IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 0102 of 2004L

Between: ASHOK CHAND

Plaintiff

And : THE PERMANENT SECRETARY FOR HEALTH & ORS.

Defendant

Before	:	Master Udit	
Counsel	:	Mr S K Ram	for the Plaintiff
		Mr R Green	for the Defendant
Date of Hearing	:	21st August, 2007	
Date of Decision	:	25th October, 2007	

D E C I S I O N

Introduction

[1] This is an unusual application. No formal Summons or Notice of Motion is filed. I am told by the Counsels that the issue for determination emanates from an oral application of the defendant's counsel. The trial in this action was to commence on 30th April, 2007. On 4th April, 2007 a Summons was filed by the defendant, seeking leave to amend the Statement of Defence to specifically plead limitation as a procedural defence so as to avoid it being defeated for want of pleading; **Fiji Electricity Authority and**

Attorney General –v- Mariamma Ganilau Court of Appeal Civil Appeal No: ABU 0050/1997.

Brief Background

[2] This alleged medical negligence action was commenced outside the statutory timeframe, for which leave was duly granted by His Lordship Mr Justice Connors on 2nd June, 2004 after an *inter-partes* hearing. I will revert to His Lordship's decision shortly in some detail. Subsequently, a writ of summons was filed, followed by Statement of defence. However, limitation was not pleaded as a defence. On 30th April, 2007 His Lordship, granted leave to amend the statement of defence to include it. In addition counsels agreed to deal with the issue of limitation as a preliminary issue before the trial.

[3] Before, I proceed to deal with the substantive issue it is important to regurgitate to the litigants and practitioners the importance of preparing trials in an orderly manner, which I have noticed in this jurisdiction is not strictly practiced. Our High Court Rules 1988, which is copied from England provides a relatively comprehensive practice and procedure for the conduct of civil proceedings. Strict compliance of the rules alone results in speedy trials. More fundamentally it precludes *adhoc* interlocutory applications especially on the day of trial, which ultimately leads to adjournments and undesirably prolonging the finalisation of an action. It serves no purpose in preparing trials when a late interlocutory application may merely sabotage it. It results in wastage of time for counsels and to the litigants the costs and possibly denial of justice due to delay.

Application

[4] Returning to the application, Mr Ram in his written submissions stated the issues as follows:-

> *(i) whether the defence of limitation can be raised now after the issue has been argued Inter-partes and leave was given.*
>
> *(ii) whether the claim is statute – barred and ought to be struck-out.*

On the other hand, Mr Green in the written submissions asserts that the claim is statute barred as such it ought to be struck-out. He forcefully submitted that irrespective of the

prior leave to commence the action out of time is granted, the action can be dismissed by way of an interlocutory application in the form of the present one.

[5] I have considered the oral and written submissions of both the parties. In my view the interlocutory issue for consideration is whether the defendant can again raise the issue of limitation as an interlocutory issue for which leave is granted after an *inter-partes* (contested) hearing.

[6] This takes me to the decision of His Lordship Mr. Justice Connors delivered on 2nd June, 2004. On 14th April, 2004, the plaintiff filed an Ex-parte Notice of Motion *inter-alia* seeking an order for extension of time to commence proceedings outside the limitation period against the defendants. On the *ex-parte* application, His Lordship notably stated that *".....despite the Act, think better to be inter-pates...". (see transcript of judges notes).* Next as required the documents were served to the defendant. It was opposed by the defendants.

[7] On the day of the hearing Ms. Tabaiwalu, of counsel for the defendant appeared and made opposing submissions. His Lordship after considering relevant authorities, legislative provisions and the evidence adduced, delivered a detailed decision alluding to the issues as submitted by counsels. His Lordship at page 4 said:-

> "On the basis of the evidence for the plaintiff, it is apparent that the plaintiff was not aware of the cause of action personal to the plaintiff until receipt of the psychiatric report on or about 26th of January, 2004. In the circumstances therefore I am of the opinion that the plaintiff is entitled to the order sought and accordingly I make the orders....."

