to parties.The Criminal Procedure Act (s. 296) does make provision for the evidence of vulnerable witnesses to be taken by audio or video link. This provision does not extend the privilege to other parties.
Issue	Should virtual hearing be allowed as of right? Or should it be allowed only in limited cases with the leave of the Court? Should Order 38 Rule 1 of the HCR and Order 5 Rule 17 of the MCR be amended to cater for virtual hearings?

Commercial Courts

Fact	Commercial cases are distributed between, and handled by, civil Judges. As a result, commercial cases go through the normal course under the existing civil rules. This causes delay and potentially impacts investor confidence.
Issue	Should a Commercial Court be created to hear commercial disputes expeditiously? If so, how should we define "commercial dispute"?If the HCR is amended to expedite the movement of all cases along the process where then is the need for a special commercial court?

A Civil Rules Committee

Fact	The CDRC's mandate does not extend to the review of the workings of the rules after amendment. There will be teething problems after the Rules are amended, thus, the need for an advisory body similar to section 204 of the Family Law Act 2003 to provide advice to the Chief Justice.
Issue	Should a Committee, Body or Council be formally established to continually review the Rules and operation of the Court system and periodically advise the Chief Justice?

Case Management Problems

21. The CDRC identifies the following as key factors which impede case management in Fiji:

(i) rules - intrinsic delays;
(ii) litigants control and manipulate the rules;
(iii) excessive procedural discretion given to Courts; and
(iv) excessive interlocutory applications.

Rules – Intrinsic Delays

22. Delay is intrinsic in the current rules for two main reasons. Firstly, delay occurs because there are no provisions for the strict enforcement of timelines. Secondly, the rules appear to give parties an unbridled right to file any interlocutory application as and when they please.

23. Lawyers repeatedly fail to comply with interlocutory timelines set under the HCR and MCR (e.g. specific discovery, amendment of pleadings, striking out application, interim payments or security for costs). They would then seek the Court for an extension of time. In most instances, the Court will grant an extension after extension spanning up to a year or more.

24. Lawyers fail to comply with timelines for a variety of reasons. Some of the common excuses are: they are sick, overloaded, have a clash in their schedule, they need to confirm instructions from the client, they are newly instructed, the previous lawyer is exercising his right of *lien* and has not released the client's file, or, they are exploring or pursuing settlement and or mediation etc.

25. The HCR and MCR give the parties a right to file interlocutory applications. Often, these applications are unwarranted and abused by the litigants e.g. applications for striking out of pleadings after discoveries or PTC stage, applications for further and better particulars both in HC and MC after close of pleadings. These hinder the progress of cases.

Litigants Control & Manipulate the Rules

26. The CDRC observes that, because delay is intrinsic in the HCR and MCR, lawyers are then able to manipulate the court processes to stall progress to their advantage.

27. For example, litigants may file unnecessary interlocutory proceedings one after another to wear out and burden the other party with excessive legal fees. This protracts the civil litigation process and makes it more costly.

28. Order 6 Rule 7 (1) HCR is an example of a provision which gives the parties control. It reads:

> *" For the purpose of service, writ (other than a concurrent writ) is valid in the first instance for twelve months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ."*

29. Order 7 Rule 17 of the MCR prescribes the life of a writ at six months which can be renewed for another six months on application. Order 7 Rule 17 reads:

> *17.-(1) Every writ of summons and every judgment summons shall be served within six months from the date of issue thereof and if not served within such period shall thereafter be of no effect unless renewed as hereinafter provided.*
>
> *(2) The Court may if it thinks fit, on application made by the plaintiff not less than seven days before the expiry of the said period of six months on ex parte notice of motion, supported by an affidavit showing the reason why service has not been effected, renew any such writ of summons or judgment summons for one further period of six months.*
>
> *Any writ of summons or judgment summons so renewed and not served within such extended time shall thereafter be of no effect.*

30. The initial validity period of 12 months in HC and 6 months in MC are too long. This causes the Writ to hibernate and age wastefully in the system. Should the life of the Writ be shortened?

31. Further, under Order 25 Rule 1 of the HCR, the plaintiff is required to file Summons for Directions at the close of pleadings. Under the current practice, it is incumbent on

the plaintiff to then move the proceedings into the next stage by filing the Summons for Directions.

32. A Summons for Directions is filed by the plaintiff after close of pleadings to seek directions on how the suit should progress thereafter.

33. This is the stage when proceedings formally enter the discoveries and pretrial conference stage.

34. Since it is the plaintiff who moves the Court by Summons for Directions into the next stage of proceedings from close of pleadings, technically, the Court is only obligated to give directions if the plaintiff seeks them.

Excessive Procedural Discretion given to Courts

35. Applications seeking extension of time are a routine fact in all courts. Such applications may be made at pleadings stage, discovery stage, or even at trial stage when a party seeks an adjournment.

36. When a party is before the Court for the umpteenth time, seeking yet another extension to file that pleading, or that affidavit, or that list of documents, or to comply with discovery orders, or to file an affidavit in opposition to an interlocutory application, or in response to an affidavit in opposition, what should the Court do?

37. Currently, the HCR does not prescribe a limit on the number of extensions a judicial officer may give. Judicial Officer (A) may give ten (10) extensions while Judicial Officer (B) may give only one (1) extension with an unless order.

38. The reason why judges exercise their discretion differently in this regard is due to Order 3 Rule 4 of the HCR.

39. Order 3 Rule 4 (1) of the HCR states:

> "*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."*

40. This provision gives the court a general discretion to extend time as and when it thinks just.

41. Generally, in exercising that discretion under Order 3 Rule 4 of HCR, the Court is required to balance two competing considerations.

42. On the one hand, it is in the public interest that justice be administered timely. This interest is reflected in the seemingly strict timelines set by the Rules[4]. Pursuant to this interest, the Courts have occasionally refused an extension on the premise that the rules are there to be strictly followed[5].

43. On the other hand, there is the concern that any refusal to extend time may lead to a denial of natural justice. There are some early English decisions which state that a party should not ordinarily be denied his claim or defence on the merits on account of a slight default in compliance with timelines. This approach is still followed in Fiji[6].

44. The CDRC is of the view that the HCR and MCR should limit judicial discretion by setting clear guidelines for extension of time. This will yield consistency, uniformity in approach and provide certainty. This will also eliminate appeals against the exercise of the judicial discretion.

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[4] e.g. Order 19 Rule 1; Order 24 Rule 16(1); Order 25 Rule 1(4); Order 25 Rule 1 (5); Order 28 Rule 11(1); Order 34 Rule 1(2); Order 25 Rule 9(1) and (2).

[5] Lord Guest in the Privy Council case of ***Ratnam v Cumarasamy*** *[1964] 3 All ER 933 at 935* said:

> *"The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion."(See also Supreme Court of Fiji discussion in **Rasaku v State** [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013)*

[6] The following cases favour the position that a party should not have to forfeit a substantive right on account of a procedural lapse or error where there is no prejudice to the other:

(i) *Costellow –v- Somerset Country Council (1993) 1 WLR 256 at 264 ;*
(ii) *State of Queensland and Another –v- J.L Holdings Pty Ltd [1997] HCA 1; (1997) 189 CLR 146;*
(iii) *Bhawis Pratap –v- Christian Mission Fellowship (ABU 0093.2005);*
(iv) *Native Land Trust Board –v- Rapchand Holdings Ltd [2006] FJCA 61; ABU 0041J.2005 (10 November 2006); and*
(v) *Raji –v- Permanent Secretary of Health[2023] FJCA 202; ABU 0031.2020 (29 September 2023)*

45. The general discretion under Order 3 Rule 4 was meant to allow the Court to permit reasonable delay. However, in the absence of clear guidelines, this Rule has been abused.

Case Law on Excessive Procedural Discretion to Courts

46. In ***Native Land Trust Board –v- Rapchand Holdings Ltd*** *[2006] FJCA 61; ABU 0041J.2005 (10 November 2006),* NLTB had failed many times to comply with certain production and inspection orders. The High Court then struck out NLTB's defence. NLTB applied to set aside the order. The High Court however dismissed the application. The High Court then proceeded to assess damages.

47. NLTB appealed to the Court of Appeal. It argued, amongst other things, that it had not withheld the documents deliberately and that the power to strike out is exercisable only where there is deliberate disobedience of discovery orders, or, if a fair trial would not be possible.

