

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

CIVIL APPEAL NO. ABU0024 OF 2003S
 (High Court Civil Action No. HBC 93 of 2002S)

BETWEEN:

THE PROCEEDINGS COMMISSIONER,
FIJI HUMAN RIGHTS COMMISSION

Appellant

AND:

THE COMMISSIONER OF POLICE

First Respondent

THE ATTORNEY - GENERAL

Second Respondent

Coram:

Smellie, JA
 Davies, JA
 Penlington, JA

Hearing:

Tuesday 11th November 2003, Suva

Counsel:

Dr. S. Shameen for the Appellant
 Mr. L. Daunivalu for the Respondent

Date of Judgment: Friday 14th November 2003

JUDGMENT OF THE COURT

This is an appeal from a decision of a Judge of the High Court of Fiji. The Proceedings Commissioner of the Human Rights Commission ("*the Commission*") instituted proceedings by way of originating summons seeking relief under the Human Rights provisions of the Constitution. The defendants, the Commissioner of Police and the Attorney-General of the State of Fiji, sought an order that the proceedings be dismissed on the ground that they disclosed no reasonable cause of action and were an abuse of process.

The learned trial Judge dismissed the proceedings on the sole ground that the Proceedings Commissioner had no standing to bring the proceedings.

A preliminary issue has been raised as to whether his Lordship's order was a final judgment or was interlocutory, thereby requiring leave to appeal. Submissions lodged on behalf of the respondents stated, inter alia:

"In particular, it is noted that the decision issued by the High Court on 8th April 2003 was made in relation to an interlocutory application. A summons issued under Order 18 rule 18 of the High Court Rules 1988 has been considered to be an interlocutory application. The White Book, Supreme Court Practice, Volume 1, 1999 at p.349 in paragraph 18/19/8 states that:

'An order to strike out or stay proceedings under this rule is interlocutory, and no appeal to the Court of Appeal lies without leave (Price v. Phillips (1894) 11 TLR 86; Hind v. Harlington (1890) 6 TLR 267; Re Page [1910] 1 Ch. 489; Hunt v. Allied Bakeries Ltd. [1956] 1 WLR 1326, CA; [1956] 3 All ER 513, CA.' "

That general approach was applied recently in Scottwood Charitable Trust v. Bank of New Zealand [2002] 2 NZLR 305.

Counsel for the respondents referred the Court to the discussion in Suresh Sushil Chandra Charan v. Syed M. Shah (Court of Appeal 8 March 1995) regarding the difference between what has been called the "*order approach*" and what has been called the "*application approach*." Applying White v. Brunton [1984] QB 570, the Court applied the "*application approach*." However, other cases in this Court have preferred the "*Order approach*". See e.g. Josefa Nata v. The State/Court of Appeal 28 May 2002).

In our view, the distinction between final and interlocutory orders depends upon the nature of the order, its substantive effect. Whilst many orders striking out a statement of claim or staying proceedings as frivolous or vexatious or an abuse of process will be interlocutory, a decision which finally determines the rights and liabilities which are in issue in a case is a final decision.

In Hall v. The Nominal Defendant (1966) 117 CLR 423, Taylor J, with whom Owen J agreed, said, at 439-440:

"A great deal has been said concerning the distinction between final and interlocutory orders but it has, in the main, been the practice of courts to confine themselves to a consideration of the character of the particular order in question in each case. Indeed, in In re Page; Hill v. Fladgate (1910) 1 Ch. 489 and 491 Cozens-Hardy M.R. commenced his judgment by saying: 'I have no intention of attempting the task of defining exhaustively or accurately the meaning of an interlocutory order. I leave that to others. The only point we have to decide here is whether the order in this particular case is an order which must be appealed against within the time limited for appeals from interlocutory orders'. 'Others' have, however, not, in general, attempted the task which the Master of Rolls declined to undertake. However, at an earlier stage Lord Alverstone C.J. when called upon to say whether a particular order was interlocutory or final said: 'It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order': Bozson v. Altrincham Urban District Council (1907) 1KB 547 at 548-549. Much the same test has been proposed on other occasions and, if I may say so with respect, it provides a broad test which is unexceptionable. So an order made in the course of an action or suit which does not conclude the rights of the parties inter se, although it may, of course, conclude the fate of the particular application in which it is made, is interlocutory only.

In the same case, Windeyer J expressed like views. At 443 – 4, His Honour said:

"The effect of such decisions as there are of this Court on the point seems to me to be that when an action has been commenced between parties then whether an order is interlocutory depends on whether or not it results in a final determination of that action...These cases are all illustrative of the general proposition that a final order is one which finally disposes (subject only to appeal) of an action or an existing dispute between parties."

