

IN THE COURT OF APPEAL
FIJI ISLANDS AT SUVA

Misc. Action No. 16 of 2009
[Lautoka Civil Action No. HBC 380 of 2000L]

BETWEEN : DOMALCO LIMITED
(APPLICANT)

AND : NEW INDIA ASSURANCE COMPANY LIMITED
(RESPONDENT)

Before the Acting President, Mr. Justice John E. Byrne

COUNSEL : G. O'Driscoll for the Applicant
: M. Prasad for the Respondent

DATES OF HEARINGS
AND SUBMISSIONS : 7th December 2009, 23rd February 2010

DATE OF RULING : 13th September 2010

**RULING ON APPLICATION FOR
LEAVE TO APPEAL**

INTRODUCTION

- [1] The applicant seeks leave to appeal the judgment of Mr Justice Inoke delivered in the High Court at Lautoka on 7th October 2009.

- [2] The applicant had applied to the Judge to reinstate its action on the list.

- [3] The applicant had filed a Writ of Summons on the 8th of November 2000 claiming indemnity against its insurer, the respondent. Liability was denied. A Defence was filed on 28th November 2000. In June 2003 the Respondent/Defendant changed its solicitors to its current solicitors. Nothing happened until 8th July 2005 when the applicant applied to amend its Statement of Claim. It is not clear from the Court file when the application was heard but the Amended Statement of Claim was eventually filed on 20th September 2005. What appears to be the same Amended Statement of Claim was again filed on 20th March 2006, the reason for which is not clear from the file. Copy pleadings were filed in April 2006. On 14th July 2006 neither the applicant nor its solicitors appeared and on the oral application of the respondent/defendant, the action was struck out by Phillips, J "With liberty to reinstate on Merits". In August 2008, Mr Samuel Ram became solicitor for the applicant. In April 2009 the applicant changed its solicitor to Mr G. O'Driscoll.

- [4] The above recitation of the history of this case shows that the applicant did not proceed with what might be called reckless speed. It might also be described as extreme tardiness.

THE APPLICATION BEFORE INOKE, J

- [5] On 12th June 2009 the applicant filed an application to reinstate the matter on the cause list. It was supported by an affidavit by the Managing Director of the applicant. The affidavit made various complaints and offered excuses as to why the applicant's representatives or Solicitors did not attend the Court hearings. The

application was first called on 26th June 2009 when Inoke, J made orders by consent of the parties' counsel for the filing of affidavits. The respondent filed his affidavit on 13th July 2009 but the applicant did not file any affidavit in response. The matter was called again on 5th August 2009 and the applicant was given a further 28 days to file its affidavit in response and the application was set down for hearing on 7th October 2009. When the matter came on for hearing on 7th October 2009, the applicant made another application for further time to file its affidavit and asked for an adjournment.

- [6] The learned Judge pointed out that the applicant had three months dating from 13th July 2009 to file its affidavit but failed to do so. The Judge held this was totally unacceptable and he did not accept the various complaints and excuses given by the applicant's Managing Director as providing a satisfactory explanation for the delay.
- [7] The Judge pointed out in paragraph 9 of his Interlocutory Judgment that the action had been struck out once before on 14th July 2006, six years after it started. Three years later, the applicant wished to have its action restored. The Judge pointed out that by the 7th of October, nine years less one month had elapsed since the action started. In that time, the applicant had amended its claim twice and had engaged three different sets of Solicitors. The Judge held that the applicant had not shown any cause or merits for reinstatement.

THE PRESENT APPLICATION

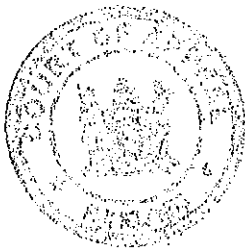
- [8] There is a wealth of Case Law on applications of this type and it surprises me that the law, being as well settled as it is, applications such as that of Domalco are all too frequently made to this Court. In my opinion most of them are a waste of the Court's time because the principles governing them are well established. To succeed in an application to reinstate an applicant must satisfy the Court that despite the delays a fair trial can still be held (Department of Transport v. Chris

Smaller Transport Ltd) [1989]A.C 1197. Paramount in the Court's mind in deciding whether to grant such an application must be whether, if it were to grant it, injustice would be caused to the other party. I am not satisfied on the facts of this case that it would now be possible to have a fair trial of the action. I consider the delays by the applicant are inexcusable. The law has never helped a litigant who has been guilty of inexcusable or deliberate delay in proceeding with his or her litigation.

[9] In only rare cases will leave be granted to appeal from an Interlocutory Judgment or Order. In Kelton Investments Ltd v. Civil Aviation Authority of Fiji (1995) F.J.C.A 15 in a judgment delivered on the 18th of July 1995, the then President of this Court referred to a number of the decided cases re-affirming the principles and said: "The Courts have thrown their weight against appeals from Interlocutory Orders or decisions for very good reason and hence leave to appeal is not readily given."

[10] The applicant has itself to blame for the position in which it now finds itself. It deserves no sympathy from this court and I give it none. Accordingly I dismiss the motion and order the applicant to pay the respondents costs which I fix at \$2000.00.

Dated at Suva this 13th day of September 2010.



A handwritten signature in cursive script, reading "John E. Byrne", is written over a horizontal dotted line.

John E. Byrne
Acting President