

TRADE AIR ENGINEERING (WEST) LTD and 3 Ors v LAISA TAGA and 2 Ors (ABU0062J of 2006)

COURT OF APPEAL — CIVIL JURISDICTION

5 WARD P, BARKER and SCOTT JJA

28 February, 9 March 2007

10 **Practice and procedure — appeal — power to strike out — delay due to oversight — no record of hearing — failure to provide reason for decision — whether the power of court was exercised in substantial conformity with Rules — High Court Rules Os 13 r 10, 14 r 11, 24 r 17, 25 r 9, 32 r 6, 34 r 2(6), 52 r 4.**

15 The Appellants commenced an action against the Respondents. However, nothing was done until more than 2 years later when the High Court issued a r 9(1) notice. The Appellants thereafter filed a notice of intention to proceed. Counsel appeared before the High Court in response to the notice, but there was no record of what transpired during that day.

20 The Respondents asked that the action be struck out for inaction. The Appellants on the other hand stated that the delay was due to oversight and that a notice of intention to proceed had been filed. The Appellants later filed a motion for reinstatement. The High Court dismissed the motion to reinstate stating abuse of process.

Held — (1) While the dismissal and the refusal to reinstate were distinct decisions, they were both part of the same process and correctness of both should be considered.

25 (2) The only fresh power given to the High Court under O 25 r 9 is the power to strike out or to give directions of its own motion.

30 (3) A simple delay without prejudice to the other parties is not a valid ground to strike out or dismiss an action. The Appellants in this case explained that the reason for such inaction was a result of oversight and not of lack of any intention to proceed. Why the judge apparently refused to accept this explanation is not known as no record of it was made. The failure to provide reasons for the decision reached was unsatisfactory. The action is reinstated.

Appeal allowed.

Cases referred to

35 *Bhawis Pratap v Christian Mission Fellowship* Civ App ABU 93/05; [2006] FJCA 41; *Grovit v Doctor* [1997] 2 All ER 417; [1997] 1 WLR 640, cited.

C. B. Young for the Appellants

F. Haniff for the Respondents

40 [1] **Ward P, Barker and Scott JJA.** This appeal is concerned with the circumstances and the manner in which the High Court may exercise the powers conferred upon it by O 25 r 9 of the 1988 High Court Rules.

[2] Order 25 r 9 which was added to the Rules in September 2005 (LN 47/05) is as follows:

45 *Strike out for want of prosecution*

- 50 9. (1) If no step has been taken in any cause or matter for six months then any party on application or the Court of its own motion may list the cause or matter for the parties to show cause why it should not be struck out for want of prosecution or as an abuse of the process of the Court.
- (2) Upon hearing the application the Court may either dismiss the cause [or] matter on such terms as may be just or deal with the application as if it were a summons for directions.

[3] Although r 9 is a new rule it alludes to powers which the High Court possessed prior to the Rule's promulgation. Paragraph 9(1) refers to the court's inherent jurisdiction to dismiss for want of prosecution (see generally the *White Book*, 1988, paras 25/1/4, /5 and /6) and its statutory jurisdiction to strike out
5 proceedings which are abusive of the court's process (RHC O 18 r 19). Paragraph (2) refers to the court's powers upon summons for directions being taken out (see RHC O 25 and especially O 25 r 1(4)).

[4] The central question raised by this appeal is whether the court's powers
10 under O 25 r 9 should be exercised in substantial conformity with the powers it already possessed prior to the making of the new rule or whether an additional jurisdiction, exercisable on fresh principles, has been conferred on the court.

[5] The Appellants commenced their action in August 2003. A statement of
15 defence was filed in the following September but nothing further was done until, on 20 February 2006, the court issued a r 9(1) notice. On 3 March the Appellants filed a notice of intention to proceed with the action pursuant to RHC O 3 r 5.

[6] On 14 March 2006 counsel for the parties appeared before the judge in
20 answer to the notice. There is no record of what occurred on that day, however in a ruling delivered on 31 May 2006 the judge stated that on 14 March:

Action [was] struck out. Leave to apply to reinstate granted.

