PARTIES: JABILUKA ABORIGINAL LAND TRUST
v
STILES

TITLE OF COURT: In the Supreme Court of the Northern Territory of Australia

JURISDICTION: Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction

FILE №: 129 and 137 of 1993

DELIVERED: Delivered at Darwin 3 February 1994

HEARING DATES: Heard at Darwin 12 October 1993 and 21 January 1994

JUDGMENT OF: Mildren J

CATCHWORDS:

APPEAL - Practice and procedure Local Court - test to be applied in determining if Magistrate's Order is interlocutory or final.

Appeal - application to set aside Orders - Local Court Rules and procedure - failure to obtain extensions of time for service - no power in Local Court to recall or set aside Interlocutory Order - can set aside Final Order - leave to appeal against Interlocutory Order - power of Local Court to set aside its own Order where there is failure to comply with the Rules - application to amend grounds of appeal to reaise ground not argued in Lower Court - principles discussed.

STATUTES

Local Court Rules: r2.01(b); r2.03; r4.02; r4.06; r5.06(1)(c); r5.15; r9.01; r9.09; r15(2); r15(3); r20.04; r20.06(1); r28.04(1); 0.25.

Supreme Court Rules: r46.28; r84.24; r83.22.
Local Courts Act: ss19(3); s19(1)
Limitations Act: ss44(1); 4(1)
Carr -v- Finance Corporation of Australia Ltd (No 1) (1960-1) 147 CLR 246, applied.
Licul -v- Corney (1976) 50 ALJR 439; (1975-6) 8 ALR 437, followed.
Water Board -v- Moustakas (1987-8) 77 ALR 193, discussed.
Nationwide News Pty Ltd -v- Bradshaw (1986) 41 NTR, considered.

REPRESENTATION:

Counsel
Appellant: JM Kilby
Respondent: N Henwood

Solicitors
Appellant: Brett Midena
Respondent: Cridlands

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Nºs 129 and 137 of 1993

IN THE MATTER of an appeal under the *Local Court Act* 1989

BETWEEN:

JABILUKA ABORIGINAL LAND TRUST

Appellant

AND:

KAREN STILES

Respondent

CORAM: Mildren J

REASONS FOR JUDGMENT
(Delivered 3 February 1994)

The appellant in matter Nº 129 of 1993 has sought to appeal from orders of Mr Hannan SM sitting in the Local Court made on 6 July 1993 that the proceedings brought by the appellant against the respondent be set aside with costs. The appellant has also in matter Nº 137 of 1993 sought leave to appeal against further orders of Mr Hannan SM made on 29 July 1993 whereby Mr Hannan declined to set aside the orders made on 6 July 1993, and ordered the appellant to pay the respondent's costs.

The appellant commenced its action against the respondent and her husband, Stephen James Stiles, in the Local Court by filing in the court a Statement of Claim on 1 May 1991 (see Rule 4.02 of the *Local Court Rules*). The appellant experienced difficulties in serving the defendants. The respondent's husband was served on 26 February 1992. He filed a defence personally on 5 March 1992. The respondent was served personally on 27 June 1992. Rule 4.06 of the *Local Court Rules* provides that a Statement of Claim must be served within a year after the day it was filed; an application to extend the

time for service may be made from time to time; but no such order can be made after a Statement of Claim has ceased to be valid. This draconian rule may be contrasted with *Supreme Court Rule* 5.12(3) which permits this Court to extend time for the service of originating process at any time. The consequence of the appellant's failure to obtain an extension within time is that, if the appellant wished to proceed against the respondent, the appellant would have been required to issue a fresh Statement of Claim in the court.

The *Local Court Rules* provide that a person wishing to defend proceedings must "give" a Notice of Defence (by serving it upon the plaintiff) within twenty-eight days: see Rule 9.01. Alternatively, a defendant may "file" (not "give") a conditional notice of defence under R9.09 if the defendant denies the court's jurisdiction to hear and determine the proceedings. On 7 December 1992 at a 'preliminary conference' (presumably this was a "pre-hearing" conference under O.25 of the *Local Court Rules*) an order was made on the application of a solicitor for the respondent granting leave for the respondent to "file" a notice of defence by 21 December 1992. At a further 'preliminary conference' held on 18 January 1993 the respondent again appeared by her solicitor and by consent an order was made granting her leave to "file" a notice of defence and counterclaim within fourteen days. The respondent' unconditional notice of defence and counterclaim was filed in the court on 3 February 1993.