48. The Court of Appeal:

(a) sympathized with the plaintiff's interest in having his claim resolved quickly;
(b) acknowledged the High Court's case- management obligations;
(c) was critical of NLTB's delaying tactics;
(d) noted the substantial monetary claim against NLTB;
(e) noted that the High Court had given no written ruling; and
(f) said that before striking out the defence, the High Court should have asked itself whether NLTB's conduct was sufficiently unsatisfactory to warrant it being denied its right to defend itself.

49. The Court of Appeal then set aside the High Court's order striking out the defence and ordered a speedy retrial[7].

50. Similarly in ***Eaton v Storer*** *(1882) 22 Ch.D 91*, Jessel, M.R., said that where a party is out of time and faces judgment or dismissal of his action for want of prosecution, the court should grant an extension upon the payment of costs. The costs will be a

[7] See also Supreme Court of Fiji decision in ***Extreme Business Solution Fiji Ltd v Formscaff Fiji Ltd*** *[2019] FJSC 9; CBV0009.2018 (26 April 2019)*.

sufficient sanction for the delay – unless there is some special reason such as excessive delay.

51. In contrast, the appellate Courts in Fiji have, in the following cases, stressed that "Rules are there to be obeyed" and that "non-compliance may well be fatal":

(i) **Venkatamma v Ferrier-Watson** Supreme Court Civil Appeal No. CBV0002 of 1992;
(ii) **Rabuka v Dreunimisimisi** [1997] FJCA 24; ABU0011d.97s (13 August 1997); and
(iii) **Native Land Trust Board v Kaur** [1997] FJCA 44; ABU0038d.97s (25 November 1997.

52. In ***Revici v. Prentice Hall Incorporated & Ors*** *[1969] 1 ALL ER 772*, Lord Denning said at 774:

> *"Counsel for the plaintiff referred us to the old cases in the last century of* ***Eaton v. Storer*** *(1) and* ***Atwood v. Chichester*** *(2),* ***and urged that time does not matter as long as the costs are paid. Nowadays we regard time very differently from what they did in the nineteenth century. We insist on the rules as to time being observed****."(emphasis added)*

53. Edmund Davies LJ also opined as follows at 774:

> *"On the contrary, the rules are there to be observed; and if there is non-compliance (other than of a minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted."*

54. In ***Allen v Sir Alfred McAlpine & Sons Ltd*** *[1968] EWCA Civ J0111-1*, the English Court of Appeal (Civil Division) said:

> *"6.All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time. ...* ***To put right this wrong, we will in this Court do all in our power to enforce expedition: and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure. But it is within the inherent jurisdiction of the Court. And the Rules of Court expressly permit it. It is the only effective sanction they contain. If a plaintiff fails within the specified time to deliver a statement of claim, or to take out a summons for directions, or to set down the action for trial, the defendant can apply for the action to be dismissed, see 0. 19, r. 1; 0. 25, r. 1; 0. 34, r. 2.*** *It was argued before us that the Court should never, on the first application, dismiss the action. Even if there was long delay, the Court should always give the dilatory solicitor one more chance. The order should be that the action should be dismissed "unless" he takes the next*

> *step within a stated time. Such has been the practice, it was said, for a great many years. It was confirmed by Sir George Jessel, M. R., in* ***Eaton v. Storer*** *(1882) 22 Chancery Division at p. 92: and it should not be changed without prior notice.* ***I cannot accept this suggestion. If there were such a practice, there would be no sanction whatever against delay. The plaintiff's solicitor could put a case on one side as long as he pleased without fear of the consequences.*** (emphasis added)
>
> *7. If you read* ***Eaton v. Storer*** *carefully, you will see that the practice described by Sir George Jessel applies only to moderate delays of two or three months. It does not apply when "there is some special circumstance such as excessive delay". The principle upon which we go is clear: When the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the Court may in its discretion dismiss the action straightaway, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight".*

Some General Suggestions

55. The CDRC proposes that there be a **specific provision** for extension of time for each process.

56. A clear timeframe should be set for each specific originating and interlocutory process as well as the number of extensions which should be allowed. This will depend on the difficulty of the process.

57. It is recommended that each timeline be accompanied by a specific provision which will set out the range of sanctions to be imposed (for example, per diem court costs, late filing fees, unless orders, and likewise).

58. In the Companies Act 2015, there are provisions which demand strict compliance of timelines. There is no procedural discretion to Judges to extend time. Hence lawyers know that if they do not comply with these timelines, they cannot seek an extension.

59. The courts have held that the time limit in section 516 is mandatory, and that they have no powers under the Companies Act or under the Companies Winding Up Rules to extend the time for filing an application to set aside the statutory demand, or to waive strict compliance with the time limits set out in that section[8].

[8] ***Sea Quest (Fiji) Pte Ltd v Daemyung Tuna Fishing Tackle Co Ltd*** [2022] FJHC 358; HBE36.2021 (8 July 2022); ***South Pacific Marine Ltd v PricewaterhouseCoopers; Nawi Island Limited v PricewaterhouseCoopers*** [2019] FJHC 118, 119; and ***Skyglory Pte Limited v Bhawna Ben*** [2019] FJHC 891.

60. In ***Sea Quest***[9], a submission was made that Order 3 Rule 4 of the HCR would permit an extension to file and serve an application to set aside statutory demand outside the statutorily fixed twenty-one (21) days, so long as no prejudice is caused to the respondent. Mr. Justice Nanyakarra rejected the submission and cited ***David Grant & Co Pty Ltd v Westpac Bank Corporation*** [1995] HCA 43 where Justice Gummow said :

> *"No doubt, in some circumstances, the new pt5.4 [equivalent of section 516 in Fiji] may appear to operate harshly.* ***But that is a consequence of the legislative scheme which has been adopted to deal with the perceived defects in the pre- existing procedure in relation to notices of demand****. It also may transpire that a winding up application in respect of a solvent company is threatened or made for an improper purpose which amounts to an abuse of process in the technical sense of that term, as explained in* ***Williams v Spautz*** *(1992) HCA 34, (1992) 174 CLR 509."*
>
> (emphasis added)

61. Limiting the general discretion to extend time will affect a judicial officer's power to deal with each case on its own facts. Understandably, this will cause some inconvenience to a party.

62. The CDRC is of the view that specific legislative provisions should be enacted to provide strict time lines. These provisions will be shaped by a clear case management policy which should be incorporated in the Rules or the Act outlining the objectives[10].

63. The need for case management outweighs any inconvenience caused to a party. It enables a party to exercise their right quickly and swiftly instead on sleeping on it. This promotes the mandate in section 15(3) of the Constitution.

Excessive Interlocutory Applications

64. Under the current HCR and MCR, lawyers can file various interlocutory applications at any stage of the proceedings up to the delivery of judgment. In most cases, these

[9] [2022] FJHC 358; HBE36.2021 (8 July 2022) para 21.
[10] See Chapter on Case Management in Other Jurisdictions

applications are unnecessary. They are filed mostly to delay the cases and frustrate the parties.

65. The CDRC recommends that the Rules be amended to limit the filing of interlocutory applications only at certain stages of the proceedings.

66. Any interlocutory application should be dealt with by the judicial officers within a prescribed time limit e.g. the Court should deal with an interlocutory application by an *ex tempore* ruling, or, within 14 days of hearing the application.

67. The rules allow for interlocutory rulings to be appealed. This is another major cause of delay. For example, in most appeals, the appellate court will stay the proceedings until the determination of the interlocutory appeal. After the determination of the appeal, the matter continues in the High Court after a lapse of a number of years.

Case Management in Other Jurisdictions

68. Most common law jurisdictions have reformed their civil rules and procedures to make them more case-management friendly.

69. In England, the Woolf Commission Report led to legislative changes resulting in the complete overhaul of the old Civil Procedure Rules in favour of a new case management friendly set of civil procedure rules.

70. In Australia, following a four-year inquiry into the Federal Civil Justice System, the Managing Justice Report (**"MJR"**) was tabled in the year 2000 by the Australian Law Reform Commission. The MJR noted that in order to run a successful case management programme, the following steps should be taken:

(i) a continuous oversight of matters to ensure satisfactory progress towards resolution within a reasonably benchmarked period;

(ii) a Judge with sufficient clout to ensure compliance with court orders;

(iii) an early identification of issues, problems and settlement prospects;

(iv) customizing court processes to the circumstances of each case and providing a sensible array of dispute resolution options in order for parties to feel they are receiving individualized justice; and

(v) to have a proper information system of the institution to provide empirical data and enable critical analysis for cases.

