ABDUL KADEER KUDDUS HUSSEIN v PACIFIC FORUM LINE LTD

COURT OF APPEAL — CIVIL JURISDICTION

TOMPKINS, HENRY and PENLINGTON JJA

23, 30 May 2003

[2003] FJCA 28

Practice and procedure — appeal — appeal against decision of High Court — whether delay is attributable to the Appellant — whether delay is intentional — whether the dismissal of appeal is proper — want of prosecution — issue of writ by Appellant — summons to strike out not served on Appellant.

Abdul Hussein (Appellant) shipped furniture but was damaged upon arrival. The Appellant commenced proceedings against the shipper (Respondent). Respondent applied to have the Appellant's claim struck out for want of prosecution. The court struck down Appellant's claim on Respondent's second application. The Appellant applied for leave to appeal and the Fiji Court of Appeal granted the appeal but was dismissed by the High Court for want of prosecution and due to the Appellant's inaction over the claim for a delay of over 4 years. The Appellant appealed against the decision of the High Court.

Held — (1) The Applicant must show that the Plaintiff has been guilty of inordinate delay that is inexcusable and seriously prejudiced the Defendant. Although these considerations are not necessarily exclusive and at the end one must always stand back and have regard to the interests of justice. It has been accepted that if the application is to be successful, the Applicant must commence by proving the three factors listed.

> *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244, considered.

(2) The judge's observations about the need for oral evidence about the packing, shipping and delivery of the container are appreciated by the court. If their evidence were not recorded at the time, it would be difficult if not impossible for the witnesses to give reliable evidence about these issues. But if their evidence were recorded, they may well be able to do so. There is no evidence either way.

(3) When regard is had to the paucity of evidence of prejudice to which we have referred, we are not satisfied that the Respondent, as the Applicant to strike out, has proved that the delay, extensive though it undoubtedly was, will seriously prejudice it in its defence of the Appellant's claim.

Appeal allowed.

Cases referred to

> *Birkett v James* [1997] 2 All ER 801, applied.
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> *Grovit v Doctor* [1997] 2 All ER 417, considered.
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> *New Zealand Industrial Gases Ltd v Andersons Ltd* [1970] NZLR 58, cited.

R. Gordon for the Appellant.

B. Narayan for the Respondent.

Tompkins, Henry and Penlington JJA. On 19 August 1989, furniture manufactured by the Appellant was shipped in a container from Suva to Sydney. On arrival the furniture was damaged. On 1 November 1999 the Appellant commenced proceedings against the consignee as 1st Defendant, the Respondent

as the shipper as 2nd Defendant and the insurers as 3rd Defendant. He is no longer proceeding against the 1st and 3rd Defendants.

The Appellant has appealed against the decision of Scott J delivered on 6 March 2000 to dismiss the Appellant's action for want of prosecution.

Chronology

The following is the chronology of relevant events:

19 August 1989 Furniture shipped from Suva

1 November 1990 Issue of writ by the Appellant.

13 November 1990 Respondent filed its defence.

28 February 1991 Respondent applied to have the Appellant's claim struck out for want of prosecution as the Appellant had not taken out summons for directions.

22 July 1991 Appellant filed summons for directions (19 months later).

26 July 1991 Summons to strike out withdrawn as the Appellant had filed his summons for directions.

11 September 1991 Chief Registrar makes order in terms of Appellant's summons for directions.

17 October 1991 Appellant writes to Chief Registrar about the hearing on 11 September 1991

3 February 1993 Notice by Respondent of intention to proceed.

7 May 1993 Notice by Appellant of intention to proceed.

12 October 1993 Respondent applied to have the Appellant's claim struck out for want of prosecution for the second time.

22 October 1993 Action struck out by Kepa J subject to Respondent filing affidavit.

28 October 1993 Affidavit on behalf of Respondent filed.

28 October 1993 Formal order of Kepa J striking out action.

3 February 1994 Appellant writes to Chief Registrar that he had learned of the action being struck out and asking for relevant documents.

30 April 1997 Notice by Appellant of intention to proceed (3 years later)

23 July 1997 Summons by Appellant for order that action be reinstated

9 December 1997 Order by Madraiwiwi J adjourning summons sine die. No appearance by Appellant.

19 March 1998 Appellant applied to have the action restored

5 May 1998 Order made by Scott J dismissing the summons for reinstatement of the action.

18 June 1998 Appellant applies for leave to appeal against order of Scott J made on 5 May 1998.

3 September 1998 Order made by Scott J dismissing Appellant's application.

26 November 1999 Fiji Court of Appeal allowed the Appellant's appeal against order made by Scott J on 3 September 1998 and set aside the order of Kepa J made on 28 October 1993. The matter was referred back to High Court for determination of Respondent's application to strike out action filed on 12 October 1993.

6 March 2000 Order by Scott J dismissing Appellant's action for want of prosecution.

The Court of Appeal judgment of 26 November 1999

The judgment in favour of the Appellant was on the ground that the summons to have the action struck out of 12 October 1993 had not been served on the Appellant. Hence the order made by Kepa J was a nullity and was set aside.

At the conclusion of its judgment this court made two observations. First, it pointed out that the setting aside of the order meant that there was an undisposed application to dismiss, that should be brought on promptly. It added that "The applicant, Pacific Forum should file an affidavit in support dealing with the question of delay and prejudice to it by reason of the delay."

