



- (a) if the writ has become invalid under Order 6 rule 4(1); or
- (b) the case has not been set down for trial within two years of service of the writ; or
- (c) the action has been adjourned sine die and no step has been taken in the action within two years from the date when it was so adjourned.
- (4) No action shall be struck out under this rule unless the parties have been given not less than 28 days notice of the Court's intention to do so.

**Background**

- [3] This action was commenced on 22 August 2016 against the defendant and other parties (since removed). The writ was served on the defendant on 23 August 2016. The action has not been set down for hearing.
- [4] There is no doubt that more than two years have elapsed since service of the writ. On the face of it O. 8 rule 8(3)(b) is engaged.
- [5] The case has not been set down, and has in fact been stayed since 14 July 2017, because the plaintiffs have failed to provide security for costs pursuant to a ruling of the Court of 22 June 2017 (the Order). The plaintiffs have challenged the Order in this Court and in the Court of Appeal. They have been unsuccessful.
- [6] Apart from this application, no step has been taken by the parties since the Court of Appeal issued a ruling on 7 September 2018 dismissing the plaintiffs' application for leave to appeal from my refusal to set aside the Order.

**The plaintiffs' opposition**

- [7] The application to strike out is opposed by the plaintiffs. Mr. Strauss has filed two affidavits in which he says that the plaintiffs wish to proceed with the claim

but are not able to provide security for costs. No time frame is given for when the plaintiffs might be able to do so.

- [8] Mr. Strauss raises matters which go to the merits of the claim including, *inter alia*, allegations that the defendant unlawfully sold the plaintiffs' private assets and failed to provide inventories of items sold. He also alleges that the defendant interfered with the inspection of documents process ordered by the Court and that she has misled the Court.
- [9] Mr. Corbett argued that the application is defective as it does not comply with the requirements of O. 13 rules 1 and 2, which deal with the form and content of applications to the Court. I should point out that the application was not filed by Mr. Edwards. He appeared for the defendant at short notice. Any criticisms of the application are not directed at him
- [10] Mr. Corbett submits that O. 8 rule 8(3) can, according to its terms, only be invoked by the Court 'of its own motion' and not on the application of the defendant.
- [11] Mr Corbett also addressed me on the merits of the plaintiffs' case and spoke to the matters raised by Mr. Strauss in his affidavits. He also argued that if the Court was minded to strike out the claim then the plaintiffs should be given more time to avoid that consequence by providing security. He suggested that they might obtain a loan and that up to a year would be a reasonable period to allow them to raise the money.
- [12] Mr. Corbett also advised me that the plaintiffs are considering filing fresh proceedings to obtain information that they consider the defendant is not disclosing to them that would support their claim.

- [13] The plaintiffs also intend to seek a variation of the Order. In respect of this matter I note that the plaintiffs are entitled to apply to vary the Order at any time (O. 17. rule 2).

**The defendant's reply**

- [14] Mr. Edwards argued that notwithstanding any deficiencies in the application the Court has an inherent power to strike out an action when a plaintiff makes default in providing security for costs. He said that such an application could be filed if the Court required it.

- [15] Mr. Edwards also sought to address me on the merits of the plaintiffs' action but I did not need to hear him on those matters as they have been considered by the Court of Appeal and me on previous occasions. Neither Mr. Strauss, in his affidavits, nor Mr. Corbett, in his submissions, has advanced anything that I regard as new as far as the merits of the plaintiffs' claim are concerned.

**Discussion**

- [16] Mr. Corbett is correct to criticise the application. It should have been made under O. 13 on a proper application notice (that complies with O. 13 rule 2) along with a supporting affidavit. None of this was done.
- [17] The application is a one page document that does little other than to invoke O. 8 rule 8(3). It provides no other information supporting the striking out of the claim. There is no supporting affidavit.
- [18] Mr. Corbett is also correct that O. 8 rule 8(3) contemplates the Court acting on its own motion. However as I am now seized of the matter and clearly have jurisdiction I will deal with the application on its merits.