71. From the MJR, the Individual Docket System (IDS) of case management was developed. Under the IDS, a Judge is given control of a case from filing until trial stage.

72. In Singapore, the Civil Justice Commission[11] recommended reforms which led to the Singapore Civil Rules 2021. The following ideals were introduced:

(a) fair access to justice;

(b) cost –effective work proportionate to –

(i) the nature and importance of the action;
(ii) complexity of the claims as well as their difficulty or novelty of the issues or questions raised; and
(iii) the amount or value of the claim;

(c) efficient use of court resources; and

(d) fair and practical results suited to the needs of the parties.

[11] constituting the Civil Justice Committee and the Chief Justice

PART B. ORIGINATING PROCESSES: HCR

Introduction

73. Under Order 5 Rule (1) of the HCR, civil proceedings may be begun either by:

(i) Writ of Summons/Statement of Claim;
(ii) Originating Summons;
(iv) Originating Motions; or
(v) Originating Petitions.

74. Some jurisdictions have just one originating process for all types of proceedings irrespective of whether the cause of action is founded in private law or public law or whether the cause of action entails triable issues of fact, or a simple matter of interpretation of contract or statute.

75. For example, in Sri Lanka, the Civil Procedure Code Cap. 105[12] requires all proceedings to commence by a ***Plaint***, whether summary or regular.

76. In the Federal Court of South Australia, there are two originating processes namely, a Statement of Claim and an Originating Application.[13]

77. In Singapore, Order 6 Rule 1 of the Supreme Court Rules 2021[14] requires proceedings to be commenced either by way of an Originating Claim or an Originating Application. Order 6 Rule 1 reads:

> *"Mode of commencing proceedings (O. 6, r. 1)*
>
> *(1) Unless these Rules or any written law otherwise provide, a claimant may commence proceedings by an originating claim or an originating application.*
> *(2) A claimant must commence proceedings by an originating claim where the material facts are in dispute.*
> *(3) A claimant must commence proceedings by an originating application where —*
> *(a) these Rules or any written law require it;*
> *(b) the proceedings concern an application made to the Court under any written law; or*

[12] Refer to http://www.commonlii.org/lk/legis/consol_act/cpc105233.pdf
[13] Referred to in https://www.courts.sa.gov.au/rules-forms-fees/ucr2020/
[14] Referred to in https://sso.agc.gov.sg/SL-Supp/S914-2021/#P11-PO6-P41_1-pr1-

(c) the proceedings concern solely or primarily the construction of any written law, instrument or document or some question of law and the material facts are not in dispute."

78. Should Fiji simplify the mode of originating processes in the High Court? If so, what mode of commencement of proceedings is best suited to Fiji. One view is that there should be one single originating process. The main advantage of this is that it simplifies procedure and is cost effective. Another advantage is that it will eliminate the applications by the Defendants challenging the correctness of the form of the originating process[15].

79. However, the disadvantage is that it is not customized to cater for the different nature of claims and the issues peculiar to them. For example, a matter which entails only an interpretation of a contract or a statute, which would normally be begun by originating summons, would have to proceed through the same processes as a matter involving triable issues such a personal injury claim. This delays the finalisation of simple cases.

80. The second view is to have only three Originating Processes namely:

(i) Writ/Statement of Claim;
(ii) Originating Application[16]; and
(iii) Originating Petition

81. The third view is to adopt a form based approach similar to that in Family Court. The forms may be adapted easily for e-filing. The following forms may be used:

(i)	Final Claim Form
(ii)	Final Originating Application Form
(iii)	Final Originating Petition Form
(iv)	Interim Application Form
(v)	Interim Response Form

[15] Usually, whenever a defendant is served with an originating process, one of the very first things which counsel takes issue with is whether or not the action has been filed *vide* the correct mode. Often, this will be followed by an application to strike out and a hearing. This delays the proceedings further if the application to strike out is unsuccessful. If the application to strike out is successful, it will prove costly for the plaintiff who will then have to re-file his case vide the appropriate mode of originating process. Needless to say, time and cost is wasted.
[16] A combination of Originating Summon and Originating Motion.

(vi)	Affidavit Form
(vii)	Defence Form
(viii)	Defence and Counter Claim Form
(x)	Reply to Defence Form
(ix)	Reply to Defence and Defence to Counterclaim Form
(x)	Reply to Defence to Counterclaim Form
(xi)	Affidavit of Service
(xii)	Acknowledgement of Service
(xiv)	Enforcement Form (already in existence. May need modification)
(xv)	Notice of Discontinuance Form
(xvi)	Notice of Appointment/Withdrawal/ Change of Solicitors Form
(xvii)	Consent Order Form
(xviii)	Address of Service Form
(xix)	Change of Address Form
(xx)	Notice of Intention to Appeal
(xxi)	Appeal Form
(xxii)	Notice of Opposition to Appeal Form

(**This list is not exhaustive and subject to review upon consultation*)

Commencement of Proceedings

82. It is recommended that the procedure for commencing proceedings in the High Court be simplified and streamlined by only three Originating Processes:

(i) Writ of Summons/Statement of Claim;

(ii) Originating Application ((expedited form where a returnable date is given by Court. This application is a combination of a Summons and Motion); and

(iii) Originating Petition (If prescribed under any written law such as Constitution of Fiji or Companies Act or Bankruptcy Act).

83. The difference between an Originating Summons and an Originating Petition is explained in a Discussion Paper written on 14 December 2016 by Dr. Thompson titled

"*Petition and Summons Procedure*" for the Rules Rewrite Committee of the Scottish Civil Justice Council[17]. At p.19 he says as follows:

> *''It has been claimed that petition procedure involves the discretionary exercise of statutory or common law powers as distinct from the application of rules of law, the converse applying for summons procedure. This is closely associated with the idea that whilst in a summons the pursuer seeks to enforce or vindicate a legal right, the petitioner supplicates the court to exercise its privilege to grant a remedy to which he has no legal right. The court's discretion is, the principle goes, key to the success of a petition."*

84. Further, Lord Esther M.R. in ***Re Holloway, Ex Parte Pallister*** *(1894) 2 QB 163 C.A* explains when an Originating Summons can be filed. His Lordship said at pages 166 and 167:

> *"No doubt there are some difficulties, contradictions, and discrepancies to be found in the rules; they arise from the infirmity of human language. But I think no one who considers the matter fairly can entertain any doubt in this case as to the intention. The definition in Order LXXI. of the term 'originating summons' is not a very happy one. It would, I think, have been better to say that an 'originating summons' is that mode of commencing an action by summons which is not allowed instead of commencing it by a writ. That is really what is meant; and no one who reads the rule with a fair mind and a knowledge of the previous practice could doubt that that was the intention. At the time when the Rules of 1883 were made the term 'originating summons' had already become well known in the Chancery Division. It was found that the old mode of commencing a suit in the Court of Chancery by a bill gave many opportunities for delay and expense, and in order to avoid this delay and expense the system was devised of a summons originating proceedings in chambers, which in the course of time came to be called an "originating summons". This procedure was invented for the purpose of quickly determining simple points. When these 'originating summonses" had been used for some years in the Court of Chancery and the Chancery Division, it was decided to extend them to the other Divisions of the High Court, and, though I agree that there is some difficulty in the language used, yet I think that the subject-matter shews conclusively, and, indeed, the legal sense of every lawyer will admit, that the real meaning of the definition of an "originating summons" is, a summons by which an action may be commenced otherwise than by writ."*

85. Currently, under Order 7 Rule 2 of the HCR, there are two forms of Originating Summons. There is a General Form (Form 3). The General Form does not have a returnable date for Court. There is an Expedited Form (Form 4). The Expedited Form

[17] https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/flc-meeting-files/flc-meeting-papers-08-may-2017/paper-3-3-the-new-civil-procedure-rules---first-report-annex-a.pdf?sfvrsn=2

is used for urgent proceedings. When an Expedited Form is filed, a returnable date is given by the Court.

86. The CDRC recommends that the two forms and the Originating Motion process be amalgamated into one process called the Originating Application. This form will be used for proceedings which are currently being brought by originating summons and originating motions. The originating application will have a returnable date. Consequently, Order 7 Rule 2 and Order 8, which permit proceedings by Originating Motions and Originating Summons, should be repealed.

87. It is also suggested that there be a rule precluding parties from raising objections on the form in which proceedings are brought. In this way we are putting a stop to the routine interlocutory applications in Court. This gives efficacy to Order 2 Rule (3) of the HCR which says that –

> *'The Court shall not wholly set aside proceedings or the Writ or other Originating Process by which they were begun on the grounds that the proceedings were required by any of these Rules to be begun by an Originating Process other than the one employed".*

88. Despite the existence of this Rule, almost every other proceeding has an application to strike out for want of proper form.

