

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

Civil Appeal No. ABU 52 of 2006
(High Court Civil Action No. HBC 38 of 1999S)

BETWEEN:

THOMAS (FIJI) LIMITED
(in receivership)

AND

FREDERICK WIMBLEDON THOMAS

AND

SIMEAMATIVA KRUSE THOMAS

Appellants

AND:

BANK OF HAWAII

Respondent

Coram: Scott, JA
Wood, JA
McPherson, JA

Hearing: 14 November 2006

Counsel: N. Lajendra for the Appellants
I. Roche and Ms. J. Raniga for the Respondent

Date of Judgment: 24 November 2006

JUDGMENT OF THE COURT

INTRODUCTION

- [1] This is an appeal from an order of the High Court striking out the Appellant's action for want of prosecution. The appeal once again raises the question whether delay alone is a sufficient ground for exercising the jurisdiction to strike out.

BACKGROUND

- [2] In 1997 the first Appellant agreed to purchase a retail grocery business at Tamavua known as Joes Farm Produce for \$500,000. The Respondent Bank agreed to finance the purchase subject to certain conditions; these included the provision of securities including first registered mortgages over properties owned by the second and third Appellants. Also required was a \$250,000 stand-by letter of credit. This was to be supplied on behalf of the vendor by his own bank.
- [3] In early 1998 settlement took place and the Bank disbursed the purchase money to the vendor. The Appellants moved into possession of the property. Unfortunately, when disbursement took place the Bank had still not received the letter of credit.
- [4] In March 1998 the first Appellant approached the Bank seeking additional finance. The Bank advised the Appellants that it could not consider their request until it had received the letter of credit. In May the Bank advised the Appellants that it took the view that the responsibility for ensuring the provision of the letter of credit lay with the Appellants; its non-provision was considered by the Bank to amount to a breach of the banking arrangement between them. The Bank advised the Appellants

that if the letter was not provided by 25 May it would consider itself at liberty to demand repayment of the entire debt due.

- [5] In September 1998 the Bank was notified by the vendor's bank that the letter of credit would not now be forthcoming owing to the vendor's failure to comply with certain conditions upon which the provision of the letter of credit was dependent.
- [6] In November 1998 the Bank demanded repayment. The Appellants were unable to meet the demand. The Bank then appointed a receiver and manager of the first Appellant.
- [7] In January 1999 the Bank, as mortgagee, advertised the sale of the second and third Appellants' properties. In due course the Appellants lost the grocery business and both properties were sold.

PROCEEDINGS IN THE HIGH COURT

- [8] On 27 January 1999 the Appellants commenced proceedings against the Bank in the High Court. They alleged breach of contract and negligence. They also alleged unconscionable conduct contrary to the Fair Trading Decree 25/92. Put shortly, their case was that the Bank had erred in disbursing the purchase monies to the vendor before first receiving the letter of credit which the vendor had agreed to provide. Had the Bank not made this mistake there would have been no ground for demanding repayment and, ultimately, bringing about the demise of the grocery business and the loss of the Appellants' homes.

[9] During 1999, 2000 and 2001 the action made relatively slow progress. Pleadings and amended pleadings were filed. Discovery took place. In August 2002 the first Plaintiff was wound up. In November 2003 a Notice of Intention to Proceed was issued. In July 2005 however, the High Court, apparently acting administratively, struck the action out.

[10] In August 2005 the Appellants sought re-instatement of their action. In November 2005 the application for re-instatement was granted subject to compliance with certain conditions. Apparently, these were that:

- (a) the Appellants file their reply to the amended Statement of Defence by 29 November 2005;
- (b) discovery be completed by 20 December 2005;
- (c) a pre-trial conference be held by 3p.m. on 27 January 2006.

[11] At this point we interpose the view that both the administrative striking out of an action, without beforehand affording the parties an opportunity to make representations, and the re-instatement of the action upon application, give rise to concern. There does not appear to be provision for either step in the High Court Rules. Mr. Lajendra suggested that the inherent jurisdiction of the Court might be invoked. We doubt the correctness of that submission.

[12] On 22 December 2005 the Respondent issued a summons seeking to have the action struck out for want of prosecution. The grounds advanced were that the Appellants had failed to

comply with conditions (a) and (b) set out in paragraph [10] above.

[13] On 17 May 2006 the High Court delivered its ruling. After reviewing the history of the litigation, the judge reached the conclusion that there had been inordinate delay by the Appellants before the action was first struck out in July 2005. After reinstatement in November 2005 there had been failure to comply with the conditions of reinstatement:

“In the circumstances I must strike out the action for want of prosecution as being an abuse of process of the court, albeit with some reluctance given what the second and third Appellants say they have lost and, apparently, how they have been served by their lawyers. In coming to this conclusion I have not made any decision as to whether the passage of time has prejudiced the [Respondents] case concerning the availability and reliability of recollection of these witnesses.”

GROUNDS OF APPEAL

[14] Although four grounds of appeal were filed and a summons to strike out the appeal was also filed by the Respondent the parties agreed that only one matter would be placed before us for determination: is delay alone capable of providing a sufficient ground for striking out an action?

CONSIDERATION OF THE ISSUE

[15] In July 2006 this Court, in Bhawis Pratap v. Christian Mission Fellowship (ABU 93/05) considered almost exactly the same question. While recognizing important overseas developments in procedural law and the generally growing awareness of the detrimental consequences of delay both on litigants and the administration of justice, the court re-affirmed that in absence of failure to comply with pre-emptory orders, delay of itself, without it being shown that the delay was inexcusable and seriously prejudicial to the Defendants, was insufficient to warrant the striking out of an action.

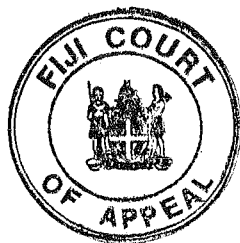
[16] It maybe helpful to add a rider. During the course of his careful and comprehensive ruling the judge placed considerable emphasis on the judgment of the House of Lords in Grovit and Ors v. Doctor [1997] 2 All ER 417. That was an important decision and the judge was perfectly right to take it into account. It should however be noted that Felix Grovit's action was struck out not because the accepted tests for striking out established in Birkett v. James [1977] 2 All ER 801; [1978] AC 297 had been satisfied, but because the court found that he had commenced and continued the proceedings without any intention of bringing them to a conclusion. In those circumstances the court was entitled to strike out the action as being an abuse of the process of the court. The relevance of the delay was the evidence that it furnished of the Plaintiff's intention to abuse the process of the court. It did not, therefore, without that intention also being established, provide a ground for striking out. In the present case there was no suggestion that the Appellants had

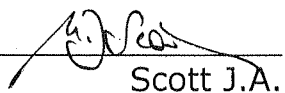
deliberately commenced their action without any intention of bringing it to a conclusion.

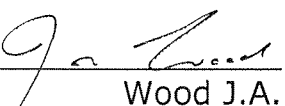
[17] In the light of this court's decision in Bhawis Pratap Mr. Roche invited us to remit the action to the High Court for consideration to be given to the questions of prejudice and excuse arising from the delays that have undoubtedly occurred. Mr. Lajendra did not oppose that suggestion.


RESULT

1. Appeal allowed.
2. Ruling of the High Court dated 17 May 2006 set aside.
3. Action and application to strike out remitted to the High Court for re-hearing by another judge.
4. No order as to costs.




Scott J.A.


Wood J.A.


McPherson J.A.

Solicitors

R. Patel & Co, for the Appellant

Howards Lawyers, for the Respondent