[7] According to para 3(d) of written submissions filed (without objection by
25 the Respondents) by counsel for the Appellants on 5 September 2006:

On 14 March 2006 the matter was called before [the judge]. There is no Judge's notes
of that date on court file. According to Ms Roshni Sharma who appeared as counsel for
the Appellants she informed the court that delay was due to oversight and that the notice
of intention to proceed had been filed. She requested for an adjournment to allow the
30 Appellants to take steps to bring the action to trial without delay. Mr Faizal Haniff who
appeared for the Respondents asked that the action be struck out. The learned judge said
he was not prepared to accept the Appellants' explanation. The Appellants had only
moved after the notice of 20 February 2006 and that the [O 3 r 5] notice to proceed had
come too late. His Lordship struck out the action but gave liberty to the Appellant's to
35 apply by motion and affidavit to reinstate the actions;

[8] On 30 March 2006 the Appellants filed a motion for reinstatement
supported by affidavit. No answering affidavit was filed by the Respondents.

[9] On 26 May the motion was heard. Counsel for the Appellants again
40 explained that the action had lapsed as a result of oversight. It was closely related
to another action which was progressing as normal. It was submitted that
reinstatement would not be prejudicial to the Respondents. According to the
Appellants' written submissions already referred to, counsel for the Respondents
emphasised the length of delay resulting from the Appellants inaction. He did not
45 apparently contend that the Respondents would be prejudiced by reinstatement.

[10] On 31 May the court dismissed the motion to reinstate. In para (8) of his
ruling the judge wrote:

I am satisfied that the matter was properly struck out on the 14th of March and should
50 not be reinstated. It is an abuse of the court process to bring an action or maintain it with
no real interest of prosecuting it with reasonable diligence or expedition.

[11] Although the focus of the notice and grounds of appeal is upon the court's refusal to reinstate the action which it had dismissed in March we are satisfied that while the dismissal and the refusal to reinstate are distinct decisions they were part of the same process and that accordingly we should consider the correctness of both.

[12] The first problem is that, as already observed, the judge apparently took no notes of the March hearing and provided no written reasons for his decision to dismiss. Such information as we have been supplied with (hearsay from the bar table) suggests that counsel for the Appellants told the judge that their inaction was the result of oversight, not of any lack of intention to proceed. Why the judge apparently refused to accept this explanation, we do not know. The failure to provide reasons for the decision reached in March was, with respect, unsatisfactory.

[13] Although the judge rejected the Appellants' submissions he did give leave to them to apply for the action to be reinstated. Mr Haniff was unable to refer us to any provision in the rules granting the court power to reinstate an action struck out in these circumstances. Generally, a party's only remedy following the striking out of its action is appeal. Exceptions to this general rule such as O 13 r 10, O 14 r 11, O 24 r 17 or O 32 r 6 have no application to O 25.

[14] In our opinion the rehearing by the same judge of substantially of the same issues is, as a matter of principle, to be avoided, if at all possible. The rationale for granting leave to apply for reinstatement after the decision to dismiss the action had already been taken is not easy to discern.

[15] A notable feature of the new O 25 r 9 is that it confers on the court the power to act on its own motion. Within our present High Court Rules such a power is only rarely conferred. One example is O 34 r 2(6), another is O 52 r 4. In a number of overseas jurisdictions much wider case management powers have been given to the High Court and most of these powers are exercisable upon the court's own motion. Such developments have however not yet reached Fiji.

[16] In our view the only fresh power given to the High Court under O 25 r 9 is the power to strike out or to give directions of its own motion. While this power may very valuably be employed to agitate sluggish litigation it does not in our opinion confer any additional or wider jurisdiction on the court to dismiss or strike out on grounds which differ from those already established by past authority.

[17] In *Bhawis Pratap v Christian Mission Fellowship* Civ App ABU 93/05; [2006] FJCA 41 this court 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. While, as pointed out in *Grovit v Doctor* [1997] 2 All ER 417; [1997] 1 WLR 640, it is an abuse of the court's process to commence proceedings without the intention of prosecuting them with reasonable diligence, so far as we have been able to establish, from the somewhat sparse materials before us, such an absence of intention was not made out and accordingly striking out the proceedings on such grounds was not justified. The fact that the limitation period for the Appellants' cause of action had not expired at the time of the dismissal is a second consideration favouring the giving of directions, possibly taking the form of "unless orders", rather than terminating the proceedings.

[18] The appeal is allowed and the action reinstated.

Result

- (1) Appeal allowed; action to be listed for mention before the High Court Master within the next 28 days.
- 5 (2) Appellants' costs assessed at \$1000.

Appeal allowed.

10

15

20

25

30

35

40

45

50