IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 117 of 2014

BETWEEN : RAJESH CHANDRA as Administrator of the ESTATE OF VINAY VIKASH CHAND late of Navoli, Ba, Fiji, Welder, and in his personal capacity.

APPLICANT

AND : THE PERMANENT SECRETARY FOR HEALTH

FIRST RESPONDENT

AND : THE MINISTRY FOR HEALTH

SECOND RESPONDENT

AND : THE ATTORNEY GENERAL OF FIJI

THIRD RESPONDENT

Date of Hearing : Friday, 27th July 2018
Date of Ruling : Tuesday, 30th October 2018

Counsel : Mr. Niven Ram Padarath for the applicant
Mr. Josefa Mainavolau for the respondents (A.G's Chambers)

RULING

(A) INTRODUCTION

(1) This is an application for leave to appeal from an 'interlocutory ruling' of the learned Master striking out the applicants' action for want of prosecution.

(2) The application is made by Summons dated 06th February 2018 seeking the following orders;

1. *The leave be granted to Appeal the Judgment of the Honourable Acting Master Mr. U.L. Mohammed Azhar delivered on the 19th January 2018;*

2. *Directions be made by this Honourable court for the conduct of the appeal and setting a hearing date in the appeal;*

3. *The time for service and filing of this application and any appeal be abridged if needed;*

4. *That the costs of this application be costs in the cause.*

(3) The application is vigorously opposed. An answering affidavit sworn on 07th March 2018 by 'Rigamoto S.Taito', the 'Medical Superintendent' at the Lautoka Hospital was filed on behalf of the respondents.

(4) Counsel for the applicant and the respondents tendered written submissions and I am grateful to counsel for those lucid and relevant submissions.

(B) BACKGROUND

What are the circumstances that give rise to the present application?

(1) By Writ of Summons issued out of the court on 18th July 2014, the applicant (original plaintiff) sued the Permanent Secretary for Health and the Ministry of Health (the original defendants) for damages for medical negligence.

(2) The Writ of Summons was served on the respondents on 21st August 2014 and on the same day the respondents filed an 'Acknowledgement of Service'. The respondents did not file a statement of defence and the applicant did not take steps in these proceedings since 21st August 2014. On 3rd August 2015 and 12th October 2016, a notice of intention to proceed was filed on the behalf of the applicant under Order 3, Rule 5.

(3) Nothing further was done until, on 23rd September 2016, the court of its own motion, in accordance with Order 25, Rule 9, directed the applicant to show

cause why his claim should not be struck out against the respondents for want of prosecution or an abuse of process of the court.

(4) The applicant filed his affidavit showing cause on 17th May 2018. The respondents elected not to file any affidavit in response as such the only evidence before the Master was the affidavit of the applicant.

(5) The notice was heard by the learned Master on 22nd May 2017 and in a ruling delivered on 19th January 2018 the Master struck out the action.

(C) THE LEGISLATIVE PROVISION

The legislative provision requiring leave to appeal from interlocutory orders or Judgments is contained in Order 59, rule 11 of the High Court Rules, 1988.

The Order 59, rule 11 is in these terms;

Application for Leave to Appeal (*O.59, r.11*)

> **11.** *Any application for leave to appeal an interlocutory order or judgment shall be made by Summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.*

(D) THE LEGISLATIVE POLICY

(1) The legislation having provided that there should be no appeal from an interlocutory Judgment, except by leave of the Court, the prima facie presumption is against appeals from interlocutory Judgments, and in favor of the correction of the decision in question, that is, that there has been a proper exercise of its discretion by the primary court. This Court is not at liberty to ignore the legislative policy against appeals from interlocutory Judgments evident in Order 59, rule 11 of the High Court Rules, 1988.

(2) As a general rule, therefore, the court will not interfere. If leave to appeal is to be granted, some prima facie case must be made out, short of hearing the appeal itself, for interfering with the exercise of its discretion by the primary court.