On 15 February 1993 consent orders were made by the solicitors for the parties for mutual discovery and inspection of documents. The appellant filed its affidavit of documents on 1 March 1993. On 15 March 1993 the parties obtained orders at a prehearing conference at which the trial was listed for hearing in August 1993, the appellant was given leave to proceed against the respondent's husband as if no defence had been filed, and leave was given to the respondent to administer interrogatories to the plaintiff. On 19 May 1993 the respondent filed her list of documents in the court. On 2 June 1993 the appellant filed its answers to the respondent's interrogatories and a notice of defence to the respondent's

counterclaim. On 15 June 1993 the appellant was granted leave to administer interrogatories to the respondent, and the respondent was ordered to make further discovery of documents.

On 29 June 1993 the respondent applied for leave to amend her Notice of Defence and for leave to administer further interrogatories. Before that application was heard the respondent applied to the court by summons filed on 2 July 1993 for an order "that in relation to the Second Named Defendant these proceedings be set aside" on the basis that the Statement of Claim was not served within a year as required by R4.06. This application was supported by an affidavit sworn by the respondent's solicitor that he became aware for the first time on 30 June 1993 that the Statement of Claim was invalid; that on 2 July 1993 he told the respondent that the Statement of Claim was invalid and she told him that she had not previously been aware of this; and that "no fresh step has been taken in the proceedings subsequent to my becoming aware on 30 June 1993" that the Statement of Claim was invalid.

This application was heard by Mr Hannan SM on 5 July 1993. There was no appearance for the appellant. The respondent's solicitor informed the court that the appellant had been served, but no affidavit of service was filed (see R5.15). The respondent's application was made under R2.03 which provides as follows:

> "2.03 APPLICATION TO SET ASIDE FOR IRREGULARITY
>
> The Court shall not set aside a proceeding or a step taken or a document or order in a proceeding on the ground of a failure to comply with these Rules on the application of a party unless the application is made -
>
> (a) within a reasonable time after the applicant becomes aware of the failure; and
>
> (b) before the applicant has taken a fresh step (except for filing a defence) after becoming aware of the failure."

His Worship, after hearing submissions from the respondent's solicitor, adjourned to consider the application over night, and announced his decision to grant the application the following morning. There is a question as to what effect that order had; i.e. whether only the Statement of Claim or the whole proceedings including the counterclaim were set aside. This is the order the subject of the appeal in matter 129 of 1993.

On 22 July 1993 the appellant filed an application to set aside the orders made on 6 July 1993. This application was heard by Mr McGregor SM on 27 July 1993. The appellant's solicitor pointed out that there was no affidavit of service of the summons of 2 July, and that the summons was not in fact received until the day after the 5th July when the application was heard. The solicitor for the respondent submitted that the court had no jurisdiction to hear the application and the appellant's only remedy was to appeal to the Supreme Court. Mr McGregor SM refused to hear the application and adjourned it, as a matter of courtesy, to be heard by Mr Hannan SM. When the appellant's application was heard before Mr Hannan SM, the solicitor for the respondent again submitted that the magistrate had no jurisdiction to set aside his own order, and the only remedy was to appeal to this Court. The lack of any proof of service of the application was not specifically drawn to the attention of Mr Hannan SM. His Worship held that his order of 6 July 1992 was a final order, that he was *functus officio*, and had no jurisdiction to set his own order aside. Accordingly the appellant's application was dismissed with costs. That order is the subject of the application for leave to appeal.