That approach has been consistently applied by the High Court of Australia. In Port of Melbourne Authority v. Anshun Pty Ltd. (1980) 147 CLR 35, Gibbs J, with whom Mason and Murphy JJ agreed, said:

"In support of the objection to competency before us, Mr. Griffith naturally relied upon the decision of the Privy Council in Tampion v. Anderson, where it was held that an order staying an action on the ground that it is frivolous, vexatious and an abuse of the process of the court is an interlocutory judgment. Their Lordships in the course of their reasons refer to a number of authorities, but none of those authorities was a case in which a stay had been granted on the ground that there was an estoppel of the kind which McGarvie J found to have been raised in the present case.

If the view expressed in Licul v. Corney is correct, and the true test of finality is whether the judgment or order, as made, finally disposes of the rights of the parties, it would seem clear that the order made in the present case was a final judgment.....

It seems to me that in the present case, as a matter of reality, the order made does finally dispose of the rights of the parties, and on that ground I would consider it to be a final order so that the objection to competency in my opinion ought to be overruled."

See also Carr v. Finance Corporation of Australia (1981) 147 CLR 246 and Sanofi v. Parke Davis Proprietary Limited (1982) 149 CLR 147. In the latter case, Gibbs CJ, Stephen and Mason JJ. said at 152:

"A final judgment is one which finally disposes of the rights of the parties."

These authorities were approved and applied in this Court in Graham Southwick v. The State (Court of Appeal 1 March 2002).

In the present case the decision was a final judgment for it dismissed the proceedings and finally determined the right of the Proceedings Commissioner to sue for the cause of action alleged therein. The trial Judge referred to Ms Joti as the plaintiff. However, she was not the plaintiff. Section 36(1) provides that civil proceedings lie at the suit of the Proceedings Commissioner. He was the plaintiff and the sole plaintiff. The order below was a final determination of the suit brought by him. Therefore, leave to appeal is not required.

Lest, however, there be any residual doubt about this matter, the Court has granted leave to appeal to the Proceedings Commissioner. The grant of leave was not opposed by counsel for the respondents.

The Human Rights Commission Act 1998 provides inter alia:

"34 - (1) After completing an investigation, the Commission must inform the parties of the result of the investigation and whether, in its opinion-

- (a) the complaint does not have substance, or cannot be established to have substance or, in relation to an investigation of the Commission's own motion, that the matter ought not to be proceeded with; or*
- (b) the complaint has substance or, in relation to an investigation of the Commission's own motion, that the matter ought to be proceeded with.*

.....

- (4) If the Commission has investigated a complaint and is of the opinion that the complaint has substance, it must act as conciliator in relation to the complaint and use its best endeavors to effect a settlement in relation to the complaint.*

.....

- (6) Whether or not it takes any of the actions referred to in subsection (2),(3) and (4), the Commission may –*

- (a) advise the parties of their respective rights, including, in relation to a complaint of contravention of the Bill of Rights, the complainant's right to bring proceedings in the High Court under section 41 of the Constitution;*
- (b) refer to the complaint and, if it considers appropriate, the result of the investigation to another competent authority;*
- (c) make recommendations to the competent authority, proposing amendments or reform of any laws, regulations or administrative provisions or practices which have created the difficulties or hardship encountered by the complainant or the aggrieved person;*
- (d) recommend to the relevant authority in respect of a person who in the opinion of the Commission has contravened human rights, either prosecution of the person or the taking of other action, and the authority must consider.*

"35 –(1) The functions of the Proceedings Commissioner include:

- (a) in relation to a complaint or an investigation of the Commission's own motion – deciding whether an application should be made for an order under section 40 and, if so, making the application;*
 - (b) in relation to a complaint resulting from a failure by a party to observe the terms of a settlement on a previous occasion – deciding whether to institute proceedings against the party and, if so, instituting the proceedings;*
 - (c) in relation to a complaint or investigation of the Commission's own motion, if it appears to the Proceedings Commissioner that a settlement has not been reached and that no action or further action by the Commission is likely to facilitate a settlement – deciding whether to institute proceedings against the person against whom the complaint was made or to whom the investigation related, and if so, instituting the proceedings.*
- (2) The Proceedings Commissioner must not institute proceedings against a person referred to in paragraph (b) or (c) of sub section (1) unless the Commissioneres has given the person an opportunity to be heard."*

"36 - (1) Civil proceedings in the High Court lie at the suit of the Proceedings Commissioner against a person referred to in paragraph (b) or (c) of section 35(1) for unfair discrimination or a contravention of the Bill of Rights."