(E) THE PRINCIPLES AND CONSIDERATIONS

(1) I think I should state what I perceive to be the principles that should guide the court and the considerations that it should take into account, in deciding whether or not leave to appeal should be granted in a case such as this.

(2) Before coming to consider that question, however, I think two preliminary matters should be noted. First, that, if leave to be given, the appeal would involve a consideration by the court of the exercise of a discretion vested in the learned Master.

Secondly, the exercise of the discretion vested in the learned Master was not a point of practice or procedure but an exercise of discretion which determines substantive rights of the Plaintiff. To put the question in its true perspective, I think I should say that the effect of the Order of the learned Master is to put an end to the plaintiff's action so as to affect the plaintiff's substantive rights. I am of the opinion that there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determine substantive rights.

(3) What principles then should guide the Court, or what considerations should it take into account, in deciding whether it should grant or refuse to appeal from an interlocutory Judgment which determines legal and substantive rights?

(4) The principles which should guide a court when sitting on appeal from a discretionary Order were expressed by the full Court in "**Niemann v Electrical Industries Ltd**", (1978) VR 431. They are;

- ❖ The Order appealed from must be seen to be clearly wrong or, at least, attended with sufficient doubt as to whether it is right or wrong, and
- ❖ Substantial injustice be a direct consequence of the Order.

(5) The same Court applied "**Niemann**" in **B.H.P. Petroleum Pty. Ltd. v. Oil Basins Limited** (1985) VR 756. The principles were expressed shortly by King J as follows at (p762);

> *".... these principles are that on an application to the full Court leave to appeal from an interlocutory Order should be granted only where; (a) the decision was*

attended with sufficient doubt to justify granting leave, and in addition, (b) substantial injustice would be done by leaving the decision unreversed."

(6) The leading authority is "Niemann" (supra). In that case the full court considered and dismissed an application for leave to appeal from a decision of a Judge refusing application by Summons for dismissal of plaintiff's actions for want of prosecution. The major Judgment of the Court was that of Murphy J.

(7) In the illuminating Judgment of Murphy J. in "**Niemman**" (Supra) contained the very significant passage following;

"On an application for leave" the Full Court ought not, in my opinion, to be required, before granting leave, to determine the issue in question, or to decide whether the primary Judge's discretion miscarried. That would be to duplicate the work of the Court. The requirement for leave is designed to reduce appeals from interlocutory orders as much as possible. If leave can only be granted, following an examination of the merits of the matter and a decision that the order made by the primary Judge was "wrong", and the matter goes then to be decided on the merits by another Full Court, the object of the legislature is negated, and absurdity is the result. C.f. Lane v Esdaile (1891) A.C. 210 per Lord Halsbury L.C. at p.212.

It therefore appears to me that in using the word 'wrong' in Perry v Smith and in the Darrell Lea case, the Full Court must have used it in a sense which included the decisions 'attended with sufficient doubt', to use the Privy Council phrase, from which decisions substantial injustice flowed.".

Niemann's case has been applied by the Full Court of Victoria in **'Monash University v Berg' (1984) V.R 383** and **B.H.P Petroleum Pty Ltd v Oil Basins Ltd (1985) V.R 756.**

(8) I feel compelled to add that the question whether or not leave to appeal should be given is a separate and distinct questions from the considerations of the appeal itself, if leave to be given. The following passage in "**Fredericks v May**" 47 A.L.J.R. 362 at 364 of Walsh J is illuminating.

"It is not in doubt that if the Court forms a clear opinion that the appeal cannot succeed, leave to appeal should be refused. But it is clear, in my opinion, that the Court does not determine, and should not determine, an application for leave to appeal, where it has adopted for convenience the course of hearing full argument as on an appeal, simply by forming an opinion whether the Judgment which the applicant seeks to challenge was right or wrong and by refusing or granting leave

accordingly. That would have practical effect of giving the applicant the benefit of an appeal as of right."