I should say that no attempt was apparently made by the solicitor for the respondent to telephone the appellant's solicitor to give any warning of the application to set aside the Statement of Claim; and that the appellant's solicitor has sworn that he was absent overseas on leave at the relevant time. If this is so - and I make no finding that this is so - I am surprised that a practitioner would make the kind of

application which was made in this case without the courtesy of contacting the solicitor for the appellant or some other solicitor having temporary conduct of the matter personally, given the minimal notice that formal service of the documents in this case involved. I am even more surprised that the respondent's solicitor would apparently choose to proceed with this application without any affidavit of service of his summons and affidavit, and apparently not draw attention to the court that this has not been attended to; and that the magistrate would have entertained that application in the absence of proof of proper service. Further, if a solicitor on the record does not attend an interlocutory application, the usual courtesy is for the solicitor who does appear to ask for the matter to be stood down temporarily to see if he can locate the other party's solicitor. I do not know whether this was done or not, but there is nothing in the transcript of 5 July 1993 to indicate that this course was adopted. I was told by Mr Henwood, counsel for the respondent, that it is not the practice for practitioners practising in the Local Court to observe these practices, and that the Local Court generally makes orders against parties who do not attend by their solicitor without enquiry. If this is so, this is to be deplored. Solicitors should be aware of their responsibilities of courtesy and fairness to each other and of their duty of frankness to the court, and not to seek to take advantage of the failure of a solicitor to appear on the hearing of a summons without good cause. It not infrequently occurs in busy professional practices that interlocutory summonses which are often served on minimal notice are overlooked or simply not drawn to the attention of the solicitor handling the matter for reasons beyond his control. No point was taken before me by Mr Kilby, who appeared for the appellant, about any of these matters, and as they have not been fully argued before me, I will not therefore make any formal findings about them as it possible that the facts may be otherwise than they appear to be, and the respondent's solicitor has not been given any opportunity to be heard. Nevertheless, I have expressed my concerns, and I trust that any such practices as have allegedly developed in the Local Court will cease forthwith.

Could the magistrate set aside his order of 6 July 1992?

The appellant argued the leave application first (№ 137 of 1993) and submitted that Mr Hannan SM was incorrect in concluding that he had no jurisdiction to set aside his earlier order. The respondent argued that Mr Hannan SM was correct, that Mr Hannan SM had no power to set aside his own order and that the only remedy was to seek leave to appeal to this Court from the order made on 6 July 1993; that (notwithstanding the respondent's submissions to Mr Hannan SM in the Local Court) that order was interlocutory and not final; that the appellant did not apply for leave to appeal within fourteen days as required by s19(3) of the *Local Courts Act* - instead it purported to appeal as of right under s19(1) on the basis that the order was a final order, and filed a notice of appeal on 29 July 1993; there is no power in this Court to treat the notice of appeal as a leave application or to extend time to the appellant to file an application for leave; hence, so the argument went, the appellant's application for leave and the appeal itself should both be dismissed. I should add that the appellant's counsel, Mr Kilby also agreed that the order of Mr Hannan SM of 6 July 1993 was interlocutory and not final; it was his submission that I ought therefore dismiss the appeal (№ 129 of 1993) but grant leave to appeal in matter 137 of 1993, allow the appeal, and remit the matter of the appellant's application of 22 July 1993 back to Mr Hannan SM for rehearing.

I consider that both counsel are correct in submitting that Mr Hannan's order of 6 July 1993 was interlocutory and not final. The test to be applied is whether or not the judgment appealed from finally determined the rights of the parties: *Carr v Finance Corporation of Australia Ltd (№ 1)* (1980-1) 147 CLR 246 at 248; *Licul v Corney* (1976) 50 ALJR 439 at 444; (1975-6) 8 ALR 437 at 446. It is not enough that the practical effect of the judgment is to prevent the appellant from pursuing its rights. Assuming that the action commenced could not be revived, the appellant could still commence fresh proceedings even if they were out of time. Unlike some other jurisdictions, the expiration of a time limit in the Northern

Territory bars the remedy, but not the cause of action. Whether or not the expiration of time will prevent a plaintiff from recovery depends upon the defendant pleading the statutory bar and the plaintiff being unable to establish grounds for an extension of time pursuant to s44 of the *Limitation Act*. However, for reasons which will become apparent below, I am satisfied that the order made could be set aside. In those circumstances, the actual decision in *Licul v Corney, supra,* is conclusive on this point. That being so, the appeal as of right in matter № 129 of 1993 is incompetent and must be dismissed. It is unnecessary to rule upon Mr Henwood's submission that the appeal having been lodged later than fourteen days from the date of his Worship's judgment cannot now be treated as an application for leave to appeal. Although s19 of the *Local Court Act* does not confer a specific power in this Court to extend the time limited by s19 of the *Local Court Act* within which to appeal by leave from an interlocutory order, it may be argued that such a power exists by virtue of s44(1) of the *Limitation Act*, having regard to the width of the definition of "action" as defined by s4(1) of that Act. However, that point was not argued, and it is unnecessary to consider it further.