Returnable Dates for Originating Processes

89. Under the HCR, there is no requirement to issue the Writ of Summons and Originating Summons (General Form) with a returnable date. From a case management perspective, the Court, thus, does not have control of the proceedings from the start.

90. Should all originating processes be issued with a returnable date of 21 days, unless a shorter timeframe is provided by any other written law**?**

Duration and Renewal of an Originating Processes

91. Order 6 Rule 7 of HCR provides that a Writ of Summons is valid for twelve months.

92. Order 6 Rule (3) of the Singapore Supreme Court Rules 2021[18] provides that an Originating Claim or an Originating Application within the jurisdiction is valid for 3 months.

93. The Originating Claim or the Originating Application outside jurisdiction is valid for six months. Order 6 Rule 3(1)(a) and (b) state:

> *3.—(1) Subject to this Rule, an originating claim or an originating application is valid for service —*
>
> *(a) where the originating claim or originating application is to be served out of Singapore —*
>
> *(i) with the court's approval under Order 8, Rule 1(2); or*
>
> *(ii) where the court's approval is not required under Order 8, Rule 1(3),*
>
> *for 6 months beginning with the date of its issue; or*
>
> *(b) in any other case — for 3 months beginning with the date of its issue.*

94. Any process issued can be renewed twice for no more than three months. Order 6 Rule 3 (2) to (5) state:

> *(2) An application may be made to extend the validity of the originating claim or originating application if it has not been served on all or any of the defendants before or after it expires.*
>
> *(3) The Court may order the validity of the originating claim or originating application to be extended by a period beginning with the day next following that on which the originating claim or originating application would otherwise expire.*
>
> *(4) Except in a special case, the Court may extend the validity of the originating claim or originating application only twice and by not more than 3 months each time.*
>
> *(5) The originating claim or originating application in respect of which validity has been extended must be endorsed with the words, "Renewed for service for ____ months from _____ by order of Court dated _____" before it is served.*

95. In Admiralty causes, the writ is valid for twelve months. O 6 r. 3(6) states:

[18] https://sso.agc.gov.sg/SL/SCJA1969-R5/Historical/20220326?DocDate=20211201&ValidDate=20220326

(6) Paragraphs (1) and (4) do not apply to an originating claim relating to Admiralty causes and matters.

CDRC's Recommendations

96. CDRC recommends:

(i) That the procedure for commencing proceedings in the High Court be simplified and streamlined by only three Originating Processes:

(a) Writ of Summons/Statement of Claim;

(b) Originating Application ((expedited form where a returnable date is given by Court. This application is a combination of a Summons and Motion); and

(c) Originating Petition (if prescribed under any written law such as Constitution of Fiji or Companies Act or Bankruptcy Act).

(ii) That Order 6 Rule 7 (1) and (2) of the High Court Rules be amended to reduce the validity period of Writ of Summons and any Originating Summons from 12 months to 3 months.

(iii) That the Court be empowered to renew the Originating process only once for a further period not exceeding 3 months.

(iv) That the Writ of Summons or Originating Application or Originating Petition be placed before the Court within 21 days, unless specified otherwise by any other written law;

(v) If an application is made for leave to issue an originating process outside Fiji, it must be accompanied by an application for leave to serve the process outside the jurisdiction.

(vi) If the Defendant appears in Court after service, the Court shall grant time to the Defendant to file their Notice of Appointment of Solicitors and/or Statement of Defence and Counter Claim within 21 days, unless the Defendant requires further and better particulars.

(vii) That there shall be only one extension to file a Statement of Defence and Counter Claim. The extended time period shall not exceed 21 days.

(viii) If the Defendant has a counter-claim against the Plaintiff, and alleges that another person who is not a party to the action is liable along with the Plaintiff in respect of the subject matter of the counter-claim, the Defendant shall add that other person to the title action and serve the Statement of Defence and Counter-claim within 21 days. There shall be only one extension of 21 days for service on the additional party.

(ix) If the Defendant requires further and better particulars, the Defendant shall apply by a letter to the Plaintiff, copied to the Court. The letter must state the particulars and reasons for the request. The letter must be written and served within 7 days of the defendant's first appearance in Court.

(x) The Plaintiff shall respond by a letter within 7 days of service, copied to Court. The matter shall then be called in Court immediately after expiry of the Plaintiff's 7 days. If the Plaintiff opposes the request or any part of the request, the Court shall hear and determine the application within 14 days.

(xi) On the date of the Ruling, if the Court determines that the Plaintiff should supply any particulars as requested, it shall make orders accordingly for compliance within 21 days. The matter shall be called in Court for review of compliance. If there is no compliance, the claim should be struck out unless the Plaintiff with good reason is granted an extension. The extension shall only be for a period of 14 days.

(xii) The matter shall be called in Court after the time limited for compliance. On the mention date, the Court shall grant the Defendant 21 days to file a Statement of Defence and/or Counterclaim. The matter shall then be called in Court after 21 days.

(xiii) If the Defendant has not filed a Statement of Defence, the Defendant may be given a further final extension of 21 days, on good cause shown. The matter shall be called in Court after 21 days and the Court shall fix the time for filing of the Reply to Defence.

(xiv) The Reply to Defence shall be filed within 14 days. There shall be no further extensions of time to file a Reply to Defence. If there is a Counter Claim, then the Plaintiff shall have the right to file Reply to Defence and Defence to Counter-Claim within 21 days with one extension which shall not go beyond 21 days.

(xv) If on the returnable date, the Defendant has been served and does not appear, the Court may determine the matter on an undefended hearing on that date or adjourn the Undefended Hearing to any other date.

(xvi) If the matter is fixed for an Undefended Hearing on a later date and the Defendant appears on that date, the matter shall still proceed to Undefended Hearing and the Defendant can apply for setting aside of the Undefended Judgment as outlined below. After the action is listed for an Undefended Hearing, the Defendant does not have a right to file a Statement of Defence unless the Court grants permission after hearing of the application for setting aside of an Undefended Judgment.

(xvii) The provisions of the HCR which allow for the entering of Default Judgment and setting aside of the same, must be repealed. (Order 13, Order 16 (5) and Order 19). There will be no need for any provisions for entering Default Judgment administratively. This will remove yet another interlocutory application for setting aside Default Judgment, which has been a major cause of delay.

(xviii) Undefended Judgments will only be set aside within a strict timeline. The CDRC proposes a time limit of 7 days from the date of service of the Order[19]. It is recommended that there be no extension of time.

[19] **Order 35 Rule 2** of HCR states:

"(1) Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just. (2) An application under this Rule must be made within 7 days after the trial".

(xix) All Undefended Judgments, whether regular or irregular, may be set aside under the established common law principles.

Timelines on Interlocutory Applications

97. An Originating process shall not be subject to an application for striking out or stay unless made on the following grounds:

(i) lack of jurisdiction[20];
(ii) forum non conveniens;
(iii) time limitations under any written law;
(iv) duplicity of claims;
(v) res judicata; and
(vi) locus standi.

98. Any such ground raised should initially be pleaded in the Statement of Defence or the amended Statement of Defence. Directions for Hearing on the questions raised will be given at the Directions Hearing stage.

99. A Defendant who files a Statement of Defence, challenging the jurisdiction of the Court, shall not be treated as having submitted to the jurisdiction of the Court.

100. Order 18 Rule 18 of the HCR will be amended accordingly. The amendment will obviate the practice of filing unnecessary applications for striking out. In the collective experience of Judicial Officers, these applications have been overtly abused by litigants to delay the progress of the cases.

First Directions Hearing

101. At the close of pleadings, the Court shall fix a time for the **First Directions Hearing[21]**.

102. At the First Directions Hearing, the Court shall give directions in relation to the following:

(1) Interlocutory applications such as striking out/stay as pleaded in the Statement of Defence, joinder/removal of parties, consolidation of actions, summary

[20] For example ouster clauses in contracts, statutes or Constitution; or claims outside statutory jurisdiction such as contempt proceedings in the MC.
[21] In the Family Court, all directions are given at the Procedural Directions Hearing Stage.

judgment, security for costs, judgment on admissions, determinations of questions of law, amendment of pleadings, interpleaders and interim payments.

