Fiji Law Reports

Hussein v Pacific Forum Line Ltd [2000] FJLawRp 24; [2000] 1 FLR 46 (6 March 2000)

[2000] 1 FLR 46

IN THE HIGH COURT OF FIJI

ABDUL KADEER KUDDUS HUSSEIN

v

PACIFIC FORUM LINE LIMITED

High Court Civil Jurisdiction
Scott, J
6 March, 2000
HBC 404/90S

Striking out for want of prosecution - inordinate and inexcusable 4 year delay causing serious prejudice to defendant - principles on which court will allow a plaintiff to continue prosecution of case

The appellant commenced proceedings against the consignee as first defendant, the respondent as the shipper as second defendant and the insurers as third defendant for damages claimed for negligence and consequential loss on a damaged shipment of furniture. He is no longer proceeding against the first and third defendants. The respondent applied twice to have the action struck out for want of prosecution. An order striking out the action was granted in 1993. The appellant applied to have the matter reinstated but the application was adjourned *sine die* due to non appearance of the appellant. He filed a Notice of Intention to Proceed. He applied again, unsuccessfully, to have the matter reinstated in 1998. The appellant appealed to the Court of Appeal, which allowed an appeal against the High Court's refusal to restore and referred the matter back to the High Court for determination of the application to have the matter restored.

Held - (1) The plaintiff did absolutely nothing to progress his action for over 4 years, and it was not in interests of justice to allow plaintiff to proceed.

(2) The plaintiff was aware of the defendant's case of contributory negligence that the container was negligently packed and the plaintiff was responsible for the misfortune he suffered. The matter could only be fairly tried by a full examination of the circumstances in which the container was packed, shipped and delivered to the consignee. Here, the plaintiff had done nothing beyond the summons for directions.

Plaintiff's action dismissed.

[**note**, on appeal, the Court of Appeal dismissed a submission that a period of delay taken up by an application for restoration should

be disregarded. The judge could consider all periods of delay up to the hearing of the application. However, given the paucity of evidence on whether there would be serious prejudice caused to the respondent, the court was not satisfied. The appeal was allowed and the High Court order set aside. The respondent's application to dismiss for want of prosecution was dismissed with costs: ABU0024/00S 30 May, 2003.]

Cases referred to in judgment
foll ***Allen v McAlpine*** [1968] 2 QB 299; [1968] 1 All ER 543
foll ***Birkett v James*** [1978] AC 297
foll ***Merit Timber Products Limited v NLTB*** (FCA Reps 94/609)
foll ***Owen Potter v Turtle Airways Limited*** [1993] ABU 49/92 FCA Reps 93/205 20 August 1993.

R.R. Gordon for the plaintiff
Ms. B. Narayan for the defendant

6 March, 2000.

JUDGMENT

Scott, J

The Plaintiff was formerly a manufacturer of furniture. On 19 August 1989 a container of furniture was sent by him to Australia. It was conveyed in a container which was carried upon the Fua Kavenga, a vessel operated by the Defendant. On arrival in Sydney the consignee found that the furniture was damaged.

On 1 November 1990 the Plaintiff issued the writ. There was then a first Defendant who was the consignee and there was also a third Defendant, the Insurers. The Plaintiff is no longer proceeding against these former Defendants who have been dismissed from the suit.

The Plaintiff's case against the Defendant is that the furniture was damaged by a sea voyage which took much longer than it was anticipated, by heat and lack of ventilation, by the tossing and turning of the Fua Kavenga and by the slap-dash loading and unloading of the container at the various ports visited on the way to Sydney. The Plaintiff claims damages for negligence and consequential loss.

On 13 November 1990 the Defendant filed its Defence. This is an important document since the principal defence was to deny negligence, to put the Plaintiff to strict proof of the various facts and matters alleged and to assert that the cause of any damage which the furniture may have sustained was the Plaintiff's failure to pack it in the container properly.

On 28 February 1991 the Defendant applied to have the Plaintiff's claim struck out on the ground that the Plaintiff had not taken out the summons for directions as required by Order 25.

On 26 July 1991 the application was withdrawn on the Plaintiff's undertakings to file the summons. It was filed on 22 July, returnable on 11 September.