[8] It is trite law that a court can review or even to set aside an *ex-parte* order. Setting aside an *ex-parte* order granted under S17 of the Limitation Act is no exception. Justice Shameem in the context of an *exparte order* granted under the Act in **Hasina Bibi v Atish Narayan and Anor *Suva High court Civil action No HBC 636/1998*** aptly stated the principle as follows:-

> "Indeed, the purpose of the discretion to set aside an ex-parte order, **is to redress the situation where an order was made without hearing both the parties...**"
>
> (emphasis added)

[9] However, the order sought to be vacated by the defendant was not made ex- parte. Under the circumstances can the defendant raise this issue as an interlocutory matter for determination by the Court? In my view, not.. I find support from a decision of His

Lordship Mr Justice Lyons in ***Ajimat Ali –v- Merewai M. Raniga [199] 42 FLR 182.*** At page 185 para B-D His Lordship said:-

> "Recent decisions of Supreme Court of New South Wales decided this point, i.e.: as to whether one can keep making interlocutory applications on the same point as long as one likes. In **Collier v Howard, McLelland CJ** (In Equity, unreported decision 23rd of April 1996) enunciated the rule as follows :-
>
> > *"Generally speaking, the interests of justice as between the parties, fortified by the public interest in the finality of litigation and the efficient employment of judicial resources,* ***require that where an application for interlocutory relief has been made, heard on the merits and refused, a further application for substantially the same relief should not be entertained, unless it is founded on a material change in circumstances since the original application was heard, or discovery of new material which could not reasonably have been put before the Court on the hearing of the original application.""***
>
> (emphasis added)

Later on the same page in respect of such applications His Lordship conclusively said:-

> "To allow the application now before me to continue would be ***"a scandal to the administration of justice"*** (as per Lord *Halsbury in Reichel -v- Magrath (1889) 14 App Cas 665 at 668 – 70."*

[10] I have considered the affidavit of Pretika Prasad, filed on behalf of the defendant. The whole purpose of the amendment as alluded to in paragraph 5, 6, 7, 8 and 9 is to include a limitation defence. No additional or new information is introduced for the court to give an indulgence in the interim to strike-out the action or vacate the order of His Lordship. I may add further that, His Lordship Mr Justice Connors in granting leave considered the material issue of *"knowledge"* as required under *S. 17* and *S. 19* of *The Limitation Act*. On the affidavit material, *(not tested by way of cross-examination)* the learned Judge made a finding of fact that the plaintiff was unaware of the cause of action until the receipt of the psychiatric report on 26th January, 2004. It will be an absurdity for another court to consider the facts which have already been conclusively dealt with by the Court once. That being the case, the interlocutory application is misguided and ought to be struck-out.

[11] In addition, Mr Ram submitted that the issue of limitation ought not to be allowed even in the trial. The reason advanced is that the issue of limitation was considered after an inter partes hearing. He relies on and referred me to ***Reserve Bank of Fiji –v- Trever Robert Gallager and another, Civil Appeal No. ABU 0030/2005.*** In my view that case is distinguishable. The facts in that case were different. The issue of *res judicata or issue*

estoppel was raised in the context of an earlier action which was conclusively decided between the parties. It was not in the present context of an interlocutory order posing as estoppel in a trial.

[12] Thus, arising from the submissions, the precise issue is whether a trial court can review an earlier interlocutory decision or order or is it restrained by it. As a matter of general principle, in my view, there is no such fetter imposed on the ultimate trial court from altering, amending or varying any interim order or finding of facts (usually on affidavits) in a trial which has the benefit of oral evidence of the witnesses and what's more is that it is fully tested by cross-examination.

[13] However, I will leave this issue for the trial judge who will have the benefit of the evidence for or in rebuttal and a comprehensive legal argument. Thus at this interlocutory stage, I will not summarily strike-out the limitation defence. In any event, the limitation defence was incorporated by consent of the plaintiff's counsel. What is intriguing about the consent order is that it was made three years after the initial grant of the leave to commence proceedings out of time. No new evidence is adduced to consider varying the consent order. Accordingly, the defendants are entitled to raise it and it is for the trial judge to determine. This is an important legal issue which I encourage parties to incorporate in the pre-trail conference minutes and pursue it in the trial.

Conclusion

[14] In view of the conclusion to which I have reached both, the application and cross application is dismissed. Further, parties are now directed to prepare the matter for trial expeditiously. After hearing counsel I will give appropriate directions.

Accordingly, ordered.

J. J. Udit
Master of the High Court

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25th October, 2007