Supreme Court Notes

by Anita Del Medico

APPEAL - Local Court - Whether order setting aside proceedings interlocutory or final - whether rights of parties finally determined by such order.

MAGISTRATES - Local Court - whether empowered to recall or set aside an interlocutory order - effect of *Local Court Rules* where party fails to appear - requirement of "admissible evidence" as to service - whether service proper and reasonable and no injustice caused - *Local Court Rules* rr 20.06 and 2.01 (b).

APPEAL - Leave to appeal - leave to rely on further affidavit evidence - grounds to be established - whether should be remitted to Local Court - *Supreme Court Rules (NT)* rr 82.02 and 2.04.

Jabiluka Aboriginal Land Trust -v- Stiles

3.02.94 Mildren J

The appellant ("A") sought to appeal from orders made by Mr Hannan SM on 6/7/93 that the proceedings brought by A against the respondent ("R"), be set aside with costs.

A also sought leave to appeal against further orders of Mr Hannan SM made on 29/7/93, whereby the learned Magistrate declined to set aside the orders made on 6/7/93, and ordered A to pay R's costs.

A had commenced an action against R and another party by filing a Statement of Claim in the Local Court on 1/5/91. R was not served until 27/6/92. 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; although an application to extend the time for service may be made from to time, no such order can be made after a statement of claim has ceased to be valid.

(Contrast *Supreme Court Rules* r. 5.12(3).) A Notice of Defence and Counterclaim were filed by R. Mutual discovery and inspection of documents occurred; a trial date was set for August 1993. Interrogatories were served by R and Answers and a Notice of Defence to Counterclaim were filed by A. A was granted leave to administer Interrogatories to R and R was ordered to make further discovery of documents. On 29/6/93, R applied for leave - to amend the Notice of Defence and administer further Interrogatories. Before this application was heard however, R applied to the Court by Summons filed 2/7/93 for an order that in relation to R (the Second Named Defendent in the proceedings), these proceedings be set aside on the basis that r 4.06 had not been complied with. The affidavit in support of the application stated: that R's solicitor had become aware for the first time on 30/6/93 that the Statement of Claim was invalid; that R was advised of this on 2/7/93 and instructed that she had not previously been aware of this; and that "no fresh step" in the proceedings had been taken since 30/6/93 (r 2.03).

When the application came before Mr Hannan SM on 5/7/93, there was no appearance for A. R's solicitor informed the Court that A had been served, but no affidavit of service was filed (see r. 5.15). The learned Magistrate granted the application on 6/7/93. [It was later contended by A that the Summons was not received until 6/7/93 and by R that facsimile service was complied with at 1.42pm on 2/7/93.] A sought to appeal from this decision to the Supreme Court.

On 22/7/93, A filed an application in the Local Court to set aside the orders made by Mr Hannan SM on 6/7/93. Once remitted to him his Worship ruled on 29/7/93 that the application be dismissed with costs for the following reasons: the order of 6/7/93 was a final order; he was functus officio and he had no jurisdiction to set his own order aside. (The lack of any proof of service by R of the Summons and affidavit of 2/7/93 was not specifically drawn to his Worship's attention nor properly argued before him.) It was in relation to this ruling of 29/7/93 that A sought leave to appeal to the SupremeCourt.

HELD, dismissing the first appeal matter, and in relation to the leave application, granting leave to appeal, allowing the appeal, setting aside the orders of the learned Magistrate of 29/7/93 and remitting to the Local Court for rehearing the matter of A's application of 29/7/93 to set aside the orders made on 6/7/93:

(1) Both Counsel were correct in submitting that the learned Magistrate's order of 6/7/93 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. 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, A could still commence fresh proceedings even if they were out of time. Unlike some other jurisdictions, the expiration of a time limit in the NT 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 defendent pleading the statutory bar and the plaintiff being unable to establish grounds for an extension of time pursuant to S44 of the *Limitation Act.* For these reasons, the first appeal matter is incompetent and must be dismissed.
Carr -v- Finance Corporation of Australia Ltd (No1) (1980 - 1) 147 CLR 246 @ 248;
Licul -v- Corney (1976) 50 ALJR439 @ 444; (1975 - 6) 8 ALR 437 @ 446, applied.