As to the power of Mr Hannan SM to set aside the order he made on 6 July 1993, I accept that, generally speaking, a magistrate sitting in the Local Court does not have power to recall or set aside an interlocutory order once it is made and entered. Except in limited circumstances neither the Local Court nor the *Local Court Rules* envisage such a procedure. Section 20 of the *Local Court Act* enables the Local Court to set aside a final order made by the court against a person who did not appear in the proceeding, but neither the Act nor the *Rules* give a similar power in the case of a party to a proceeding who fails to attend at the hearing of an interlocutory application. This may be regrettable, and both the Act and the *Rules* are open to the criticism of being unduly inflexible and oppressive on this as well as other issues with which the *Rules* deal. The facts of this case demonstrate amply how this may be so. It is unusual, to say

the least, for a court not to have a power to set aside any interlocutory order obtained in the absence of a party: cf *Supreme Court Rules* R46.08. Of course, the party affected is not entirely without a remedy. A right to apply for leave to appeal to this Court is still open to it - at least if the application is made within fourteen days after the order was made - and possibly later than fourteen days if s44(1) of the *Limitation Act* applies. But it is not difficult to envisage circumstances under which an order is made in the absence of a party, minimum notice of the application having been given, and yet the party affected is not even informed of the making of the order until after the fourteen day period has expired. If the party affected could not obtain relief from such an order, the opportunity for tactics deliberately designed to take improper advantage of the Act and *Rules* arises. (I hasten to add that I do not infer that such tactics were deliberately employed here). It is for this reason that magistrates should be particularly astute to ensure that proper notice of such an application has been given, i.e. that the application has been served in accordance with the *Rules*, and even then to consider carefully whether the interests of justice are best served by proceeding without further enquiry as to why the party concerned has not appeared. For the same reason, solicitors ought to be astute to ensure that every opportunity is given to the party concerned to attend, and that orders are sought in the absence of a party only as a last resort or where it is plain that the orders will not be opposed. So much is essential to even-handed justice, the avoidance of unnecessary costs, unnecessary appeals to this Court, and unnecessary delay in the disposition of litigation.

In this case it appears from the Local Court file that the order of 6 July 1993 was taken out and entered in accordance with R28.04(1) on the same day. It also appears that the appellant's solicitor's first knowledge of the order was on 21 July 1993, i.e. one day after the time limited for any application for leave to appeal had already lapsed.

It was submitted by Mr Henwood that in these circumstances, the learned magistrate had no power to set aside his own order, that his decision made on 29 July 1993 was correct, and therefore that leave to appeal against his order made 29 July 1993 ought to be refused.

It was only after reserving my judgment in this matter on 12 October 1993 that it came to my attention that there was never any evidence of service of the application and supporting affidavit of 2 July 1993 which were the foundation for the orders made by Mr Hannan SM on 6 July 1993. In those circumstances it seemed to me to be arguable that Mr Hannan SM did have power to set aside his orders on 29 July 1993, and I invited further submissions from the parties. This caused some unavoidable delay in disposing of these appeals. Ultimately I heard further argument on 21 January 1994, at which time the applicant sought leave to rely upon a further affidavit sworn 17 December 1993 setting out further grounds upon which his application for leave to appeal could be supported, notwithstanding that that affidavit was not filed within the time limited by R83.24 of the *Supreme Court Rules*. This affidavit was technically necessary in order to found the argument upon which the applicant now sought to rely: see R83.22.

