IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.525/74

No Special Consideration

NO

IN THE MATTER of the Limitation Act 1950

A N D

IN THE MATTER of an intended action

BETWEEN IULIO SETEFANO of Porirua, Assembler

Intended Plaintiff Applicant

AND WINSTONE CLAY PRODUCTS LIMITED a duly incorporated company having its registered office at Auckland

Intended Defendant Respondent

30

Hearing: 4 February 1975

Counsel: M.J. O'Brien, Q.C., and T.J. Broadmore for the intended plaintiff
D.L. Duggan for the intended defendant

Judgment: 4 February 1975

JUDGMENT OF WHITE J.

(I indicated to Counsel at the close of the argument this morning that I would probably deliver judgment orally later in the day, but I think it will be more convenient if I simply dictate what I would have said and issue a written judgment through the Court office.)

This is a motion for leave to bring proceedings out of time. The chronology covering the facts submitted by Mr O'Brien was accepted by Mr Duggan as accurate, subject to one additional fact which has been added. That chronology is on the Court file. There is no doubt that, while explanations have been proffered for the delay, the blame for it must be borne by the solicitor concerned. On the other hand, Mr Duggan conceded that no question of prejudice arose and his submission was simply that this was a case in which the general discretion should be exercised in favour of the intended defendant.

In the most recent case on this matter decided in the Court of Appeal - Wellington City Corporation v. E.N.

Ramsbottom Ltd. and Hayes (C.A. 52/72) in which the judgment of the Court was delivered by McCarthy J., as he then was, on 1 March 1973, the general principles to be applied in exercising the discretion are re-stated briefly. It is pointed out that all the circumstances are relevant and the judgment deals as follows with a case where the failure to issue proceedings in time was due to the omissions of a solicitor:

> "It has been urged upon us that it would be inequitable if a plaintiff having accepted the advice of his solicitor were to allow the limitation period to expire and then by the expedient of consulting another solicitor be entitled to have the shield which the Limitation Act gives a defendant taken away. It was said that an intending plaintiff must be identified with his solicitor. It is true that this word 'identification' has been used in a number of reported cases, including some in this Court, but one wonders whether there is, in truth, any such doctrine of identification. Certainly no question of vicarious responsibility arises in respect of omissions by the solicitor concerned. True the Courts should not permit intending plaintiffs too easily to shed responsibility for a course of action adopted or omitted by their solicitors. But all that can be really said of general application is that it is not necessarily an excuse for an intending plaintiff to say that the running out of the period of limitation was due to his solicitor's advice, error or omission. Again we point out that each case must be decided on its own facts. The question is always simply whether in the light of what has been done and left undone it is just that leave should be granted."

Later the judgment continues:

> "In deciding whether it is just having regard to all the circumstances of a particular case to grant leave, the Courts have always to bear in mind - as Sir Alfred North P. pointed out in the unreported judgment of this Court in Burne v. St. Peters Ltd. No.71/69, dated 2 September 1970 - not only that the shield which the statute gives a defendant should not be lightly removed, but also that when the Legislature passed the Limitation Act, which cut the usual period of limitation from six years to two years, it intended that the reduction should not act too harshly and so included the provisos to s.4 and, as was then the position, to s.23. In each case, therefore, the Court has to achieve a nice balance between these two competing considerations."

McCarthy J. also delivered the judgment of the Court of Appeal in Peihopa v. Amuri County (1966) N.Z.L.R. 161, 168 in which it was said:

> "In discharging its residuary discretion as to whether

> it is just or unjust to grant leave, the Court may look at the conduct of the parties and inquire whether there is anything in that conduct over the whole period since the cause of action accrued which renders it just or unjust to make the order sought:".

Counsel had not seen the unreported decision of the Court of Appeal but I asked them to consider it at an adjournment and let me have their submissions. Mr O'Brien relied on the case as reiterating a liberal approach in line with earlier decisions of the Court of Appeal, in particular, Tokoroa Earthmovers Ltd. v. Currie (1966) N.Z.L.R. 989. Mr Duggan argued in reply that, having regard to the lack of action on the part of the intending plaintiff himself the discretion should not be exercised in his favour. Mr Duggan relied on Wall and Another v. Caldow (1964) N.Z.L.R. 539, where it was stated by the Court of Appeal that it will not generally be just to withdraw from a defendant a statutory shield expressly given to him by the Legislature where the delay is substantial and no reasonable excuse for it is put forward to support the grant of an indulgence.

Applying the principles to the totality of the evidence in the present case, including the intending plaintiff's lack of understanding of English, I consider this is a case where it is just that leave should be granted. There will be an order granting leave to the intending plaintiff to bring an action, the writ to be filed and served within fourteen days of the date of delivery of this judgment. The statement of claim is to be in the form of the draft submitted which may not be amended without the leave of the Court. The order being an indulgence to the intending plaintiff, he must pay the costs of the application which I fix at $50, with disbursements to be fixed by the Registrar.

Solicitors:

Kevin J. Bell & Broadmore, Wellington, for the intending plaintiff

Swan, Davies, McKay & Co., Wellington, for the intended defendant