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

CIVIL APPEAL NO. ABU0031 OF 1996S
(High Court Civil Appeal No. 289 OF 1987)

BETWEEN:

THE NEW INDIA ASSURANCE
COMPANY LIMITED

Appellant

AND:

RAJESH K. SINGH
ARUN K. SINGH

Respondents

Coram: The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Mr. Justice Savage, Justice of Appeal
The Hon. Sir David Tompkins, Justice of Appeal

Hearing: Friday, 19 November 1999, Suva

Counsel: Mr. G. P. Shankar for the Appellant
Mr. R. Prakash for the Respondents

Date of Judgment: Friday, 26 November 1999

JUDGMENT OF THE COURT

On 7 June 1996 Sadal J. reinstated the action which had been commenced by the respondents, the plaintiffs in the High Court. He also ordered that the application to strike out the action for want of prosecution that had been brought by the appellant, the defendant in the High Court, be dismissed. The appellant has appealed against the latter order.

The claim and the defence

In their statement of claim, the respondents allege that there was in existence a contract of fire insurance between them and the appellant pursuant to which the appellant indemnified the respondents for loss by fire of stock in trade for \$50,000.00 and furniture for \$3,000.00. As the result of a fire that occurred on 27 July 1983 the stock and furniture at the premises subject to the insurance policy was destroyed. The plaintiff claims \$51,000.00, being

the amount claimed to be due under the policy, plus interest.

By its amended statement of defence the appellant admits the existence of the policy of insurance but denies liability on two grounds. First, that the loss was caused by the willful act of the respondents in setting fire to the building in which the stock and furniture were, and secondly, that the respondents breached a condition of the policy by delivering to the appellant a fraudulent or fraudulently exaggerated claim for their loss. It also puts the appellant to proof of the amount of any loss.

The sequence of events

The following is a summary of the long and unhappy history of these proceedings.

On 27 July 1983 there occurred the fire giving rise to the claim.

On 10 June 1985 the respondents' writ of summons with statement of claim was issued out of the High Court and served on the appellant. On 14 June 1985 the appellant entered an appearance and on 1 July 1985 filed its statement of defence.

Between then and July 1987 there were various interlocutory steps including the filing of the summons for direction, the filing of a motion to enter the matter for trial and a fixture made which was adjourned on the application of the appellant. An amended statement of defence was filed by the appellant on 13 July 1987.

From 17 July 1987 to 2 October 1992, a period of over 5 years, there was total

inactivity. No step was taken by either party.

On 2 October 1992 the appellant filed its motion to strike out for want of prosecution. There then followed a series of fixtures and adjournments. On 23 July 1993 a summons to strike out came before the Judge. The respondents did not appear. The application was granted and the proceedings struck out. It transpired that the reason for the non appearance of counsel for the respondents was that he had died shortly before 23 July 1993.

On 29 July 1993 the respondents filed a notice of change of solicitors and a summons to reinstate the action. Again there were a series of dates and adjournments. The Judge ordered that written submissions be filed. That process was completed on 21 July 1994.

Almost 2 years later, namely on 7 June 1996, the Judge delivered his decision. On 19 July 1996 the appellant was granted leave to appeal against the interlocutory decisions re-instating the action and dismissing the application to strike out.

The decision in the High Court

It is notable for its brevity. We set it out in full.

“This action originally commenced in Suva. It was transferred to Lautoka.

On 23/7/93 this action was struck out for want of prosecution because no one appeared for the plaintiffs. The plaintiffs’ former solicitor Mr Darma Nandan had died.

I feel this case should be heard and decided on merit. In the interest of justice this action is to be reinstated. Every action should be taken in order to bring this matter to final determination.”

On this decision we have two comments. First, counsel for the parties had filed carefully prepared written submissions. The Judge, in deciding whether to strike out the proceedings, was exercising a judicial discretion. It has long been the case that when a Judge is delivering a decision on a matter of substance, as this application to strike out undoubtedly was, the Judge should give not only the decision, but also the reasons for the decision. By failing to give reasons, neither the parties nor this Court know why he decided the summons to strike out in the way he did.

Secondly, the Judge has not given any reason, and counsel were unable to explain, why the decision on a relatively simple and straight forward summons should have been delayed for almost 2 years. We deplore that delay. It is unfair to the parties. It also reflects adversely on the Judge and on the administration of justice.

