The Editor
NZLR
PO Box 1453
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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 1348/73

699

BETWEEN THE PERPETUAL TRUSTEES ESTATE AND AGENCY COMPANY OF NEW ZEALAND LIMITED

Plaintiff

A N D THE COMMERCIAL UNION ASSURANCE COMPANY OF AUSTRALIA LIMITED

THE VICTORIA INSURANCE COMPANY LIMITED

THE GUARDIAN ASSURANCE COMPANY LIMITED

THE MARITIME INSURANCE COMPANY LIMITED

THE SWITZERLAND GENERAL INSURANCE COMPANY LIMITED

THE ROYAL INSURANCE COMPANY LIMITED

THE QUEENSLAND INSURANCE COMPANY LIMITED

THE TRANSPORT AND GENERAL INSURANCE COMPANY LIMITED

THE BANKERS AND TRADERS INSURANCE COMPANY LIMITED

THE MLC FIRE AND GENERAL INSURANCE COMPANY LIMITED

and THE AUSTRALIAN MARINE UNDERWRITING AGENCY PTY LTD

First Defendants

A N D PRICE FORBES SEDGWICK LIMITED formerly SEDGWICK COLLINS (NZ) LIMITED

Second Defendant

Hearing: 22, 23 and 24 May 1984

Counsel: C J Allan for Plaintiff
P A D Davies for First Defendants
M E Perkins for Second Defendant

Judgment:24 May 1984

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ORAL JUDGMENT OF HILLYER J

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These are motions by the first defendants and the second defendant to strike out the Statement of Claim of the plaintiff pursuant to R 273 of the Code of Civil Procedure. The relevant parts of the Rule are as follows:

> " Where the plaintiff fails to prosecute his action ... the defendant to the action ... may move to dismiss the action ... out of court and the court or a judge may on such motion make such order as may be just. "

The plaintiff is the personal representative of a Mr Riviere who, in the early part of 1970, purchased a Chinese junk in Hong Kong named "Midnight Mover". The junk was brought out to New Zealand by a freighter and underwent fitting out and a period of trials and training on the Auckland Harbour. On 6 May 1970 Midnight Mover left Auckland bound for Rarotonga. It was lost at sea with the whole if its crew, including Mr Riviere. As near as can be determined, that loss occurred about 15 May 1970.

Prior to the vessel leaving New Zealand Mr Riviere had communicated with the second defendant, which is an insurance broker, and had asked the second defendant to arrange insurance in the name of Mr Riviere for the sum of something over $80,000 in respect of the Midnight Mover on her journey from Auckland to Tahiti - apparently the vessel was proposing to call at Rarotonga on the way to Tahiti where it was intended to carry out a charter business.

The second defendant duly arranged insurance accordingly with all of the first defendants except the last named first defendant. That defendant has not been served and the case proceeded against all the other first defendants.

The Writ and Statement of Claim claims the sum of $88,000 in the alternative against the first defendants, or if the second defendants failed properly to arrange the insurance required by Mr Riviere, against the second defendant. It is those claims which the defendants seek to have dismissed on the grounds of delay and it is necessary therefore for me to set out at some length the events following the loss of the vessel which culminated in the filing of the motions to dismiss the claims.

There was of course a period after the vessel was lost when the authorities were seeking to ascertain what had happened. Eventually it became clear that the vessel had been lost and a coroner's inquest was held. On 29 September 1971 the coroner found that Mr Riviere died in the Pacific Ocean, approximately 400 miles east of Auckland, on or about 15 May 1970. Death was due to "misadventure by drowning" when the Chinese junk, "Midnight Mover" foundered in a storm. Prior to that, on 26 February 1971, the first defendants had given to Mr Riviere's representatives, notice of avoidance of the plaintiff's claim.

It is clear that until the inquest was held no personal representative could have been appointed to make a claim against the insurance company because an order granting leave to swear death had to be obtained. It was necessary to give notice to insurance companies in the United States of America which held policies on the life of Mr Riviere and it was not until 7 May 1973, following consents from Mr Riviere's family in the United States, that Letters of Administration were granted in New Zealand to the plaintiff as to the New Zealand estate of Mr Riviere.

Following that, on 1 November 1973, the Writ was issued and served that month on the first and second defendants. Some criticism has been made of the fact that it took nearly six months to issue the Writ after Letters of Administration had been obtained. In ordinary circumstances that of course would not be a significant period.