(2) Unless a party is applying for a striking out/stay in the Statement of Defence, any other interlocutory application shall be brought by a summons within 14 days. There shall be only one extension of 7 days. If the application is objected to, a right of reply within 14 days shall be given to the opposing party with only one extension of 7 days. The applying party shall have the right to respond to the reply within 7 days with no right of extension.

(3) If any party wishes to adduce evidence in respect of striking out application, they can file their respective affidavits. The Defendant can file the affidavit within 14 days. There shall be only one extension of 7 days. The Plaintiff can file his affidavit within 14 days thereafter with only one extension of 7 days. The defendant shall have the right to respond to the reply within 7 days with no right of extension.

(4) If the applicant fails to file the application within the extended time period, he will be deemed to have abandoned his right to file the application.

(5) All interlocutory applications raised at the First Directions Hearings and any application for striking out/stay arising from the Statement of Defence shall be heard together.

(6) These applications shall be determined either by an *ex tempore* ruling or by a written ruling within 14 days. The parties are at liberty to tender their written submissions before or on the day of the hearing.

(7) Upon delivery of the ruling, the Court shall fix the time for the filing of the Affidavit Verifying List of Documents ("**AVLD"**).

(8) Both parties shall simultaneously file their AVLD within 14 days. Only one extension of 14 days is permissible to file the AVLD.

(9) After the time limited for the filing of the AVLD, the Court shall appoint a date for setting time for discovery.

Discoveries

(10) Discovery and inspection shall take place within 21 days of filing of AVLD. There shall be only one extension of no more than 14 days for discovery.

(11) After the time limited for inspection, the matter shall be called in Court to deal with any potential applications for specific discovery and/or interrogatories.

(12) The party applying should write a letter to the other party, copied to the Court, within 14 days. The letter must identify the particulars for specific discovery and questions for interrogatories.

(13) The requested party has 7 days to respond to the request. If any part of the request for specific discovery or interrogatories is opposed, the court shall hear and determine the issue by an *ex tempore* ruling or written ruling within 14 days.

(14) If any part of the application is granted, the Court shall fix 14 days for compliance with the order with only one extension of 14 days failing which the claim or defence (as the case may be) shall be struck out.

(15) The time period for filing of PTC Minutes will run from the time limited for compliance of the order for specific discoveries and interrogatories.

PTC Minutes

(16) If there is no application for specific discovery and interrogatories, the Court shall give the parties 21 days to file their Pre Trial Conference (PTC) Minutes, failing which it shall fix a date in court within 14 days for the parties to identify the issues for the trial.

Mediation

(17) Upon the filing of the PTC Minutes, the Court shall refer the matter for mediation to ascertain if there is a likelihood of the same being resolved partly or wholly. A returnable date after a month shall be fixed to monitor the progress of mediation.

(18) If the Mediator needs more time, he shall inform the Court in writing by a file note, for extension of time. A further extension of one month may be granted for mediation with a returnable date in Court.

(19) If the matter is settled, the parties shall enter into a Deed of Settlement which shall then be placed before the Court to enter judgment by consent.

Second Directions Hearing

(20) If the matter is not settled, the Court shall appoint another date for **Second Directions Hearing.** The purpose of this hearing is to grant any party another opportunity to raise any further interlocutory applications.

(21) If there is, then 14 days shall be granted to the parties to file their respective interlocutory applications with no further right to an extension.

(22) The opposing party shall have another 14 days to respond to the application with no right of extension. The applying party shall have the right of reply within 7 days with no right of extension.

(23) The application shall be heard and determined by an *ex tempore* ruling or written ruling, within 14 days.

(24) Upon the delivery of the ruling, the matter shall then be fixed for trial within 60 days with directions on filing of copy pleadings and agreed bundle of documents within a time frame of 30 days. The trial shall still proceed in the absence of the copy pleadings and agreed bundle of documents.

Interlocutory Appeals (HCR and Court of Appeal Rules)

(25) No interlocutory/ procedural direction or decision shall be subject to stay or appeal until the final determination of the action or until the matter is finalized in some other manner for example permanent stay of proceedings in light of arbitration clause.

(26) Section 12(2) (f) of the Court of Appeal Act 1949 provides *inter alia* no appeal shall lie without the leave of the Court of Appeal from any interlocutory order or interlocutory judgment of the High Court except in cases as set out in Section 12(2)(f) (i) to (v).

(27) Sir Moti Tikaram, President Fiji Court of Appeal in ***Totis Incorporated, Spor (Fiji) Limited & Richard Evanson v John Leonard Clark & John Lockwood Sellers*** (Civ. App. No. 35 of 1996) at page 15 observed that interlocutory orders and decisions will rarely be amenable to appeal and rarely succeed.[22]

(28) The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible.

(29) The legislature has evinced a policy against bringing of interlocutory appeals except where the Court, acting judicially, finds reason to grant leave (see ***Yasin***

[22] The Court of Appeal said as follows:

"It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances".

(see also **Edmund March & Ors. v Puran Sundarjee & Ors.** [Civ. App. ABU 0025 of 2000 at p.9)

v Basic Industries Ltd *[2000] FJLawRp 34; [2000] 1 FLR 88 (16 May 2000*; ***Décor Corp v. Dart Industries*** *104 ALR 621 at 623 lines 29-31)*.

(30) Section 12(2)(f) of the Court of Appeal Act has always been interpreted and applied in Fiji to require an intended appellant of an interlocutory decision to seek the leave of the High Court first. Even after the High Court refuses to grant leave, the intended appellant may still seek leave from the Fiji Court of Appeal.

(31) Often, a case will already have been languishing in the High Court with multiple interlocutory applications. Then at some point, if one of the parties decide to appeal any one of the interlocutory decision(s), the matter will languish for a few years in the Court of Appeal and consequently in the High Court as the Court of Appeal in many cases stays the determination of the substantive cause in the High Court. This contributes to delay and aging of cases in the High Court.

(32) The CDRC recommends that there should not be any appeals allowable from interlocutory decisions unless the matter is determined finally. If any party is affected with the interlocutory decision, they can appeal the same when the substantive cause is finalized. This approach is similar to the criminal courts.

(33) The CDRC proposes amendment of the section 12 of the Court of Appeal Act to preclude any interlocutory appeals.

Adjournments

(34) An application to adjourn an interlocutory hearing shall not be allowed. The Court may proceed to determine the issue on papers within 14 days.

(35) Unless good cause is shown, an application to adjourn a trial shall not be allowed.

(36) CDRC notes that section 170 of the Criminal Procedure Act (CPA) allows for adjournments of trials on "good cause". The CPA defines good cause to include the reasonable excusable absence of a party or witness or of a party's lawyer.

(37) The CDRC has deliberated on whether the term "good cause" should be defined or left to the discretion of the judicial officer. The existing rules do not define what constitutes "good cause". (Refer to Goldenwest Enterprises Ltd –v- Pautogo [2008] FJCA 3; ABU 0038.2005 (3 March 2008).

(38) An adjournment of a trial may be allowed with or without costs and on such terms and conditions as the court deems fit.

(39) If a trial is adjourned, another trial date shall be set within 90 days. However if it is not possible to set a date within 90 days, the Court must ensure that the matter is tried as soon as practicable, but not later than 6 months from the date of first adjournment.

(40) CDRC is of the view that the Court needs to control adjournments for the purposes of case management. It may be difficult to legislate the issue of subsequent adjournments. However there should be a Judicial Policy to clearly set out the guidelines on subsequent adjournment of cases and the reporting procedure to the Chief Justice/Head of Civil Division.

Substitution of parties

(41) An application for substitution of parties may be made at any stage of the proceedings. The application may be made orally. If supporting evidence is required, the court may make directions for the filing of affidavits. The court shall fix a timeframe within which the orders for substitution should be complied with.

(42) If affidavit evidence is required, the applicant shall file the affidavit within 14 days and the respondent shall file the response within 14 days. There shall be no extensions from this time period. The Court shall hear and determine the application by an *ex tempore* ruling.

Act of God/death or injury to a party or counsel: Timeline for compliance with procedure or process.

(43) CDRC recommends that the Court retains a discretion for extension of time for compliance of any procedure set under the rules, if the reasons for non-compliance arises due to circumstances beyond a party's control.

CDRC'S recommendation for abolishment/amendment of rules relating to interlocutory applications

(i) **Order 3 Rule 4 HCR**– This is a general rule allowing for extension of time for all processes in Court. This rule needs to be abolished to remove the general discretion to extend time.

