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

CIVIL APPEAL NO. ABU0030 OF 2004S
(High Court Civil Action No. HBC 0404 of 1995L)

BETWEEN:

SOUTH PACIFIC FERTILIZER LIMITED

Appellant

AND:

CBM SHIPPING CORPORATION LIMITED

First Respondent

AND: INTER-PORTS SHIPPING CORPORATION LIMITED

Second Respondent

Coram: Penlington, JA
Scott, JA
Wood, JA

Hearing: Wednesday, 3rd November 2004, Suva

Counsel: Mr. P. McDonnell for the Appellant
Mr. I. Razak for the Respondents

Date of Judgment: Thursday, 11th November 2004

JUDGMENT OF THE COURT

The Appellant commenced proceedings against the Respondents by writ issued on 22 December 1995.

The writ was endorsed with a claim for $12,272.90:

"being damages caused to the Plaintiffs' 300 tonnes of fertilizer on 25th day of December, 1994. The said damages were caused due to the negligence of the Respondents."

This form of generally endorsed writ is not a sufficient pleading (***Murray v. Stephenson*** (1887) 19 QBD 60) and therefore it must be followed by a statement of claim within 14 days of notice being given of the intention to defend (RHC 018 r2).

Notice of intention to defend was given on 8 February 1996. No statement of claim has ever been served.

On 15 August 2001 the Respondents sought an order that the action be struck out for ant of prosecution. Such orders are made in the inherent jurisdiction of the Court. The applicable principles have been considered by this Court (see especially ***Owen Clive Potter v. Turtle Airways*** FCA 49/92 and ***Merit Timber Products Ltd. v. Native Land Trust Board*** FCA 52/93).

The application was supported by an affidavit by Justin Smith and was opposed in an affidavit by Mohini Prasad.

On 26 April the High Court at Lautoka (Connors J.) ordered the action be struck out. The Appellant seeks to have that order reversed.

An order dismissing an action for want of prosecution is interlocutory (see ***Suresh Charan v. Shah*** (1995) 41 FLR 65 and RHC Order 59 r 1A of the 1991 White Book), therefore leave of the Court is required before it can be appealed (Court of Appeal Act – Cap. 12 - Section 12(2)(f).

Where the leave of the Court is required application for leave must first be made to the Court below (Rule 26(3)). The application has to be made within 21 days of the order to be appealed (Rule 16(a)). No application for leave to appeal against the High Court's order has been made to the High Court or to this Court.

Since no application for leave has been made it follows that no material has been filed in support of the application explaining why the appeal period was allowed to expire.

However, as was stated by the Privy Council in ***Ratnam v. Cumarasam*** [1964] 3 All ER 933 (cited with approval by this Court in ***Ist Deo Maharaj v. Burns Philip (SS) Co. Ltd.*** – ABU0051/94S:-

> ***"the rules of court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure is required to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."***

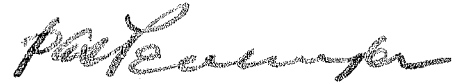
By the time the application came before the High Court just under 10 years had elapsed since the Appellant's goods were damaged. While it is understood that the damage occurred when a vessel owned by the first Respondent sank no sinking had ever in fact been pleaded as part of the Appellant's case. Although negligence was alleged in the indorsement upon the writ no particulars of the negligence have ever been provided. To this day the nature of the Appellant's claim is unknown. According to Justin Smith's affidavit the vessel's captain, engineer and senior crew have all left the Respondents' employment.

The limitation period for actions in tort is six years (Limitation Act – Cap – 35 section 4(1)(a)). This reflects recognition of the fact that the passage of many years before the presentation of a claim is likely severely to prejudice an intended defendant and may make it difficult or impossible for a fair trial of the claim to be held. In the present case, beyond filing a writ containing a bare allegation of negligence the Appellants have not advanced their case one iota.

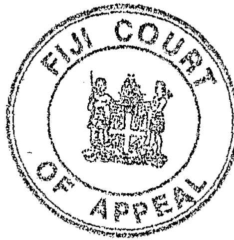
In his ruling allowing the respondents' application the Judge quoted remarks by Lord Woolf in ***Lownes v. Babcock Power Ltd***. TLR 18-2-98 emphasising the damage caused to the administration of justice by inordinate and inexcusable delay on the part of solicitors. We endorse those comments.

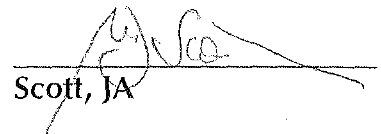
The decision to strike out for want of prosecution is discretionary. The presumption is against interfering with the decision reached (***Mace v. Murray*** 92 CLR 370; ***Kelton Investments v. CAA*** ABU0034/95). As already explained the Appellant has not sought leave to appeal against the decision impugned. But even if leave had been granted we should have had no hesitation in declining to interfere.

In the result the appeal must be dismissed. The Respondents will have their costs which we assess at $500.00.

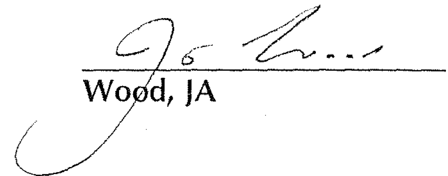


Penlington, JA





Scott, JA



Wood, JA

Solicitors:

Messrs. Cromptons, Suva for the Appellant
Messrs. Lateef & Lateef, Suva for the Respondents.

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