

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. AAU0054 OF 2007S
(High Court Civil Action No. HBC 217 of 1999L)

BETWEEN: INDAR DEO

Appellant

AND: THE FIJI TIMES LIMITED

Respondent

Coram: Byrne, JA
Powell, JA
Hickie, JA

Hearing: Wednesday, 29th October 2008, Suva

Counsel: N. Khan for the Appellant
F. Hannif for the Respondent

Date of Judgment: Monday, 3rd November 2008, Suva

JUDGMENT OF THE COURT

- [1] On 29 June 1999 the appellant Indar Deo filed a Statement of Claim claiming that in December 1994 the respondent had wrongfully terminated his distribution agency.
- [2] On 7 June 2002 Byrne J fixed the matter for hearing on 5, 6 & 7 November 2002. On 5 November 2002 the hearing was adjourned by Byrne J. The proceedings were back before the Deputy Registrar on 11 April 2003, when it was adjourned for mention until 27 June 2003, and from then to 29 August 2003 on which day the proceedings were adjourned sine die.

- [3] On 28 April 2005 the proceedings were dismissed at a call-over, there having been no appearance by the appellant.
- [4] On 4 August 2006 the appellant filed a Summons seeking to re-instate the proceedings. On 28 February 2007 orders were made by consent that the action be re-instated, however on 1 March 2007 the respondent filed a Summons to dismiss the action for want of prosecution, and on 24 May 2007 Connors J dismissed the appellant's action for want of prosecution.
- [5] On 27 July 2007 the appellant appealed that decision.

Leave to the Court of Appeal

- [6] Section 12(2)(f) of the Court of Appeal Act provides that in civil cases no appeal shall lie without the leave of the judge or of the Court of Appeal from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, except in certain specified cases.
- [7] It is beyond doubt, following the decision of this Court in Vimal Raj Goundar v Minister of Health [2008] ABU0075 of 2006S that a strike out order is an interlocutory one and thus any appeal to the Court of Appeal from such High Court order requires the leave of the Court of Appeal. In Shore Buses v. Minister for Labour FCA ABU0055 of 1995, the Court of Appeal specifically held that an order dismissing proceedings for want of prosecution was an interlocutory one.
- [8] The appellant sought leave in Court and was granted leave on the grounds that when the appeal was commenced he was entitled to take the view, relying on the authority Jetpacker Works (Fiji) Ltd v The Permanent Secretary for Works & Energy & Ors [2004] Vol 1 Fiji CA 213, that the effect of the decision of Finnigan J was final and thus not interlocutory and that leave was therefore not required. Jetpacker

Works was overruled by Raj Goundar and the law of Fiji was restored to its pre-2004 position.

The Trial Judge's Decision was Discretionary

[9] The decision of the trial judge to strike out proceedings for want of prosecution was a discretionary one.

[10] An appellate court ought not to interfere with the exercise of a discretionary order by a trial judge unless it appears that some error has been made in exercising of the discretion and a substantial wrong has occurred: House v The King [1936] 55 CLR 499

Strike Out Principles

[11] The power to strike out proceedings for want of prosecution should only be exercised where the Court is satisfied:

- (1) That the default has been intentional and contumelious, for example disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or
- (2) (a) That there has been an inordinate and inexcusable delay on part of the plaintiff or his lawyers; and
(b) that such delay would give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

See *Pratrap v Christian Mission Fellowship* ABU 0093 of 2005 where the Court of Appeal approved the principles expounded in *Birkett v James* [1978] AC 297.

Inordinate and Inexcusable Delay

- [12] The meaning of “*inordinate and inexcusable delay*” was considered by the Court of Appeal in *Owen Clive Potter v Turtle Airways Limited v Anor* Civil Appeal No. 49 of 1992 (unreported) where the Court held that inordinate meant “*so long that proper justice may not be able to be done between the parties*” and “*inexcusable*” meant that there was no reasonable excuse for it, so that some blame for the delay attached to the plaintiff.

The Delay

- [13] The appellant says that the hearing on 5 November 2002 was adjourned at the request of the respondent’s solicitors. This is not accepted by the respondent who points to a letter from the appellant of March 2005 in which the appellant says it was adjourned “*as the Judge was going away overseas for medical treatment.*” The letter also says that the respondent’s solicitors had written to the Court for an adjournment claiming that they had found new evidence that had been locked in a brief case.
- [14] Byrne J’s diaries don’t bear out the assertion that he was going away for medical treatment and the Court Record suggests that the matter was adjourned because something was “*incomplete*”. In these circumstances and on the evidence before him it was not possible for the trial judge to conclude that the appellant was responsible for the hearing not taking place in November 2002.