(ii) **Order 5 Rule 3 and Rule 5, Order 7 and Order 8 HCR**- These rules need to be abolished. The Originating Motion and Originating Summons are to be amalgamated into one single process to be called the Originating Application.

(iii) **Order 6 Rule 1 and Form 1 Appendix 1 HCR** – The rule and Form of the Writ needs to be amended to include a provision for a returnable date and to incorporate all recommendations of the CDRC.

(iv) **Order 6 Rule 7 HCR** – This rule needs to be amended in line with the CDRC's recommendation to reduce the validity period of a Writ from 12 months to 3 months with only one extension of 3 months.

(v) **Order 13, Order 16 Rule (5) and Order 19 HCR** – These rules will be abolished as all applications will be heard on an undefended basis.

(vi) **Order 14, Order 15 and Order 16 HCR** – To amend and align it with CDRC's recommendation on timelines for interlocutory processes.

(vii) **Order 18 HCR-** to be amended to include CDRC's recommendation to set strict timelines for filing of pleadings and extensions.

(viii) **Order 18 Rule 18 HCR**– to abolish the existing grounds of striking out and set new grounds as recommended by CDRC.

(ix) **Order 20 Rule 3 HCR**– to abolish the need to seek leave to amend the pleadings and to introduce a Court driven approach which allows the Court to deal with the issue of amendment at First or Second Directions Hearing.

(x) **Order 25 Rule 1** – the Summons for Directions is to be abolished as the Court will now be seized of control to provide directions at the First and Second Directions Hearing.

(xi) **Order 25 Rule 9 HCR**– This rule was to control a file which had been dormant in the system for 6 months. With the CDRC's recommendation for a Court driven approach to control the proceedings, there will be no dormancy. Hence Order 25 Rule 9 will be a dead letter.

(xii) **Order 34 HCR –** The Court driven approach to control proceedings means that the Court will now also control when matters are entered for trial. There will be no need for a summons to enter the action down for trial.

(xiii) **Order 59 HCR** – This rule needs to be amended to include new jurisdiction of the Master.

(xiv) **Section 12** of the ***Court of Appeal Act*** – To be amended in line with the CDRC's recommendation to preclude all interlocutory appeals until the matter is finally determined.

(xv) **Section 5** of the ***Arbitration Act*** – To allow Court to stay any matter at any stage of the proceedings and refer it to Arbitration on the application of a party.

PART C. MANDATORY MEDIATION

103. Mandatory mediation is not new to Fiji. Under the Family Law Act 2003, there is provision for mandatory conciliation of matters involving children and property (Section 53 of the Family Law Act 2003 and Rule 9 of the Family Law Rules 2005).

104. Under the Employment Relations Act 2007, all employment grievances and disputes must first be filed in the Mediation Unit for mediation. If the matter is not settled, it is then referred to the Employment Relations Tribunal for hearing and determination (section 110 of the Employment Relations Act 2007).

105. In Family Court, matters involving children and property will not be listed for trial unless the parties have been before the Registrar and Counsellor for mandatory conciliation conference. In a Conciliation Conference, the possibility of settlement of issues must be explored.

106. The statistics submitted for Conciliation Conference for 2023 shows a high success rate for parenting order applications and property distribution cases.[23]

107. Under the Employment Relations Act, lawyers are not allowed to participate in mediation. In contrast, in Family Court, lawyers must attend the conciliation conference.

108. Under Order 59 Rule 2 (h) of HCR, the Master is empowered to conduct mediation.

109. Under section 28 of the MCA, the court must encourage settlement between parties.

110. The CDRC is of the view that virtual mediation should be allowed in special cases (for example, where a party resides outside the division or jurisdiction of the Court). This will align with CDRC's recommendations on virtual trial.

111. The CDRC is of the view that non-resident lawyers who wish to represent litigants virtually, should be temporarily admitted in Fiji to deal with the case partly or wholly.

[23] Magistrate Court (Family Division) statistics, 2023.

CDRC's recommendation on Mandatory Mediation

112. The CDRC recommends that there be mandatory mediation in all matters begun by Writ of Summons after the completion of the pre-trial conference minutes.

113. Whilst the parties are at liberty to enter into pre-litigation mediation, they will still be required to submit to mandatory mediation.

114. Mandatory mediation shall be excluded for all appeals, summary proceedings, winding up actions, judicial review, mortgage actions, enforcement proceedings and any such interlocutory applications that does not require trial.

115. Parties should however be at liberty to use the mediation services even in these cases, upon an order made on an application by any party or on the courts own motion.

116. The CDRC recommends that there be Uniform Rules for MC and HC on mandatory mediation.

CDRC's recommendations on Court –Annexed Mediators

117. It is recommended that there be Court -Annexed Mediators appointed to conduct mediation. They should be legally qualified and accredited mediators.

118. Court-Annexed Mediators will have access to registries in order to assist them in the preparation and administration of mediation processes.

119. It is the view of the CDRC that it is easier and effective if a Mediator is legally qualified.

120. A legally qualified mediator would be more accountable and attuned to the rules and to the judiciary's mission to resolve cases quickly and easily. There may also be a need for a Mediator to draft the terms of settlement for unrepresented parties.

121. A legally qualified Mediator will be of immense assistance to unrepresented litigants.

CDRC's recommendation on Mediation Rules

122. A set of rules governing mediation must be developed.

123. The rules must include but not be limited to the following matters:

(1) Mandatory mediation for all matters involving hearing or trial of issues in action except for matters outlined above.

(2) In cases excluded from mandatory mediation, a party can still apply for mediation. If there is no objection for mediation then the court shall refer the parties for mediation. If there is objection, the court shall make orders for mediation if it is likely to resolve the controversy between the parties.

(3) The Court, on its own motion, can make an order for mediation in these excluded cases.

(4) Lawyers shall be involved in the mediation. If the parties and lawyers consent, mediation can take place without the lawyers.

(5) If a McKenzie Friend has been appointed by the court at any stage of the proceedings, he can also be present to assist the party at Mediation.

(6) There shall be a time frame within which the Mediator shall attempt mediation of the cases sent by the Court.

(7) A time frame of one month shall be given for mediation and the Court must fix a returnable date after one month.

(8) The Court shall consider extension of such time on the request of the Mediator *vide* a file note request or a form which should form part of the schedule to the rules, setting out brief reasons for such a request. The extended time frame for mediation must not exceed one calendar month.

(9) If a party is unable to attend mediation due to unforeseen circumstances, the mediator should grant another time for the parties to appear for mediation within the same initial one month.

(10) If a party does not turn up for mediation in a mandatory mediation case or in a mediation upon an order of the Court, there should be sanctions imposed.

(11) The sanction should be court costs not less than $1,000 and not more than $5,000 to be paid within a prescribed time limit not exceeding a month. Upon payment of the costs, the matter shall be re-listed for mediation within 30 days.

(12) If a party does not pay the costs, the Court may, in suitable cases, grant one extension. Upon default, the claim or defence, as the case may be, may be struck out.

(13) No order for costs or striking out of the claim or defence for non-payment of the costs shall be subject to any challenge or an appeal.

(14) When the matter is not settled, the Court must immediately set the action down for a second directions hearing.

(15) There shall be confidentiality in all mediation matters. The Mediator and anyone else involved in the mediation must sign a Confidentiality Agreement before the commencement of mediation.

(16) No Mediator shall be required to give any evidence obtained in the mediation process at any time.

(17) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that is required to be kept confidential.

(18) If a party considers that a document which has been produced during mediation is a relevant document for determination of the real issue in controversy, he may make an application for specific discovery of that document before a trial judge.[24]

(19) Where a case is resolved through mediation, the Mediator must ensure that the parties and their lawyers execute the terms of settlement. Where parties are unrepresented, the Mediator may prepare the terms of settlement for the parties.

(20) The executed terms of settlement shall be listed before the Court for orders to be granted thereon.

(21) No party may challenge the terms of settlement by any action in Court unless on grounds of fraud, misrepresentation, duress/undue influence, mistake or incapacity to enter into contract.

[24] Refer to Section 195 (4) of the Employment Relations Act 2007.

(22) No mediation may be challenged or called in question in any proceedings on the grounds that the nature and content of the mediation was inappropriate, or that the manner in which the mediation was provided was inappropriate.

(23) A Code of Ethics should be developed to guide Mediators.

(24) Appropriate forms shall be developed for referrals to the Mediator by the Court and back to the Court. Relevant standard notices that needs to be sent to the parties appointing the date and time for mediation should also be developed. All notices are to be sent in the standard form to the parties and/ or their lawyers by emails.