(2) Generally speaking, a Magistrate sitting in the Local Court does not have power to recall nor 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

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and oppressive on this as well as other issues with which the Rules deal: the facts of this case demonstrate how this is so. It is unusual for a court not to have a power to set aside any interloctory order obtained in the absence of a party: see *Supreme Court Rules* r46.08. Nevertheless, the party affected still has a right to apply for leave to the Supreme Court, so long as the application is made within 14 days after the order was made, and possibly longer than 14 days if S44(i) of the *Limitation Act* applies. However, it would not be difficult to envisage a situation where the party affected is not informed of the order until after the 14 days have 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 rules arises. "It is for this reason that magistrates should be particularly astute to ensure that proper notice of such an application has been given, ie. 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. 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."

[In this case, A's first knowledge of the order of 6/7/93 was on 21/7/93 - one day after the limitation period. That there was no evidence of service of the application and supporting affidavit of 2/7/93, "which were the foundation for the orders made by Mr Hannan SM as 6 July 1993", did not come to his Honour's attention until judgment was reserved.]

(3) In these circumstances, it is arguable that the learned Magistrate did in fact have the power to set aside his orders of 29/7/93. Leave to rely upon a further affidavit, setting out further grounds upon which application for leave to appeal, granted to A (rr. 82.02 & 2.04 *Supreme Court Rules*). Although the issue of service had not been properly raised before Mr Hannan SM, "...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...". There was here, no dispute as to the facts: R had never filed an affidavit of service and the only "evidence" before Mr Hannan SM on 5/7/93, were R's submissions from the bar table that A had been served. The point being a short one, depending upon the construction of the *Local Court Rules*, it was more expedient for this court to deal with it.

Water Board -v- Moustakas (1987 - 8) 77 ALR 193, applied.

[It was submitted by A that r 20.06 (1) of the *Local Court Rules* permitted the learned magistrate to proceed in A's absence on 6/7/93 only if satisfied that the application had been duly served. Mr Hannan SM could not have been so satisfied in the absence of admissible evidence as to service. He was empowered by r 2.01 (b) to set aside the order of 6/7/93 on 29/7/93 as there had been a failure by R to comply with the Rules.]

(4) The purpose of r 20.06 (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 here, r 20.06 (1) was not complied with and accordingly the learned Magistrate did have the power, on 29/7/93, to set aside his own order of 6/7/93. Although it was conceded that service by facsimile had occurred at 1.42pm on 2/7/93, it was very much open to question whether service in this case was within a reasonable time before the day of the hearing, it being served only 18 minutes before the minimum time fixed by the Rules (rr 20.04 and 5.06 (1) (e)). That is a question which ought to have been determined and may yet still have to be determined by the Local Court. It is difficult to see how no injustice was caused, even if the summons was technically served in time.

Observations by Mildren J as to the conduct of the proceedings in the Local Court on 6/7/93, and in general:

Having noted that it appeared that no attempt had been made by R's solicitor to telephone A's solicitor to give any warning of the application to set aside the proceedings, his Honour said (@ pp 4-5): "... **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.**"

His Honour expressed surprise that R's solicitor should have proceeded on 6/7/93 without any affidavit of service and that this was not specifically drawn to the court's attention; and furthermore, that the learned Magistrate had proceeded in the absence of such proof. "... **Further, if a solicitor on the record does not attend an interloctory application, the usual courtesy is for the solicitor who does appear to ask the matter to be stood down temporarily to see if he can locate the other party's solicitor**..." Having been advised by R's solicitor that this is not indeed the usual practice in the Local Court, and that the Local Court generally makes orders against parties who do not attend by their solicitor, without enquiry, his Honour said: "... **If this is so, this is to be deplored. Solicitors should be aware of their responsibilities of courtesy of 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... I have expressed my concerns, and I trust that any such practices as have allegedly developed in the Local Court will cease forthwith**..."

Appeal and application for leave to appeal, from the Local Court.
JM Kilby instructed by Brett Midena, for the appellant.
N Henwood instructed by Cridlands, for the respondent.