(9) Sir Moti Tikaram, in the Fiji Court of Appeal decision in **Kelton Investments Ltd v Civil Aviation Authority of Fiji** (1995) FJCA 15 ABU 00341A.958 18 July 1995 said;

> *I am mindful that Courts have repeatedly emphasized that appeals against interlocutory orders and decision will only rarely succeed. As far as the lower Courts are concerned granting of leave to appeal against interlocutory orders would be seen to be encouraging appeals (see Hubbal v Everitt and Sons Limited (1900) 16 FLR 1680)*
>
> *Even where leave is not required the policy of appellate courts has been to uphold interlocutory decision and orders of the Trial Judge – see for example Ashmore v Corp of Llod's (1992) 2 ALL ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the house of Lords.*

In **Darrel Lea (vic) Pty Ltd v Union Assurance Society of Australia** (169) VR 401, the full court of the Supreme Court of Victoria said

> *"We think it is plain from the terms of the Judgment to which we have already referred that the Full Court was stating that error of law in the order does not in itself constitute substantial injustice but that it is the result flowing from the erroneous order that is the important matter in determining whether substantial injustice will result."*

In **Chandrika Prasad v Republic of Fiji & Attorney General** (No 3) (2000) Vol - 02 FJHC 81p, the High court of Fiji in dealing with an application for leave to appeal to set aside interlocutory order said ;

> *"In an application for leave to appeal the order to be appealed from must be seen to be clearly wrong or at least attended with sufficient doubt and causing some substantial injustice before leave will be granted see Rogerson v Law Society of the Northern Territory (1993) 88 NTE 1 at 5 – 33, Nieman v Electronic Industries Ltd (1978) VR 451, Nationwide News Pty Ltd (t/a Cnetralian Advocate) v Bradshaw (1986) 31 NTR 1.*
>
> *Fiji's legislative policy against appeals form interlocutory orders appears to be similar inter alia to that of the State of Victoria , Perry v Smith (1902) 27 VLR 66 at 68, and also with appeals to the High Court of Australia, see Ex parte Bucknell (1936) HCA 67 at 223.*

If it is necessary for instance to expose a patent mistake of law in the judgment or to show that the result of the decision is so unreasonable or unjust as to demonstrate error, then leave will be given Niemann (Supra) at 432. It is not sufficient for an appeal court to gauge, that when faced with the same material or situation, it would have decided the matter different. The Court must be satisfied that the decision is clearly wrong.

Leave could be given for an exceptional circumstance such as if the Order has the effect of determining the rights of the parties Buckneel (Supra) at 225, Dunstan v Simmie & Co Pty Ltd (1978) VR 669 at 670. This is not the case here. Leave could also be given if "substantial injustice would result from allowing the order, which it is sought to impugn to stand ...."

(F) CONSIDERATION AND DETERMINATION

(1) Bearing those considerations in mind, I now turn to consider the application in the present case.

(2) Besides an application for leave to appeal, the applicant has also filed 'Proposed Notice of Appeal' (exhibit RC-3).

The grounds set out in the "Proposed Notice of Appeal" are;

1. *The Learned Master erred in Law in concluding that simply because the litigant did not have the funds to pay his lawyer to move the case forward meant that he did not have an intention to bring it to a conclusion.*

2. *The learned Master erred in Law in holding that there was no necessity to show prejudice to the Defendant before striking out the matter.*

3. *The learned Master erred in Law in holding that the principals in striking out of claim for want of prosecution differs when a notice to show cause is brought about by the courts own motion.*

4. *The learned Master erred in Law in not taking into account that the Defendants had not filed a Statement of Defence therefore could not establish any prejudice.*

(3) As pointed out in **Grovit v Doctor** (1997) 2 All ER 417, it is an abuse of the court's process to commence proceedings without the intention of prosecuting with reasonable diligence.

The learned Master's explanation for finding that "the applicant commenced proceedings without the intention of prosecuting with reasonable diligence" was that; Reference is made to paragraphs 16 and 17 of the ruling (so far as is relevant)

(16)

.....