PART D. TRIALS

Withdrawal of Counsel at Trial

124. There is now a growing trend for Counsel to seek withdrawal of representation on the date of trial or prior to the date of trial on the basis of lack of or no instructions.

125. The CDRC recommends the following –

(i) Counsel should not be allowed to withdraw from proceedings on the grounds of lack or no instructions after the matter is set for trial.

(ii) If counsel is given permission to withdraw from proceedings at any time (before trial date is fixed), it shall be conditional on the basis that Counsel ought to inform the affected party of the order of the Court granting leave to withdraw together with the next returnable date via a letter.

126. In considering the application for withdrawal, the Court must balance the party's right to legal representation and to resolve the matter within a reasonable period of time under section 15 (3) of the Constitution.

Virtual Hearing

127. Order 38 of the HCR provides as follows –

> *"Subject to the provisions of these Rules and of the Evidence Act and any other enactment relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be provided by the examination of the witnesses orally and in open court.'*

128. Order 5 rule 17 (i) and (ii) of the MCR states –

(i) In the absence of any agreement between the parties, and subject to these rules, the witnesses of the trial of any suit shall be examined viva voce and in open court, but the court may, at any time, for sufficient reason, order that any particular fact or facts may be provided by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such a condition as the court may think reasonable, or that any witness whose

attendance in court ought, for sufficient cause, to be dispensed with be examined by interrogation or otherwise before an officer of the court or other person:

(i) Provided that, where it appears to the court that the other party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

129. In the Magistrates Court, other modes of evidence are accepted but there is no specific provision to take evidence by audio and video link.

130. The CDRC recommends that there be uniform rules for the Magistrates and High Court to allow the taking of evidence by audio and video link.

131. The proposed rules should cover the following aspects:

a. Granting powers to hear cases virtually. This applies to a witness or party within or outside Fiji.

b. The need for a formal application and the timeframe within which the application should be made.

c. Circumstances in which such provision should be made such as where there is hardship faced by a party or witness precluding him or her from attending court.

d. That the party or witness who wants to give evidence virtually should make arrangements to give evidence from court premises, any public office or an embassy.

e. If the witness or party is within Fiji then the evidence should be given in the presence of a court official.

f. Outside Fiji, the giving of the evidence shall at all times be supervised by a public official.

g. Oath will be administered by a public official.

h. The costs for use of premises in another jurisdiction and any other related costs shall be borne by the party making the application for virtual hearing.

i. All documentary evidence to be addressed by the witness or party giving evidence virtually should be made available to the witness within 7 days of the hearing by the party making the application for virtual hearing. The other party's documents should also be furnished through the party seeking virtual hearing.

j. The evidence shall be recorded in handwriting and/or electronically.

k. The person giving evidence will have their picture and the picture of the public official taken electronically to identify who has given evidence and who has administered oath.

l. Any documentary evidence to be tendered by the witness or party giving evidence virtually is deemed to be tendered by him if it is made available to the Court at the time of giving evidence.

m. The party making the application to give evidence virtually shall be responsible for arranging his or her evidence to be given at an official time in Fiji.

PART E. COMMERCIAL COURTS

132. In most jurisdictions the increasing volume of commercial cases has led to the establishment of specialized Commercial Courts.

133. These specialized Commercial Courts are created to ensure that commercial matters are dealt with expeditiously.

134. The World Bank[25] has observed as follows:

> "*Dedicated systems for commercial cases can make a big difference in the effectiveness of a judiciary. Having specialized commercial courts or divisions reduces the number of cases pending before the main first-instance court and thus can lead to shorter resolution times within the main trial court—one reason why economies have introduced specialized courts as a case management tool. But the benefits do not end there. Commercial courts and divisions tend to promote consistency in the application of the law, increasing predictability for court users. And judges in such courts develop expertise in their field, which may support faster and more qualitative dispute resolution."*

135. The UK Commercial Court (Kings Bench Division) Rules[26] defines '*commercial claim'* as any claim arising out of the transaction of trade and commerce and includes any claim relating to:

(a) a business document or contract;
(b) the export or import of goods;
(c) the carriage of goods by land, sea, air or pipeline;
(d) the exploitation of oil and gas reserves or other natural resources;
(e) insurance and re-insurance;
(f) banking and financial services;
(g) the operation of markets and exchanges;
(h) the purchase and sale of commodities;
(i) the construction of ships;
(j) business agency; and
(k) arbitration.

136. The jurisdiction that is given to a Commercial Court varies from country to country and depends on what the country wishes to prioritize in the nature of commercial matters.

[25] Referred to https://subnational.doingbusiness.org/en/data/exploretopics/enforcing-contracts/good-practices#1
[26] Referred to https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part58#IDA1J3HC

137. The CDRC notes that some jurisdictions do not define their commercial claims as broadly as UK does.

138. It is recommended that the following be considered before determining whether a specialized Commercial Court should be set up in Fiji:

(i) if the Rules are to be amended as recommended by the CDRC, it is expected that cases including commercial cases will be determined within a span of no more than 2 years in any civil court. In that case, is there a real need for the establishment of a specialized Commercial Court?

(ii) will there be a sufficient volume of commercial cases to justify the establishment of a specialized commercial court? This will depend partly on the definition of a commercial claim; and

(iii) are there available resources including trained commercial Judicial Officers to handle commercial claims? If not, what is the extent of training and investment required to upskill the Judicial Officers?

139. Before establishing a specialized Commercial Court in Fiji, will there be a need to first amend the HCA?

140. It also needs to be considered whether there should be enabling rules and regulations for the specialized Court or the proposed amended rules will suffice?

PART F. MASTER'S COURT

141. Since the CDRC has recommended that the proceedings be Court driven, the question arises as to whether the Masters Court should be retained.

142. The proposed timeline for procedures and processes would be shorter and require Judges to take full control of proceedings from initiation and case management. This alleviates the need for the Masters Court.

143. There is a diverging view that the Masters Court should be retained to assist the Judges in disposing of certain interlocutory processes or matters as and when the need arises.

144. For example, if a judge is required to hear an interlocutory application within 14 days, and due to unforeseen circumstances, the judge is not available, such as being absent, sick or on official or personal leave, the Master can step in to perform the functions under the Rules to assist in the progress of the matter.

145. There is also a view that the Masters be retained to deal with every file from initiation to Second Directions Hearing. In such a case, there will be a need to increase the cadre of the Masters to handle the volume of the work. This decision has to be weighed economically as well.

146. Another view is that the Master should be retained to deal with the following applications from start to completion:

(i) all Appeals from the Magistrates Court. There is a suggestion that all that is required to empower the Master to hear an appeal from Magistrates Court and Tribunal is to amend Order 59 of the HCR and that there is no need to amend the HCA and the Constitution. The Constitution grants the Masters the jurisdiction conferred on it under any written law. The written law which confers jurisdiction on the Master is Order 59 of HCR.

(ii) all section 169 applications for vacant possession whether defended or undefended;

(iii) applications for vacant possession under Orders 88 and 113 of HCR;

(iv) injunctions;

(v) Judicial Review;

(vi) applications under the Companies Act;

(vii) uncontested probate matters;

(viii) applications and proceedings under FNPF Act; and

(ix) any other chamber matters conferred by the Chief Justice.

147. The CDRC recommends that the HCA and the HCR be amended for all appeals from the Masters Court to now lie with the Court of Appeal. To bring finality to cases in the High Court Division, it is essential that appeals from the Master's Court be heard by the Court of Appeal.

PART G. E - FILING

148. E-filing is the platform for digitising the court records from filing to the trial and delivery of judgment over an electronic system.

149. The Judicial Department has an e-filing software which is active but, for one reason or another, not operational.

150. Although the e-filing system was tailor made for Fiji, the CDRC, after consultation with the IT Manager Mr. Ronald Kumar and the Acting Assistant Program Analyst Ms. Aradhna Chandra, is of the view that the system needs to incorporate some changes to attend to the concerns raised by the CDRC.

151. The CDRC recommends that the e-filing system should be piloted in Family Court first since it is much easier to do so as the applications are already Form based.

152. The CDRC further recommends that an *ad hoc* committee be formed to provide advisory support to the Chief Justice on the following:

(i) the necessary amendments needed to the existing software to align with our needs and requirements;
(ii) the timeline within which the amendments can be incorporated; and
(iii) the timeline within which the system can be made available for piloting and thereafter for full implementation in all Courts.