On 11 September 1991 there was some confusion. Counsel for the then 3rd defendant told the former Chief Registrar that the 28 February summons had not yet been dealt with. This was wrong since it had been withdrawn on 26 July. Furthermore, the 28 February summons was taken out not by the then 3rd Defendant but by the present Defendant, the then 2nd Defendant. Apparently the Chief Registrar did not examine the file properly because he then noted on it "no order on the Summons for Directions would be made against the 3rd Defendant". The action then went to sleep until 3 February 1993 when the Defendant filed a notice of intention to proceed pursuant to O 3 r 5. That notice was followed by a similar notice filed by the Plaintiff on 7 May 1993. Nothing then happened until 12 October 1993 when the Defendant filed a summons seeking to have the action struck out for want of prosecution

(see the White Book, 1988, paragraphs 25/1/4 and 25/1/5). There was no affidavit in support. On 28 October 1993 the Plaintiff's action was struck out by order of Kepa J.

Nothing at all then happened until July 1997 when the Plaintiff filed a summons to have the action re-instated. He deposed that he had not been served with the summons of 12 October 1993.

On 9 December 1997, after various adjournments and the non appearance of the Plaintiff the action was adjourned sine die.

On 19 March 1998 the Plaintiff applied to have the action restored. On 5 May 1998 I dismissed the application to set aside the order of Kepa J on the ground that the order had been perfected (see O 32 r 5 (3)).

On 26 November 1999 the Fiji Court of Appeal allowed the Plaintiff's appeal and set aside the order of Kepa J. It did so on the ground that the Plaintiff had not been served with the summons and that accordingly Kepa J's order was a nullity. It followed that the summons to dismiss for want of prosecution filed on 12 October 1993 remained to be disposed of. It is that summons, now supported by an affidavit filed on 15 December 1999, which is before the Court. An affidavit in answer was filed by the Plaintiff on 14 January 00.

The principles governing the exercise of the Court's jurisdiction to strike out for want of prosecution are well settled. The leading English authorities are ***Allen v. McAlpine*** [1968] 2 QB 299; [1968] 1 All ER 543 and ***Birkett v. James*** [1978] AC 297; [1977] 2 All ER 801 and these have been followed in Fiji in, for example, ***Merit Timber Products Ltd v. NLTB*** (FCA Reps 94/609) and ***Owen Potter v. Turtle Airways Ltd*** (FCA Reps 93/205). In the present case it is the Defendant's submission that the Plaintiff's prosecution of the action has been inordinately and inexcusably delayed and that the consequences of this delay have seriously prejudiced the Defendant.

Ms. Narayan pointed out that the former 3rd Defendant has ceased trading and is in receivership while the Defendants principal and indeed only witness with whom the Plaintiff dealt died in early 1999. Given that the matters complained of were said to have taken place over 10 years ago Ms. Narayan submitted that a fair trial was no longer possible.

In his affidavit in opposition the Plaintiff relied heavily on the confusing order of the Chief Registrar made on 11 September 1991. He exhibited a copy of a letter which he said he sent to the Chief Registrar in October 1991 (oddly enough, a copy is not to be found on the file) but to which he obtained no reply. It was because he, as a litigant in person, was confused about what to do next that he had done nothing until 1993 when he had issued his notice of intention to proceed.

In reply to my question, Mr. Gordon argued that the only period of delay with which the Court was now concerned was the period 1991 to 1993 since that was the only period covered by the 1993 summons. Ms. Narayan on the other hand suggested that the whole period, 1991 to 2000 was to be taken into consideration.

With respect, the order of the Court of Appeal is slightly ambiguous but I was satisfied that the real question to be answered was whether the Plaintiff should now be allowed to take his action any further and I so ruled. Mr. Gordon then forcefully argued that although the Plaintiff might well have difficulty in making out his case at this late stage he should not be denied the opportunity. Even if John Eastgate could no longer give evidence then there were numerous documents which would still be available and from which it would be possible to deduce where responsibility for the damage to the furniture lay.

It is well understood that the Court will not lightly deprive a Plaintiff of the opportunity to present his case in Court, however weak. But at the same time the interests of a Defendant who may well be put to great trouble and considerable expense in preparing the Defence must also be considered.

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.

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.

In all the circumstances of this case I am satisfied that it would not be in the interests of justice to let it go any further. Accordingly the Defendants application succeeds and the Plaintiff's action is dismissed.

Application granted.

Marie Chan