- [15] The trial judge had before him correspondence between the appellant and his lawyers Pillai Naidu & Associates but that material does not demonstrate that the appellant or his lawyers were responsible for delay in the period prior to April 2005, or at least any more responsible than the respondent. If the letters are evidence of anything it is that while the appellant was urging his lawyers to "*proceed with my case without any further delay*", the cause of delay was the respondent.
- [16] It is accepted by both parties that the proceedings were adjourned indefinitely on 28 August 2003 because, as recorded by this Court in Woodstock Homes (Fiji) Limited v Sashi Kant Rajesh [2008] ABU0081 of 2006S, for a number of years until at least 2006, the High Court in Lautoka had not been provided with an adequate number of judges.
- [17] The appellant says that he only became aware of the 28 April 2005 call-over and the dismissal orders on 2 June 2005 when he called at the High Court Registry to make enquires about his case. Shortly thereafter his solicitors told him they would write to the Court to have the matter re-instated. Then, in August 2005 they told him that a formal application would have to be made supported by affidavit.
- [18] The appellant's solicitors failed to prepare an affidavit or make an application in spite of prompting by the appellant. In January 2006 the appellant asked for his file to be returned and lodged a complaint with the Fiji Law Society. His solicitors did not return the file and on 2 May 2006 the appellant consulted new solicitors which, eventually, led to his 4 August 2006 Summons.
- [19] The appellant's counsel conceded that in the period 28 April 2005 to 4 August 2006 there was inordinate delay but submitted that it was excusable because it was caused by the appellant's solicitors and not the appellant. However the test is inordinate and inexcusable delay on the part of the plaintiff "*or his lawyers*" and

accordingly the trial judge was entitled to find that the appellant had been responsible for the delay, at least during this period.

[20] Further the trial judge properly relied on Lownes v Babcock Power Ltd [1998] EWCA Civ 211 for the proposition that a party is responsible for the conduct of his solicitor. Moreover the incompetence or negligence of legal advisers is not sufficient excuse: R v Birks [1990] 2 NSWLR 677.

[21] Further the trial judge was entitled to find that this delay was inordinate and inexcusable. The appellant's lawyers ought to have made an immediate application to the Court to have the matter restored in June 2005 when the appellant became aware that it had been struck out. If the appellant's evidence is accepted it follows that the appellant's lawyers were grossly negligent firstly in suggesting that the matter could be restored by the writing of a letter and then, having advised that a formal application supported by affidavit was required, failing for six months to prepare any application or affidavit, particularly when the information for the affidavit was peculiarly within the knowledge of the lawyers who had been notified of the April 2005 call-over and who had failed to appear.

The Prejudice

[22] The trial judge had before him affidavit evidence on behalf of the respondent the effect that it made the decision to terminate the appellant's distribution agency after compilation of daily reconciliation statements of Mr Deo's agency account dating back to 1990, where it was found that there was a shortfall of \$22,709 in remittances by the appellant to the respondent. The reconciliations were prepared by a Mr Naidu who was credit officer at the time and verified by a Mrs Singh was the credit manager. The decision to terminate the appellant's agency was made by a Mr Rao who was the financial controller of the respondent.

- [23] The evidence, hearsay but admissible on interlocutory applications, was that Mr Naidu had died, that Mr Rao had resigned and emigrated in June 2001 and that Mrs Singh had resigned and emigrated in January 2005, in each case their whereabouts unknown.
- [24] The respondent's case before the trial judge was that these three were its only witnesses in the case and it would be prejudiced if they could not be called.
- [25] The appellant did not call evidence or hand up written submissions when the strike out application was heard but submitted that the evidence to be given by Mr Naidu, Mrs Singh and Mr Rao could be given by an accountant or some other qualified person. The trial judge did not refer to this submission but noted the respondent's **submission** [emphasis added] that the unavailability of the three witnesses meant that *"there is a risk that a fair trial will not be possible"*. The trial judge then said *"This **evidence** [emphasis added] is not **rebutted** [emphasis added] by the plaintiff"*.
- [26] Loose and ambiguous language aside, the trial judge must be taken to have determined the contest about prejudice in the respondent's favour and this Court is in no position to overturn this finding.

Is it relevant prejudice ?