Explaining his reason for delay, the plaintiff in paragraph 9, 10 and 11 states as follows;

> *9. I do not have sufficient fund to pay my lawyers and asked them if they could do it for me and then collect any sum payable if judgment was entered in my favor.*
>
> *10. My lawyers advised me that they will need to consider this because as a rule they do not conduct matters on a no-win-no-fee basis.*
>
> *11. For these reasons, the matter was on hold for a little while.*

(17) This clearly indicate that, the plaintiff intentionally failed to take any steps for 2 years and one month, because he knew that was not doing so due to his financial constraints and just left it idle. It seems from his conduct as described above that, he did not have any intention to bring it to conclusion.

(Emphasis added)

With respect, I find that reasoning unconvincing. In my view, it was contrary both to the material before him and the law that he was bound to administer.

From the material referred to, such an absence of intention was not made out and accordingly he erred in the exercise of his discretion. I refrain from examining the matter further because to do so would involve a hearing of the appeal.

(4) I now turn to the topic of "**procedure**" and "**prejudice**". The learned Master observed at paragraph 23 and 24 of his ruling;

> *23. However, the situation would differ when it comes to the court's own*

*motion. **If the court issues a notice, it would require the party, most likely the plaintiff, to show** cause why his or her action should not be struck out under this rule for want of prosecution. In such a situation, **it is the duty of the plaintiff to show** the cause to the satisfaction of the court and to negatively establish that, there has been no intentional or contumelious default, there has been no inordinate and inexcusable delay and **no prejudice is caused to the defendant**. This is the burden of negative proof. **In this case the court issued the notice on its own motion and the defendant does not, even, need to participate in this proceeding. He or she can simply say that, he or she is supporting court's motion and keep quiet,** allowing the plaintiff to show cause to the satisfaction of the court not to strike out his cause. Even in the absence of the defendant, the court can require the plaintiff to show cause and if the court is satisfied that the cause should not be struck out, it can consider it were a summons for directions and give necessary directions to the parties. In that event, the plaintiff would be required to serve such directions to the defendant and to take further steps as per the rules of the court.*

24. *Generally, when the notice is issued by the court, it will require the Defendant to file an affidavit supporting the prejudice and other factors etc. However, this will not relieve the plaintiff from discharging his or her duty to show cause why his or her action should not be struck out. In the instant case, it was the notice issued by the court on its own motion. **Thus, the plaintiff has burden of negative proof that no prejudice would be caused to the defendant** and or to show cause why his action should not be struck out for want of prosecution or abuse of the process of the court. In fact, the argument of plaintiff's counsel tries to get the plaintiff relieved from showing cause, by putting the burden on the defendant, which cannot be accepted. If this argument is accepted, it would lead to the proposition that, the court should depend on the defendant for the proof of inordinate and inexcusable delay and prejudice, even though it acted on its own motion. As a result, the purpose of granting special power to the court, to act on its own motion to agitate sluggish litigation, will be lost. For these reasons, I am unable to agree with the argument of plaintiff's counsel.*

(Emphasis added)

I do not agree with the statement made by the learned Master. It is a proposition I would not be prepared to countenance.

The Master's proposition misses the point. The fundamental point which this court is concerned to underline is that the only fresh power given to the High Court under Order 25, rule 9 is to strike out or to give directions of its own motion. Whilst this power may very valuably be employed to agitate sluggish litigation it does not in my opinion confer any additional or wider jurisdiction on the court to dismiss or strike out on the grounds which differ from those already established by authority. I cannot find that the clear and well established authorities binding on the court leave any room for such a blunt approach. I do not deny for a moment that Order 25, rule 9 confers on the Court the power to act on its own motion. All I am saying is that there do not exist special or unusual circumstances justifying a departure from the established precedent in authority.