The principles to be applied

The basis upon which the discretion to strike out proceedings for want of prosecution should be exercised is well established. We need only to refer to the decision of the House of Lords in *Birkett v James* [1978] AC 297, and in particular the statement by Lord Diplock at 318:

"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."

In the present case the court is concerned with the application of principle (2) only. Contumelious default is not relied upon by the appellant.

We do not consider it either helpful or necessary to analyse what is meant by the words 'inordinate' and 'inexcusable'. They have their ordinary meaning. Whether a delay can be described as inordinate or inexcusable is a matter of fact to be determined in the circumstances of each individual case.

Where principle (2) is relied on, both grounds need to be established before an action is struck out. There must be both delay of the kind described and a risk of an unfair trial or serious prejudice to the defendants. In *Department of Transport v Smaller (Transport) Limited* [1989] 1 All ER 897 the House of Lords did not accept a submission that the decision in *Birkett* should be reviewed by holding that where there had been inordinate and inexcusable delay, the action should be struck out, even if there can still be a fair trial of the issues and even if the defendant has suffered no prejudice as a result of the delay. Lord Griffiths, after a review of the authorities and relevant principles, said at 903 that he had not been persuaded that a case had been made out to abandon the need to show that post-writ delay will either make a fair trial impossible or prejudice the defendant. He went on to affirm the principle that the burden is on the defendant to establish that serious prejudice would be caused to it by the delay.

The delay

In considering whether delay of the kind required has been established, the court is concerned only with delay on the part of the respondents or their lawyers. It is that delay which must be shown to be inordinate and inexcusable. The plaintiffs issued their writ a little

under 2 years after the fire. For the next 2 years various steps were taken including the summons for direction and the listing for hearing. Although it seems that progress was rather desultory, we do not consider that the 4 years delay between the fire and July 1987 has been shown to be due to the respondents to any material degree, and, to the extent it was their responsibility, it could not be described as inordinate or inexcusable.

However, given that 4 years had already elapsed since the fire, to allow the action to lie without a single step of any kind being taken for 5 years resulted in a delay that was both inordinate and inexcusable. Indeed the respondents make no effort to excuse that delay. They gave no explanation or reason why they let their claim sleep for such a long time. Counsel for the respondents referred to the coups, the first of which occurred on 14 May 1987, as causing considerable disruption and making progress in litigation difficult. We have no doubt that this would be so, but note that the respondent Rajesh Kuma Singh, in his affidavit of 27 May 1993, attributed "only a small portion of the delay" to them. They cannot possibly excuse such a long period of inactivity. Inexcusable and inordinate delay is established.

Prejudice and fair trial

Prejudice can be of two kinds. It can be either specific, that is arising from particular events that may or may not have occurred during the relevant period, or general, that is prejudice that is implied from the extent of the delay.

The appellant relied on specific prejudice resulting from the non-availability of material witnesses. The evidence in support of this contention is most unsatisfactory. It consists of two affidavits by Rajesh Kumar who is a law clerk employed by the solicitors acting for the

appellant. In an affidavit dated 25 September 1992 he deposes:

"2. THAT because of delay, the Defendant will be seriously prejudiced in the conduct of defence case since its very material witness Corporal Janardan left Fiji, and number of other witnesses could not be traced."

Presumably recognising the inadequacy of that affidavit, a further affidavit by the same deponent dated 27 April 1993 was filed. The relevant paragraphs are:

"2. THAT Police Sergeant Janardan Naicker is very material witness for Defendant but he has left Police Force and lives somewhere outside Fiji. My investigation revealed that he has permanently left Fiji.

3. THAT the following very material witnesses could not be traced now:-

- (a) Miss Kimberly Wong*
- (b) Mr Niranjan Singh*
- (c) Mr Gopal*

4. THAT I have made investigations and have learnt from Official Receiver's Officer, Lautoka that Receiving Order was made against the Plaintiff on 8th February, 1985, a copy of letter is annexed hereto and marked "A". Another witness Inspector Jai Raj has retired from Police Force.