- [27] The inordinate and inexcusable delay has to cause the prejudice.
- [28] There was no evidence as to when Mr Naidu died so the only evidence the trial judge had before him was that the prejudice had occurred by January 2005 at the latest, when Mrs Singh resigned and emigrated. If the only delay that could be sheeted to the appellant was delay in the period following April 2005, then there is no relevant prejudice and the trial judge ought to have refused the application.

[29] In House v The King [1936] 55 CLR 499 (Dixon, Evatt & McTiernan JJ) at 504-505 held:

“The manner in which an appeal against the exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the material for doing so.”

[30] As has been said, the appellant was responsible for inordinate and inexcusable delay in the period following 28 April 2005, but the only period prior to this where it could be said that there was delay caused by the appellant was the period between his cause of action arising (December 1995) and the commencement of proceedings (June 1999).

[31] The appellant submits that this period, subject to proceedings having been commenced within the limitation period, cannot be held to be “delay”.

[32] In Birkett v James [1978] AC 297 Lord Diplock at page 323 said:

“Contrary to the later preference expressed by the Court of Appeal I would hold the principle to be that which had been laid down in William C. Parker Ltd. v F.J. Ham & Son Ltd. [1972] 1 W.L.R. 1583. To justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff’s tardiness in issuing his writ must

be shown to have resulted from his subsequent delay (beyond the period allowed by rules of court) in proceeding promptly with the successive steps in the action. The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued; but it must be more than minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by rules of court for taking that step. Dicta to the contrary in Thorpe v Alexander Fork Lift Trucks Ltd. [1975] 1 W.L.R. 1459 are, in my view, wrong."

[33] In Rove v Tregaskes [1968] 2 All ER 447 Lord Denning, M.R. at page 448 said:

"What is to be done? We have said on many occasions that we consider all the delay, not only the delay after writ, but also the delay before it. The delay in the first two or three years is often the most prejudicial of all. At any rate, if a plaintiff does delay until the period of limitation is nearly expired, he should keep to the timetable thereafter. Bearing this in mind, it seems to me that the delay here was inordinate. It was inexcusable; and there is serious prejudice to the defendant. The judge directed himself properly in accordance with the recent cases. He dismissed the action for want of prosecution, and I do not think that we should interfere with his discretion."

See also Roebuck v Mungovin [1994] 2 AC 224 at 234.

[34] Once the plaintiff is guilty of further delay, the prejudice caused by the totality of the period of delay can be looked at. However, Birkett v James at least, confirms that it must be shown that the prejudice to the defendant *"resulted from (the plaintiff's) subsequent delay."*

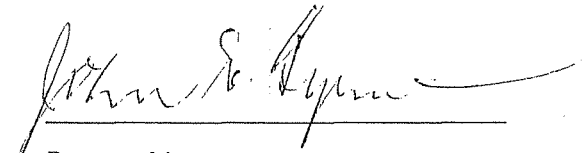
[35] The trial judge held that on the evidence *“there has been a delay of 8 years since the writ of summons and statement of claim was filed.”*

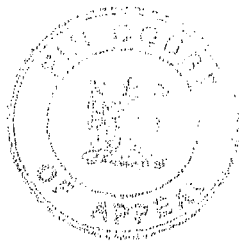
There is no specific finding that the appellant was responsible for any of this delay prior to 28 April 2005, but if the trial judge has implicitly made such a finding then he was mistaken as to the facts.

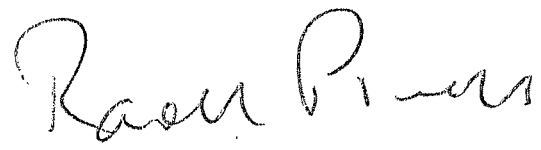
[36] In essence, the trial judge erred in failing to consider whether delay for which the appellant was responsible resulted in the prejudice which the respondent suffered. If the trial judge had considered this matter he would have been bound to find that there was no evidence to support such a finding.

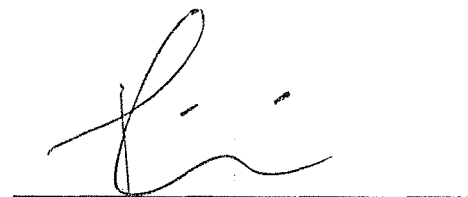
[37] The orders of the Court are:

1. The appeal is allowed;
2. The orders of the trial judge of 24 May 2007 are vacated;
3. The respondent is to pay the appellant’s costs as taxed or otherwise agreed.


Byrne, JA




Powell, JA


Hickie, JA

Solicitors:

Yash Law, Lautoka for the Appellant
Munro Leys, Suva for the Respondent