- [19] Order 8 rule 8 is concerned with striking out pleadings. Order 8 rule 8(1) sets out grounds upon which any pleading (that is a claim or defence) may be struck out on application to the Court because the pleading is deficient or amounts to an abuse of the process of the Court.
- [20] In contrast, O. 8 rule 8(3), with which I am concerned, confers upon the Court the power to strike out an action where the plaintiff has failed to advance the case diligently or there has been delay. The three circumstances referred to are where the writ is not served on the defendant within 12 months and has become invalid, the case has not been set down within two years of service of the writ and where the action has been adjourned *sine die* and no step taken within two years from the date the action was so adjourned.
- [21] It should not be thought that an order for strike out will be made in each case where a circumstance identified in O. 8 rule 8(3) has arisen. Order 8 rule 8(3) confers a discretion upon the Court to strike out. This is indicated by the words 'the Court may, of its own motion, strike out an action.'
- [22] The striking out of an action is a drastic step as it deprives the parties of access to the Court for a hearing of their dispute on the merits. The Courts are very reluctant to strike out any action except on its merits. The power to strike out is used sparingly and only in cases where it is clearly appropriate.
- [23] In deciding whether to exercise its discretion the Court must have regard to the purpose for which the power to strike out is conferred and all the circumstances of the case before it. For instance, it could hardly be thought that an action should be struck out simply because it has not been set down for hearing within two years of service of the writ if the parties have been diligently working through interlocutory matters or delay has been caused by a defendant intent on avoiding a hearing.

[24] Some of the matters that might be relevant to the exercise of the Court's discretion under O. 8 rule 8(3)(b) include:

- (a) Whether the claim is genuine and meritorious (in so far as it is possible to make an assessment upon what is likely to be incomplete information);
- (b) The length of time that has elapsed since the service of the writ;
- (c) The stage that has been reached in the proceeding;
- (d) When the parties last took a step in the proceeding;
- (e) Any circumstances peculiar to the plaintiff that might prevent it from advancing the case towards a hearing in a diligent manner;
- (f) The reasons why the action has not been set down;
- (g) The extent to which the action has not been set down due to 'fault' attributable to one party or another;
- (h) Whether further delays may be avoided by case management;
- (i) Whether the Court is in a position to offer a hearing date;
- (j) An assessment of when the action is likely to be ready to be set down;
- (k) Whether any party is suffering any particular hardship as a consequence of the delay; and
- (l) The application of any limitation provision that might prevent the action being brought again if struck out.

[25] This list is not intended to be exhaustive and, of course, not all matters will arise in every case.

[26] Turning back to this application, the matters that might support the making of an order for strike out include the following. It has been 2 ½ years since the writ was served. The plaintiffs' claim, as it is presently formulated, is weak in my view and the Court of Appeal in its ruling (AC 11 of 2017 at [17]) agreed with that assessment noting that the amounts claimed 'are extravagant, indeed fanciful' and 'They have the appearance of claims made *in terrorem*'. The action has not progressed because the plaintiffs have failed to comply with the Order and the plaintiffs can give no indication when they might do so. If the stay was lifted, the pleadings are clearly not adequate for trial, discovery issues are unresolved and there are likely to be further interlocutory applications. On any view of the facts, the case will not be ready for hearing for a considerable period of time. There is also unfairness to the defendant in having the claim hanging over her with no idea of when it might be resolved.

[27] The contrary arguments are the following. The plaintiffs feel strongly that their claim has merit and are genuine in their desire to have it heard. They have been unable to advance the claim because they are impecunious and not because they have been idle. They have been actively challenging the Order and the last step taken by them to do so was in September 2018 (just 5 months ago). The plaintiffs now intend to apply to vary the Order and have put before the Court more information as to their financial circumstances that might be relevant to such an application. There is the possibility that should this claim be struck out the plaintiffs would have no opportunity to bring it again due to the application of s. 16 Supreme Court Act. Finally, the defendant has put no evidence before the Court that she is suffering any particular hardship as a consequence of the delays that have occurred.

[28] Balancing all these matters I consider a line must be drawn. The plaintiffs must progress this action towards a hearing. However, justice requires that I give them more time within which they may either comply with the Order or obtain a

variation of it and advance the action. Should they fail to do so the action will be struck out.

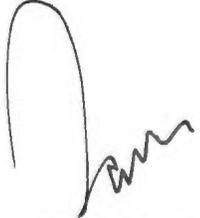
**Result**

[29] For the reasons set out above the Orders that I make are as follows:

- (a) Subject to any further Order of the Court, unless by no later than 26 July 2019 the plaintiffs provide security for the defendant's costs as ordered on 22 June 2017 this action shall be struck out.
- (b) Costs on the application are reserved.

Nuku'alofa: 25 February 2019



  
Lord Chief Justice