A Ms Joti had, on 16 July 1999, made complaint to the Police concerning conduct of Police Officers. On 28 October 1999, she was informed that her complaints had been investigated and found to be without substance. On 31 March 2000, Ms Joti sought the assistance of the Human Rights Commission. The trial Judge recorded the following events as follows:

"The Human Rights Commission thereafter proceeded with investigation of the complaint pursuant to its powers under section 31 of the Human Rights Commission Act and which ultimately resulted in the initiation of these proceedings by the Proceedings Commissioner on 6th March 2002."

Misreading the provisions of s.35(1), the trial Judge concluded that the Proceedings Commissioner had no entitlement to institute the proceedings. His Lordship said:

"On plain reading of section 36(1) and section 35(1)(b) and (c), it is clear to this Court that Proceedings Commissioner suit on behalf an aggrieved individual "for unfair discrimination or a contravention of the Bill of Rights" is limited only to situations described under (b) and (c) of s.35(1) of the Act.

In situations such as it is in this case, where the complaint had been investigated and conciliation process instigated at the behest of the Commission (section 34(4), and where the Commission has advised the complainant that her individual rights had been contravened while informing of her right under the Constitution to bring proceedings, (s.34(3), the question is whether the Proceedings Commissioner can still proceed under section 36(1).

.....

"The complainant had been advised of her rights to bring a section 41 proceedings, after the conciliation process failed to produce any settlement. As a result, this Court believes that the matter can no longer belong to categories (b) or (c) of section 35 and for which the Proceedings Commissioner is authorized to bring an action on behalf of the complainant."

His Lordship's approach erred for s.35(1)(c) specifically empowers the Proceedings Commissioner to decide to initiate proceedings when, after investigation, it appears that a settlement has not been reached and that no further action is likely to facilitate a settlement.

The functions of the Proceedings Commissioner did not end simply because the Commission, after investigation, informed Ms Joti of the Commission's view that her individual rights had been contravened and of her right to take proceedings under the Human Rights provisions of the Constitution.

Counsel for the respondents concedes this point.

We consider that there is no relevant ambiguity in the provisions of the Human Rights Commission Act. However, if there were an ambiguity, we would give the statute a liberal and enabling interpretation. In Northern Regional Health Authority v. Human Rights Commission (1997) 4 HRNZ 37, Cartwright J said at 56-7:

"In interpreting human rights legislation the New Zealand Courts have resisted any attempt to limit their impact, noting that such legislation is to be "accorded a liberal and enabling interpretation" (NZ Van Lines Ltd. v. Proceedings Commissioner [1994] 2 ERNZ 140, 143; [1995] 1 NZLR 100, 103 per Smellie J) and that (Coburn v. Human Rights Commission [1994] 3 NZLR 323,333; (1994) 1 HRNZ 120, 137 per Thorp J): "The proper construction requires an appropriate regard for the substantial body of authority both in New Zealand and abroad, as to the special character of human rights legislation and the need to accord it a fair, large and liberal interpretation, rather than a literal or technical one."

It was unfortunate that the trial Judge took a restrictive view of the legislation. His Lordship did so without there being any application to dismiss the proceedings for want of standing and without any submissions on that point having been sought from the parties. In this session of the Court of Appeal, there have been two instances, of which this is one, where a Judge has decided a case on a ground not raised by or debated with the parties. In each case, the matter was wrongly decided. Such results can be avoided if care is taken to ensure that the rules of natural justice are complied with. If a Judge, having reserved his or her decision, concludes after careful consideration, that a dispute appears to fall for resolution on a ground not pleaded or argued, the proper course is to reconvene, advise the parties of the tentative views reached and provide an adequate opportunity for further submissions.

The position, is, therefore, that the Proceedings Commissioner had standing to initiate the proceedings which were before the trial Judge. The basis on which his Lordship dismissed the proceedings was unfounded.

In written submissions, counsel for the respondents has raised this issue:

"..... whether a Proceedings Commissioner has been appointed by the Chairperson in accordance with section 12(1) of the Act. Reference is made to the former Proceedings Commissioner Mr Graeme Everett Leung in Joti's sworn affidavit. No material has been submitted by the Appellant to suggest that a Proceedings Commissioner has been officially appointed and this may render the appellant's standing as questionable."

The issue was not raised before the trial Judge and, in this Court, there is neither material going to the issue nor a notice of contention raising it. It cannot be raised here.

In these circumstances, the orders of the Court will be:

1. Appeal allowed.
2. Orders below set aside.
3. In lieu thereof, it is ordered that the summons for dismissal be dismissed with costs which are fixed at \$750.
4. The respondents are to pay the appellant's costs of the appeal which are fixed at \$750.00.



Robert Smellie
Smellie, JA

J. Gary Davies
Davies, JA

Pennington
Penlington, JA

Solicitors:

Office of the Human Rights Commission, Suva for the Appellant
Office of the Attorney General, Suva for the First and Second Respondent