Mr Henwood submitted that leave to rely upon that affidavit could not and in any event ought not now be given. As to the first point, the jurisdiction to grant leave to rely upon an affidavit filed out of time is conferred by R82.02 and R2.04 of the *Supreme Court Rules*. As to the second point, Mr Henwood submitted that, the point which Mr Kilby sought to now argue not having been raised before Mr Hannan SM, I ought not now entertain it, and he relied upon the decision of the High Court in *Water Board v Moustakas* (1987-8) 77 ALR 193. However, as that authority shows, where all the facts have been established beyond controversy or where the point is one of construction or of law, a court of appeal may find it expedient and in the interests of justice to entertain it. In this case, there was no dispute as to the facts. The

respondent had not filed any affidavit of service of the summons or supporting affidavit, and the only 'evidence' of service before Mr Hannan SM was the respondent's solicitor's statement from the bar table that the applicant had been served. Mr Henwood submitted that the applicant could make a further application before Mr Hannan SM on this ground, and that it was therefore not expedient for this Court to determine the point, but in my view, the point being a short one, depending upon the construction of the *Local Court Rules*, it was more expedient for this Court to resolve it. As to the interests of justice, in my view they were all on the side of the applicant. Accordingly I granted Mr Kilby's application.

Mr Kilby submitted that R20.06(1) of the *Local Court Rules* permitted Mr Hannan SM to proceed in the applicant's absence only if satisfied that the application had been duly served. He submitted that Mr Hannan SM could not have been so satisfied in the absence of admissible evidence as to service. Rule 20.06(1) provides:

> "20.06 ABSENCE OF PARTY TO APPLICATION
>
> (1) If a person to whom an application is addressed fails to attend, the Court may hear the application if satisfied that the application was duly served."

Rules 5.15(2) and (3) envisaged proof of service by affidavit, but no doubt service may be also proved by calling *viva voce* evidence.

Rule 2.01(b) permits the Local Court to set aside an order in a proceeding where there has been a failure to comply with the *Rules*. It was submitted that in the absence of admissible evidence as to service of the application and the affidavit in support, there had been a non-compliance with R20.06. Mr Henwood submitted that what happened did not involve any non-compliance with the *Local Court Rules*, as the learned magistrate must have impliedly been satisfied that the application had been duly served in view of the fact that he made the order. Whilst he conceded that in the absence of

admissible evidence as to service the court could not hear the application, the mistake made was one of the general law relating to what is admissible evidence, not a matter of non-compliance with R20.06(1). I do not accept this submission. The purpose of R20.06(1) is to confer a discretion upon the court to hear an application in the absence of a party if there is admissible evidence of proper service. There being no such evidence, R20.06(1) was not complied with, and accordingly in my opinion Mr Hannan SM did have power to set aside his own order of 6 July 1993.

Mr Henwood further submitted that in any event no injustice was caused because the summons and affidavit was in fact served in time. In support of this argument, Mr Henwood referred me to the observations of O'Leary CJ in *Nationwide News Pty Ltd v Bradshaw* (1986) 41 NTR 1 at 7-8 where his Honour discussed the principles upon which leave to appeal against interlocutory orders are usually considered. It is not contested that the application and supporting affidavit were in fact served by fax at about 1.42 pm on Friday 2 July 1993. Rule 20.04 required service "within a reasonable time before the day for hearing named in the application, and in no case later than 2.00 pm on the day before the hearing, or where the office of the court was closed on the day before the hearing, not later than 2.00 on the day the office was last open." Service by fax upon a solicitor is permitted by R5.06(1)(e). However, it is very much open to question whether service in this case was within a reasonable time before the day of the hearing, bearing in mind that it was served eighteen minutes before the minimum time fixed by the *Rules*. That is a question which ought to have been determined and may yet still have to be determined by the Local Court. Be that as it may, I find it difficult to see how no injustice was caused even if the summons was technically served in time. The application proceeded without hearing the applicant to this appeal, and on the face of it, it appears that the applicant has a strong argument - I put it not higher than that, as this will be a question for the Local Court - that the order ought not to have been made and should be set aside.

Accordingly, the appeal in matter № 129 of 1993 is dismissed. In matter № 137 of 1993 leave to appeal is granted, the appeal is allowed, the orders of Mr Hannan SM of 29 July 1993 are set aside, and the matter of the applicant's application of 29 July 1993 to set aside the orders made on 6 July 1993 is remitted to the Local Court for rehearing. I will hear the parties on the question of costs.