Second, the court said:

> The second matter relates to a submission made by the 2nd Respondent on the substantive issue. It was urged that the Appellant should be denied any relief in view of his long and unreasonable delay in making his application for reinstatement. Since in our view the order made by Kepa J was a nullity delay on the Appellant's part cannot affect the invalidity of that order. Had it been a relevant factor there would, in our view, have been much merit in the submission. It is also to be noted that between 7 May 1993, when he filed a notice of his intention to proceed with his action, and 30 April 1997 when he filed another notice of his intention to proceed he did nothing; and this notwithstanding that by the 3 February 1994, as he states in a letter to the Chief Registrar attached to his affidavit of the 24 June 1997, he was aware of the order made by Kepa. J.

The High Court judgment

In his judgment, the Judge set out the history of the proceedings. His reasons for allowing the Respondent's application to dismiss and dismissing the Plaintiff's action are in the following passage of the judgment:

> In the present case the Plaintiff has discovered no documents to the Defendant other than 3 documents wrongly attached to the Statement of Claim. His case appears to depend heavily on assurances which he says were given to him by an unnamed person on behalf of the Defendant on the day the container was delivered to the wharf. He asserts, on what basis it is not known, that the container was mishandled on the voyage. Presumably the Plaintiff did not himself physically pack the container but as long ago as 1990 he knew that it was the Defendant's case that the container had been packed negligently and that the Plaintiff was himself responsible for the misfortune which he suffered.
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> Beyond the pleadings themselves no progress whatever has been made in this action. In my view it could only be fairly tried by a full examination of the circumstances in which the container was packed, shipped and delivered to the consignee. However confused the Plaintiff might have been by the events of September and October 1991 the plain fact is that he did absolutely nothing whatsoever at all to further the action between 7 May 1993 and July 1997, a delay of over 4 years.

The principles to be applied

In *Grovit v Doctor* [1997] 2 All ER 417, the House of Lords at 419 adopted the approach of Lord Diplock in *Birkett v James* [1997] 2 All ER 801 at 805:

> The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. 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 inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as 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.

The first of Lord Diplock's conditions do not apply, there can be no suggestion of an intentional and contumelious default. This issue is whether the Respondent satisfied both limbs of the second condition.

In *Lovie v Medical Assurance Society Ltd* [1992] 2 NZLR 244 at 248, Eichelbaum CJ reviewed the authorities and concluded:

> The applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since *NZ Industrial Gases Ltd v Andersons Ltd* [1970] NZLR 58 it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.

That there was significant delay by the Plaintiff cannot be doubted. He did nothing between the issue of the writ on 1 November 1990 and the filing of his summons for directions on 22 July 1991, a period of 20 months. The next step he took was on 7 May 1993 when he filed his notice of intention to proceed, a delay of 22 months. His next step was when he wrote to the Chief Registrar on 3 February 1994, 9 months later, when he became aware that his action had been struck out. He then did nothing for 3 years and 5 months until 23 July 1997, when he filed his summons seeking an order to re-instate his action.

Mr Gordon submitted that this later period from 3 February 1994 until 23 July 1997 should be disregarded because it was after the filing of the application to strike out on 12 October 1993. We do not accept that submission. We see no reason why the judge should not have regard to all periods of delay up to the hearing of the application. That was clearly the intention of this court when it made the second observation that we have set out above.

When there is taken into account the cumulative effect of all these periods of delay, we conclude that the Plaintiff was indeed guilty of inordinate and inexcusable delay. A more difficult issue is whether the delays were such that it may not be possible to have a fair trial, or that it may have caused serious prejudice to the Respondent.

Following the invitation to do so by this court, the Respondent filed an affidavit on 16 December 1999. It repeated the history of the proceedings. The only evidence it contains relating to prejudice is in these two paragraphs:

> (iii) The 2nd Defendant's officer, John Eastgate who gave the instructions and who was familiar with this matter retired and then passed away in early 1999.
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> (iv) It is more than 10 years now that the cause of action arose and the 2nd Defendant will therefore definitely be prejudiced having to defend this action and a fair trial would not be possible.

The affidavit is notable for what is omitted. The writ was issued on 1 November 1990, and the statement of defence with particulars of contributory negligence was filed 12 days later. It is reasonable to assume that the Respondent investigated the allegations made against it in order to file its defence. Indeed, the shortness of time between the issue of proceedings and the filing of a detailed statement of defence suggests that the Respondent had investigated the claim prior to the issue of proceedings. There is no reference to who carried out that investigation, what witness statements were recorded, what reports were prepared. It does not say what was the nature of Mr Eastgate's instructions and familiarity. It does not say to whom his instructions were issued. Nor does it say whether Mr Eastgate's evidence was recorded, which seems likely. Any written statement by him would be admissible. Nor does it say whether there were other

employees familiar with the claim, and if so, whether their evidence was recorded and whether they are available to give evidence. Nor does the affidavit make any reference to the documentary evidence that is likely to exist concerning the conditions on the voyage, the ships ports of call, and the weather conditions prevailing.

The proceedings were initially also against an insurance company as 3rd Defendant. It is likely that the insurance company instructed an assessor to investigate and report, but the affidavit is silent on this point. The proceedings were issued 15 months after the shipment, when the factual events would have been reasonably fresh in the minds of all those involved.

We appreciate the force of the judge's observations about the need for oral evidence about the packing, shipping and delivery of the container. If their evidence were not recorded at the time, it would be difficult if not impossible for the witnesses to give reliable evidence about these issues. But if their evidence were recorded, they may well be able to do so. There is no evidence either way.

When regard is had to the paucity of evidence of prejudice to which we have referred, we are not satisfied that the Respondent, as the Applicant to strike out, has proved that the delay, extensive though it undoubtedly was, will seriously prejudice it in its defence of the Appellant's claim.

Result

The appeal is allowed. The order made in the High Court is set aside. The Respondent's application to dismiss the Appellant's action is dismissed.

The Appellant is entitled to costs which we fix at $750.00

Appeal allowed.