On 23 January 1974 the first defendants filed their Statement of Defence to the Claim. With the intervention of the Christmas vacation its Statement of Defence was filed commendably promptly and within the thirty day period allowed for filing a Statement of Defence. The defence was a complicated one but no doubt had been in the course of preparation or was the result of preparation which had been done from the time of the notice of avoidance of the plaintiff's claim given on 26 February 1971.

The allegations in the Statement of Claim against the second defendant, however, were insufficiently precise and the solicitors for the second defendant sought further particulars. They were eventually given by an Amended Statement of Claim which was filed and served on 20 September 1974. That Amended Statement of Claim did not call for a further Statement of Defence from the first defendants but undoubtedly it required a Statement of Defence from the second defendant.

Over the period of approximately the next year the plaintiff wrote to the second defendant no fewer than six letters seeking the Statement of Defence. An affidavit on behalf of the second defendant said that the second defendant was a company with offices in London, Sydney and Melbourne, as well as New Zealand; that each of those offices was involved in the claim and that legal issues had to be considered in the United Kingdom and Australia as well as in New Zealand.

This was put forward as being the reason why it took a year to file the Statement of Defence. I cannot consider that that was a proper period to take in all the circumstances and in my view there was delay on the part of the second defendant which was unjustified and unnecessary. It does not appear that over that period any information was given to the other parties as to the reasons for the delay. Certainly no such evidence has been put before me.

After that Statement of Defence was filed an order for discovery was made by consent against the first and second defendants. It has been suggested to me on behalf of the first defendant that some moves to obtain the order for discovery were made in October 1975; the defendants being overseas companies, of course an order was required. I am not certain what the position is in that regard as to the moves that were made to obtain the order but it does seem clear that finally the order was obtained on 25 February 1976.

It has been suggested on behalf of both sets of defendants that compliance with that order was an onerous and difficult matter. It has been suggested that it took each of the parties several days to search through the files of all of the first defendants, and in the case of the second defendant, the files in the overseas offices. I accept that it did take several days to prepare the affidavits although on a perusal of them, without such explanation as I have received, it might have been difficult to appreciate that that length of time was required.

Be that as it may, it took until 29 January 1982 before the first defendant filed its affidavit as to documents, a period of nearly six years, and the second defendant did not file its affidavit as to documents until 13 May 1983, after the motions filed for this order. I shall return to that later.

It has been submitted on behalf of both sets of defendants that the reason why such a lengthy period went by was because the defendants did not think that the plaintiff was serious in its intention to pursue the claim. They pointed to the leisurely fashion in which matters had been pursued down to the time of the filing and serving the order for discovery, and indeed one cannot say that the plaintiff was exhibiting any frantic desire to expedite the matter. Nevertheless, when an order of the court is served it behoves the parties to comply. So long as they do not comply they are in default.

Over this period of six years or more, Mrs Riviere in the United States was relying upon the assistance of American attorneys to communicate with her Auckland solicitors. She was undoubtedly in financial difficulties. No doubt that was the reason why she was not pursuing the matter with any force. She did make an application for legal aid on 12 April 1976, which was declined in October 1976. This had to go to the Minister in New Zealand because Mrs Riviere was resident in the United States.

After the application for legal aid was declined however, Mrs Riviere deposes that she endeavoured to work out some method of raising the necessary funds to enable her to proceed with the action. She did have American attorneys acting for her who did not appear to deal with the matter with any expedition. Eventually she deposes she consulted a Mr Maley, a Las Vegas attorney. Mr Maley apparently communicated with the New Zealand solicitors advising that he was taking the matter in hand and taking some steps to obtain the necessary finance. It appears that as a result interest in New Zealand was revived and on 10 July 1978 the plaintiff's solicitors wrote asking the first and second defendants to comply with the orders for discovery. That was two and a half years after the orders had been issued and some criticism has been made of the plaintiff because so long a period elapsed before the letter was written.

Unfortunately Mr Maley, having arranged a mortgage over Mrs Riviere's house in Las Vegas and obtaining in that way a sum which would have been sufficient to cover the costs of the Auckland solicitors, failed to send the money to the Auckland solicitors. Eventually he was arrested on charges of defalcation and in July 1981 was sent to jail in relation to a number of charges, including one as to Mrs Riviere's money.

Following the letter of 10 July 1978 from the plaintiff's solicitors, the first defendants' solicitors made enquiry on 2 March 1979 as to whether one affidavit would be acceptable or whether ten affidavits were required. They were

advised that one affidavit would be acceptable but again took no action in the matter until 26 August 1981 when the plaintiff's solicitors asked for the order for discovery to be complied with and in December 1981 wrote threatening to strike out the Statement of Defence. Effectively, therefore, something more than five and a half years had expired after the service of the order for discovery before the plaintiff's solicitors wrote saying that they would take action if the order for discovery was not complied with.