In "**Bhawis Pratap v Christian Mission Fellowship**" (Civ App ABU 93/05 – 14 July 2006) the Fiji Court of Appeal reviewed the authorities and explained that mere delay without prejudice to the other parties is not ordinarily a sufficient ground for striking out an action for want of prosecution.

(5) In both **Allen v McAlpine & Sons Ltd** (1968) 2 Q.B. 229 and **Birkett v James** (1978) A.C. 297 reference is made both to the risk that there could not be a fair trial of the action and of prejudice to the defendants which one would suppose was intended to mean some prejudice other than mere inability to have a fair trial.

(6) In the exercise of a judicial discretion to applications to strike out it is necessary to consider two issues;

- a plaintiff's ordinary but fundamental right of access to the Court to have his claim adjudicated; and
- the need or desirability of expedition in the administration of justice.

(7) As I said earlier, a notable feature of Order 25, rule 9 is that it confers on the Court the power to strike out on its own motion. To remove the requirement for proof of prejudice by the defendant would be to adopt a policy that accords so great an importance to expedition as to override a person's right to a trial where,

despite his delay, the issue could still be fairly tried. Any such policy would be impracticable and unfair.

(8) Bearing that in mind, I now refer to what the learned Master did say; Reference is made to paragraph 24 of the ruling (so far as is relevant)

> ***In the instant case, it was the notice issued by the court on its own motion. Thus, the plaintiff has burden of negative proof that no prejudice would be caused to the defendant*** *and or to show cause why this action should not be struck out for want of prosecution or abuse of the process of the court."*
>
> (Emphasis added)

It is a proposition I would not be prepared to countenance. It would put an unrealistic burden on the plaintiff. The plaintiff will not know the defendant's difficulties in meeting the case, such as availability of witnesses and documents nor will the plaintiff know of other collateral matters that may have prejudiced the defendant such as the effect of delay on the defendants' medical service activities.

The authorities clearly establish that prejudice may be of varying kinds and it is not confined to prejudice affecting the actual conduct of the trial. The thrust of the jurisprudence does acknowledge collateral type of prejudice (which is unknown to the plaintiff) as sufficient to justify the striking out of an action. The defendants, on the other hand, have no difficulty in explaining its position to the Court and establishing prejudice if it has in fact suffered.

This is only the tip of the iceberg.

(9) A more fundamental difficulty for the respondents in this case is that the learned Master failed to make any finding at all on the questions to be asked when applying the "**Birkett v James**" (1978) A.C. 297 principles namely; "**In view of the delay which have occurred, is a fair trial now possible**?" The learned Master has failed to make any decision as to whether the passage of time has prejudiced the (respondents') case concerning the availability and reliability of recollection of witnesses. In the absence of any consideration of this essential question it is clear to me that the learned Master erred in the exercise of his discretion. There is no suggestion that there cannot be a fair trial of the issues. Then, delay should not bar the applicant (plaintiff) from the door of the court.

Of course, I acknowledge the need or desirability of expedition in the administration of justice. But to extend that principle purely to punish the plaintiff in the illusory hope of transforming the habits of other plaintiffs solicitors would, in my view, be an unjustified way of attacking a very intractable problem.

I resist the temptation to examine the matter further because to do so would involve a hearing of the appeal.

(10) I entertain a real doubt as to the correctness of the interlocutory judgment of the learned Master and I form the view that a substantial injustice (not mere technical or trivial injustice) will flow if leave to appeal is not granted.

A substantial injustice has been and will be done to the plaintiff so long as he is faced with this Order and its effects. Such an Order is manifestly an injustice to the plaintiff's fundamental right of access to the Court to have his claim adjudicated.

The expedition in the litigation process is good. Justice is better!

(G) ORDER

(i) Leave granted.

(ii) The costs of this application be costs in the cause.

HIGH COURT OF FIJI
LAUTOKA

30/10/2018

Jude Nanayakkara
Judge

At Lautoka,
Tuesday, 30th October 2018.