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IN THE COURT OF APPEAL, FIJI ISLANDS

Miscellaneous Application No. 7 of 2000
(High Court Civil Action No. HBC 93/1995)

BETWEEN:

KAMLA PRASAD

(f/n Shiu Datt)

Applicant

AND

PRAKASH INDUSTRIES LIMITED

First Respondent

AND

C.J. PATEL & COMPANY LIMITED

Second Respondent

AND

GENERAL MACHINERY HIRE LIMITED

Third Respondent

AND

DEO CHAND

(f/n Bal Govind)

Fourth Respondent

Ms. A. Neelta for the Applicant

T. Tuitoga for the First Respondent

No appearance by the Second Respondent

Ms. L. Vaurasi for the Third and Fourth Respondents

DECISION

[1] On 18 November 1997 the Plaintiff's son Dharmendra Prasad was killed when heavy machinery fell upon him. His father Kamla Prasad instituted proceedings on 18 February 1999.

[2] By 31 December 2001 the litigation had proceeded no further than a request by the Plaintiff for a pre-trial conference to be held as required by RHC O. 34 r2. There was no appearance by solicitors for the Defendants at the conference.

[3] Between December 2001 and April 2005, apart from occasional correspondence between solicitors, no further progress was made in the matter.

[4] On 13 July 2005 a judge of the High Court, acting on his own motion after reading the pleadings but without giving any notice to any of the parties, and in their absence, struck out the action. No reasons were given and no order for costs was made.

[5] According to a ruling delivered by the Judge on 31 March 2006, on the day that the action was struck out a notification of the striking out was sent to all parties. The notification advised them that:

"... if any party considers there is good reason why the case should be reinstated then application must be

made by summons to apply to reinstate returnable 25 August 2005 at 10 a.m. "

- [6] According to the same ruling it was accepted that no copy of the notification was actually received by the Plaintiff's solicitors who did not come to know that their action had been struck out until November 2005.
- [7] On 17 February 2006 the Plaintiff's solicitors filed an application to re-instate the action. On 24 March the application was heard and refused. On 31 March the reasons for the refusal were delivered. The Applicant wishes to appeal against the refusal to re-instate the action.
- [8] The application raises three important procedural questions. They are:
- (i) was the High Court right to strike out the proceedings on 13 July 2005?
 - (ii) was the High Court right to refuse, on 24 March 2006, to restore the action which it had struck out on 13 July 2005?
 - (iii) Were the orders of 13 July 2005 and 24 March 2006 final or interlocutory?
- [9] As noted in Woodstock Homes (Fiji) Ltd v. Sashi Kant Rajesh (FCA Misc Appln. 6/06) the Court of Appeal has unfortunately not always adopted the same approach to deciding whether orders are final or interlocutory. The contrasting approaches may be

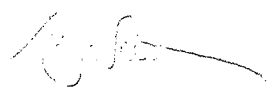
found exemplified in Suresh Charan v. Shah (1995) 41 FLR 65 ("the application approach") and in Jetpatcher Works (Fiji) Limited v. Permanent Secretary for Works and Energy (ABU 63/03 - FCA B/V 04/213 - "the order approach").

[10] Importantly different consequences flow from the adoption of the alternative approaches. Final orders generally confer a right to appeal but interlocutory orders are for the most part only appealable with leave (Court Appeal Act - Cap. 12 - Section 12). The appeal period for a final order is 6 weeks but the appeal period from an interlocutory order only 21 days (Court of Appeal Rules - Rule 16).

[11] As indicated in Woodstock Homes (supra) it is hoped that the Court of Appeal will reach a definite conclusion on the approach in future to be taken to the interlocutory/final question at the November 2006 sessions of the court. Meanwhile, it has been decided, as a matter of general convenience, to grant leave wherever leave would not be required were the "order" approach to be taken to the question.

[12] In view of the uncertainty of the position, the present application is framed as an application for leave to appeal and an application for leave to appeal out of time. For the reasons given the requirement for leave to appeal is dispensed with. In view of the important matters raised, if leave to appeal out of time is needed, then it is granted.

[13] The Appellant should now proceed to file the petition of appeal without further delay.



M.D. Scott
Resident Justice of Appeal

3 August 2006

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