Again criticism has been made on behalf of the defendants of the failure by the plaintiff to pursue the matter. In my view against that must be set the fact that the defendants themselves were in default. They were disobeying a court order and I must take that fact into consideration in my overall assessment of the position. Eventually, on 29 January 1982, the first defendants filed their affidavit as to documents. With that affidavit they served a letter in which they said:

> " We have filed and served this Affidavit of Documents without prejudice to our contention that our clients' defence to the claim has been hopelessly prejudiced by the delays on your clients' part. "

Following that there were apparently some discussions in which it was suggested that the defendants would move to strike out the plaintiff's Statement of Claim but nothing was done in that regard until 15 November 1982 when the plaintiff presented a praecipe to the first defefndants and the second defendants in reply filed the notice of motion and affidavit in support which is now before the Court.

I note that at this stage the second defendants had still not filed their affidavit as to documents. Again there was delay in the filing of an affidavit by Mrs Riviere in reply. It was not until 29 July 1983 that affidavit was sworn and it was served on 3 August 1983. Thereafter matters moved reasonably on the motions and a Ready Notice was filed on 30

September 1983 which, because of the congestion in the Court lists, has only now resulted in the matters coming before me.

The principles on which the power given by R 273 are exercised have been explored in many cases. It is a sad fact that the law's delays are not confined to one country or one age.

> " All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the 'whips and scorns of time' (Hamlet Act 3, Scene 1); Dickens tells how it 'exhausts finances, patience, courage, hope'. (Bleak House, chapter 1). To put right this wrong, we will do all in our power to enforce expedition; and, if need be, we will strike out actions when there has been excessive delay." "... the law's delays have been intolerable. They have lasted so long as to turn justice sour" (Lord Denning in Allen v Sir Alfred McAlpine & Sons Ltd [1968] 1 All ER 543, 546-7).

The tests that have been applied are as follows:

1. That there has been inordinate delay;
2. That the delay is inexcusable;
3. That the defendants are likely to be seriously prejudiced by the delay.

(Salmon LJ in Allen v Sir Alfred McAlpine & Sons Ltd p 268), adopted by our Court of Appeal in New Zealand Industrial Gases Ltd v Andersons Limited [1970] NZLR 58, 61. The New Zealand rule, however, has an addition noted in the words "the court or a judge may on such motion make such order as may be just". That requirement is noted in Fitzgerald v Beattie [1976] 1 NZLR 265, 268 by McCarthy P:

> " Our rule requires us to pursue the interests of justice and so in the end the overriding consideration is always whether justice can be done despite the delay. "

It is clear in my view that when looking at the delay the whole period of delay must be consideration. I think it would be unrealistic to suggest that because delay up until, for example, February 1976 or the end of 1977 even, was not inordinate, that it should not be looked at in determining

whether the overall delay is inordinate and inexcusable. It seems to me that every party starts off an action with a certain amount of goodwill and that goodwill can be used up. Until the goodwill is used up no complaint can be made. But if the goodwill is used up or frittered away at the beginning of a case, the party does so at its peril because if further delay subsequently takes place he cannot say "only the delay after I used up my goodwill can be looked at." The whole period must be considered.

This is recognised in a number of cases, particularly in New Zealand Industrial Gases Ltd v Andersons Ltd where our Court of Appeal said at page 63:

> " We would now like to say something with regard to the observation of the learned Judge in the Court below that the only prejudice which the Court will take into account is that which arose after the date when the inexcusable delay commenced, in fact from the time when the defendant was first entitled to say that the action was not being prosecuted with diligence. No doubt in saying that the learned Judge was influenced by observations which have been made relative to applications under the Limitation Act for leave to bring actions. Whatever may be the validity of those observations in that setting, we take the view that in so far as applications under R. 273 are concerned, it is the whole delay which must be looked at and we draw attention to what was said by Diplock L.J. in Allen v. Sir Alfred McAlpine and Sons:
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> ' It must be remembered, however, that the evils of delay are cumulative, and even where there is active conduct by the defendant which would debar him from obtaining dismissal of the action for excessive delay by the plaintiff anterior to that conduct, the anterior delay will not be irrelevant if the plaintiff is subsequently guilty of further unreasonable delay. The question will then be whether as a result of the whole of the unnecessary delay on the part of the plaintiff since the issue of the writ, there is a substantial risk that a fair trial of the issues in the litigation will not be possible. '