153. It is suggested that the *ad hoc committee* should comprise of the following personnel:

(i) relevant Judicial Officers;
(ii) IT personnel;
(iii) Deputy Registrar Legal Suva, Lautoka and Labasa; and
(iv) one registry representative from each division

154. CDRC recommends that the Committee be convened as soon as possible.

PART H. MAGISTRATE'S COURT

155. The Resident Magistrate's, by their Issues Paper had indicated that they preferred the MCR to be amended and aligned to the HCR.

156. On the other hand, the High Court Judges, prefer to move away from the existing HCR as it is an impediment to case management.

157. The CDRC finds that the problems in the practice and procedural issues faced by both Courts are similar. The CDRC recommends that there be Uniform Rules for both HC and MC. The Family Court and the Employment Court already have Uniform Rules.

PART I. COSTS, INTERESTS AND FEES

Costs

158. Costs can be a powerful tool for the courts to manage cases effectively and efficiently.

159. In his ***Access to Justice Final Report 1996,*** Lord Woolf said as follows at Chapter 7 paragraph 4:

> *"Costs are … of great importance to my Inquiry because the ability of the court to make orders as to costs is the most significant and regularly used sanction available. The court's power to make appropriate orders as to costs can deter litigants from behaving improperly or unreasonably and encourages them to behave responsibly. Cost orders can also have a salutary effect on members of the legal profession".*

160. The UK Civil Procedure Rules 2005 gives power to the court to order a party who fails to comply with the rule or directions, to pay a sum of money to the court. Order 3.1 (5), (6) and (7) states:

> *The court's general powers of management*
>
> *3.1—(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.*
>
> *(2) …*
>
> *(3)…*
>
> *(4)…*
>
> *(5) The court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.*
>
> *(6) When exercising its power under paragraph (5) the court must have regard to—*
>
> *(a) the amount in dispute; and*
>
> *(b) the costs which the parties have incurred or which they may incur.*
>
> *(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order.*

161. The CDRC is of the view that there should be a specific provision in the HCR and MCR allowing the Courts to impose costs against a defaulting party for non-

compliance with a Rule or an order/direction of the Court, to be paid to Court. This will ensure that the Courts wasted time and resources are addressed in terms of costs.

162. Currently, in most cases, non-compliance with a rule, order/direction of the Court results in payment of costs to the non-defaulting party only.

Interest

163. There is a difference in the rate of post judgment interest in the High Court and the Magistrate's Court.

164. Order 32 Rule 8 of the MCR provides for 5% per annum post judgment interest.

165. Section 4 of the **Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935** fixes post judgment interest at 4%:

> *Judgment debts to carry interest*
>
> *4. - (1) Every Judgment Debt shall carry interest at the rate of four cents per centum per annum from time of entering up the Judgment until the same shall be satisfied, and such interest may be levied under a Writ of Execution on such Judgment.*
>
> *(2) Rules of court may provide for the court to disallow all or part of any interest otherwise payable under subsection (1).*
>
> *(3) Notwithstanding anything contained in this section, the State Proceedings Act or any other written law, no interest shall be payable on any Judgment Debt entered in any proceedings against the State, or the Attorney-General.*

166. The CDRC recommends that there should be a uniform rate of post judgment interest in both the Magistrate's and the High Court.

167. In respect of pre-judgment interest, there is no power in the Magistrate's Court Act and Rules to grant pre-judgment interest.

168. The High Court has a discretion to award to pre-judgment interest at a rate it thinks fit for any period between the date of the cause of action and the judgment.

169. Section 3 of the **Law Reform (Miscellaneous Provisions) (Death and Interest) Act 1935** states:

> *Power of High Court to award interest on debts and damages*
>
> ***3**. In any proceedings tried in the High Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:*
>
> *Provided that nothing in this section-*
>
> *(a) shall authorise the giving of interest upon interest; or*
>
> *(b) shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; or*
>
> (c) *shall affect the damages recoverable for the dishonour of a bill of exchange.*

170. Since there is no provision in the Magistrate's Court Act or Rules for pre-judgment interest, it is natural for a litigant to choose the jurisdiction of the High Court in filing their claims.

171. Justice Jiten Singh in **Vuli v BW Holdings Ltd** [2008] FJHC 351; HBC97.2007 (17 December 2008) said:

> *"[41] In Fiji the statutory authority is Law Reform (Miscellaneous Provisions) (Death & Interest) Act which allows the High Court [not the Magistrates Court] to award interest at such rates it thinks fit on either whole of the debt or damages recovered in part of it and on either the whole or part of period when cause of action arose to date of judgment.*
>
> *[42] Unless the Miscellaneous Provisions (Deaths & Interest) Act is amended to give power to the Magistrates Courts to award interest, on [sic] personal injury claims will continue to occupy a substantial portion of judges' works and to a large extent frustrate the purpose for extending the Magistrates' jurisdiction in civil matters".*

172. The CDRC recommends that the Magistrate's Court Act and Rules be amended to provide for pre-judgment interest. It should also be amended to reflect that the monetary jurisdiction of the Magistrate's Court is exclusive of interest and costs.

173. This would encourage litigants to maintain their claims in the Magistrate's Court and not clog up the High Court.

Fees

174. Appendix 2 of the HCR provides for General Filing Fees. Appendix D of the MCR provides for the same. Appendix D in MCR had been updated in 2006. However, Appendix 2 of the HCR has not been updated since 1993.

175. The *per capita* income in Fiji has increased considerably since 1990. However, the High Court fees have not been revised for over 20 years.

176. Filing fees (late filing included) is vital in case management. When the fees are increased reasonably, it will promote settlement, and discourage excessive applications. It will also encourage timely compliance with the Rules and orders/directions of the Court.

177. Currently, the late filing fee in the High Court is $ 23.00. This is irrespective of number of days of delay. For example a party who is out of time by one day will pay the same amount as a party who is out of time by a month.

178. Order 3 rule 2 (4) (e) of Singapore Supreme Court Rules 2021 grants the court powers to impose SD 50.00 per day for late filing. This is equivalent to FJD 82.32 at the current exchange rate.

179. The CDRC recommends that there should be a similar rule in Fiji for late filing fees per day. A sum of FJD 50 per day is recommended. It is also recommended that the initial filing fees for all claims and interlocutory applications be increased.

180. In cases of impecunious parties, applications can be made to pay fees after the final verdict.

181. Filing fees can be recovered if the claim is successful, for example personal injury claimants who have no income can file their claims without payment of fees. If they receive damages in favour of their claim, fees can be recovered from the damages.

PART J. CONCLUSION

182. This Report proposes a case management framework to streamline civil processes in both the Magistrate's and the High Court in terms of section 15(3) of the Constitution.

183. The amendments proposed in this Report are based on the case management difficulties that currently exist in Fiji.

184. A number of countries have developed case management policies and amended their rules accordingly in order to improve case management.

185. The UK Civil Procedure Rules 2005 for example imposes on parties a duty to assist the court in fulfilling its case management objectives. The Rules also impose on the Court a duty to interpret the rules in accordance with its case management objectives. Similar provisions exist in the Singapore Rules and also in the Uniform Rules of New South Wales.

186. Having such provisions at the outset would ensure that our Rules are founded on a new philosophy which treats case management as a primary focus.

187. The suggested amendments in this Report are tailored to cater for the difficulties faced by the Fijian Judiciary.

188. It is hoped that the proposed amendments will provide a platform for further consultation with the relevant stakeholders such as Fiji Law Society, Fiji Mediation Centre, Legal Aid Commission, Police and Corrections Services, Fiji Women's Crisis Centre, Fiji Employers Federation, academic institutions such as University of the South Pacific, Fiji National University and University of Fiji, business community and members of the public. The list is not exhaustive.

189. Understandably, stakeholders will have different emphasis based on their interest. However, the focus of the consultation should be early resolution of cases for general public interest.

190. For some stakeholders, it may appear that the proposed amendments are stringent and has an impact on access to justice. The CDRC is of the view that the proposed amendments promote access to justice.

191. The parties existing rights have not been taken away. The proposed amendments only set strict timelines for the parties to exercise their rights.

192. If the proposed amendments are accepted and implemented, it will not be difficult for a Judicial Officer to complete a civil cause within a span of two years. The CDRC has prepared a flow chart to reflect the time period it will take if the recommendations are materialized. The flow chart appears in the Appendix.

193. It would be a great achievement for the Fijian judiciary if civil cases can be finalized within a span of two years. It is hoped that the proposed amendments are realized soon.

APPENDIX

1. FLOW CHART