5. THAT the Manager of Defendant Company who was in Fiji at the time was also a witness and he has also left Country."

There are a number of respects in which these affidavits fail to prove material prejudice. They do not describe, even in general terms, the nature of the evidence that each witness is able to give. Obviously if the evidence is only peripherally relevant, the non-availability of the witness is less significant. Further they do not indicate the time at which the witnesses ceased to be available. If, for example, the witnesses ceased to be available within say 2 years of the fire, that will not amount to material prejudice caused by the delay. Further the evidence does not establish comprehensive efforts to locate the witnesses. A bare statement that witnesses could not be traced now is unconvincing. If, as is deposed, Inspector Jai Raj has retired from the Police Force, that is no reason why he should not be able to be located and

available to give material evidence if he can. Similarly the statement that Police Sergeant Janadan Naicker has left the Police Force and lives somewhere outside Fiji does not, without more, establish prejudice. Details would need to be given of the inquiries that had been made which may show either that he cannot be located or if he can be, that he cannot be brought back to Fiji for the hearing or have his evidence taken on commission. Nor is prejudice established by saying that a manager of the appellant was a witness and has left the country, without saying whether he is still with the company, where he is, and whether he can return or have his evidence taken on commission.

We now turn to consider whether prejudice should be inferred from the extent of the delay. It has long been recognised that the longer the delay the more difficult it can be for witnesses accurately to remember events that may have occurred years before. Such events may be forgotten, and there may be an increased possibility that a witness may, by virtue of the passage of time, come to believe an event or a happening that in fact did not occur, or did not occur in the manner he or she now believes. These considerations are also relevant to whether it is possible to have a fair trial of the issues in the action.

For this purpose it is necessary to consider what those issues will be. Judging by the appellant's amended statement of defence there will be two. The first is whether the respondents deliberately lit the fire that caused the loss. The second is whether the claims submitted by the respondents were fraudulently exaggerated. To establish the first, the appellant will need to call witnesses who will have to rely on the accuracy of their memory of events that occurred now 16 years ago. The second is less likely to rely on personal recollection, and more likely to depend on written records.

The appellant has given no evidence of the steps that it took to investigate the fire at the time, and the extent to which, if it all, those investigations were continued after the respondents issued their writ on 10 June 1985. In the absence of any evidence to the contrary, it is reasonable to assume that the appellant took the steps an insurance company would normally take under those circumstances. They would include an assessor investigating the claim and obtaining written statements of evidence from relevant witnesses. The assessor would then prepare a detailed report which, together with those statements, would be submitted to the insurance company for decision. Obviously a decision to decline a claim would not be made without clear evidence in support. All of that evidence should have been carefully recorded. Further, it seems that the police were involved, as is to be expected when there is an allegation of arson. There will be more detail and witnesses' statements on the police file.

Similarly with the claim under the policy, presumably the assessors will have considered that claim with care and have prepared material that persuaded the appellant that the claims submitted by the respondents were fraudulently exaggerated. All of this information also will have been carefully recorded, or we assume it would have been in the absence of any evidence from the appellant to the contrary.

These steps may well largely overcome the problem caused by the passage of such a long period of time. Witnesses who would otherwise be unable to recall relevant events can frequently do so when they are able to refresh their memory by reading detailed statement that they made shortly after the event. There is no reason to believe that that would not occur in the present case.

The sealing of the order

Mr Shankar submitted that there could be no reinstatement of the proceedings that had been struck out because the order striking out the proceedings has been sealed. We do not accept this submission for two reasons.

First, on the information made available to us, the application to reinstate pursuant to O.32, r.5 was made before the order was sealed and perfected. From the file it appears that both events occurred on the same day, 29 July 1993.

Secondly, not only was this ground not raised in the appellant's written submissions in the High Court, it also was not a ground of appeal. This court has frequently held that an appellant cannot advance in support of the appeal a ground that has not been set out in its notice of appeal, save in exceptional circumstances which do not apply here.

Conclusion

Inordinate and inexcusable delay on the part of the respondents has been established. The appellant has failed to establish that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues, nor has it established that the respondents' delay is likely to cause or to have caused the appellant serious prejudice.

The appeal is dismissed. The respondents are entitled to costs which we fix at \$500 inclusive of disbursements.

.....
 Sir Maurice Casey
 Justice of Appeal

[Signature]

 Mr Justice Savage
 Justice of Appeal

[Signature]

 Sir David Tompkins
 Justice of Appeal

Solicitors:

Messrs. G.P. Shankar and Company, Ba for the Appellant
 Messrs. Mishra, Prakash and Associates, Ba for the Respondent