> To the same intent are observations by Lord Denning in Clough v. Clough ([1968] 1 WLR 525, 528) and Rowe v. Tregaskes ([1968] 1 WLR 1475, 1477), where he points out that the Court must consider all the delay, not only the delay after the writ but also the delay before it: 'The delay in the first two or three years is often the most prejudicial of all'. "

It has always been said that there is no obligation on a defendant to provoke the plaintiff into activity. In Fitzpatrick v Batger & Co Ltd [1967] 1 WLR 706 at 710, Salmon LJ made his wellknown comment that the defendant was entitled to "let sleeping dogs lie". That comment was echoed by Wild CJ in Cotton v Timaru Harbour Board [1969] NZLR 1066 at 1068.

That simile has been extended in other cases; comments that "the dog may not only be sleeping, it may be dead". I accept that there is no obligation on a defendant to require the plaintiff to take further action. Those comments however, in my view, do not apply with such force when the defendant himself is in breach of an order of the court and has, himself, been guilty of inordinate delay.

Further, criticism has been made by the defendants of the delays that have taken place through the inactivity of the plaintiff in this action, or more particularly the inactivity of Mrs Riviere. Some comment has been made that the plaintiff, the Perpetual Trustees Estate and Agency Company of New Zealand Limited, should or should not have taken more action than it did, or is, or is not really involved in the action.

I have no evidence from that company as to what actions it has taken, nor have I had much assistance from a consideration of the position of the company as plaintiff. Looking at the matter realistically, I think I must consider the position of Mrs Riviere and her actions and impute those to the plaintiff. That being the case, I accept that the onus is on Mrs Riviere to provide an adequate excuse for the delay. That was said by Edmund-Davies LJ in Austin Securities Ltd v Northgate & English Stores Ltd [1969] 1 WLR 529 at 534.

Reasons have been given by Mrs Riviere for the delay but I must say that although those reasons arouse some sympathy they nevertheless cannot totally excuse her for the delays which have taken place.

I have been given substantial evidence on the question of prejudice that has been suffered by the defendants in these proceedings. Not only will the parties necessarily have suffered prejudice from fading memories, but in an affidavit filed on behalf of the first defendants a number of witnesses who clearly would have been useful in the action are named, and it is indicated that their present whereabouts are unknown or that there would be substantial difficulty in communicating with them. Such witnesses include Mr Dunn who was involved in the preparation of the Midnight Mover for its last voyage; a Mr Hargraves who from a newspaper report that has been put before me was clearly in the view of the coroner, an important witness; Captain Partridge; a journalist, Vonnie Bishara; and a Mr Clarke, who provided expert advice and organised enquiries for the defendants. Further, the records of the Customs Department for 1970 which were relevant evidence, have been destroyed apart from a letter from a Mr Wyatt which has been produced. The affidavit on behalf of the first defendants, however, makes the comment that the solicitors for the first defendants did not pursue the taking of evidence overseas because the plaintiff's solicitors appeared to have no serious intention of pressing the action to a hearing.

That surmise on the part of the first defendants, appears to have coloured the actions of the first defendants. It undoubtedly would be the case that the delay has affected the memories of certain witnesses and may have made it difficult or impossible for other witnesses to be communicated with. Nevertheless, it would be surprising if, faced with a Writ for so substantial a sum, adequate enquiries and statements from witnesses were not made and taken. I do not have before me full details of what evidence is in the hands of the defendants in this regard, nor indeed do I complain in that

regard. One could well imagine that a defendant would not wish to set out the whole of his evidence in a motion of this nature. Nevertheless, perhaps seeking an unusual degree of perfection, but having regard to the seriousness of the matter, the comment could be made that the first defendants and the second defendants could, and perhaps should, have taken the precaution of recording the evidence while it was fresh in the minds of the parties and the witnesses.

There has undoubtedly been delay. There have been reasons given for the delay. If the action is allowed to proceed the defendants at the very least will have considerable difficulties. If the action does not proceed the plaintiff, or more particularly, Mrs Riviere will be prevented from coming to court to pursue her claim. She will suffer hardship. I must endeavour, as best I can, to balance these conflicting rights and hardships. In doing so I follow the requirement imposed on me by R 273 of the Code to "make such order as may be just".

In arriving at the conclusion I have, I have considered the factors involved on each side as best I can. But the matter which has finally persuaded me to refuse the motions, which I do, is that for a period of nearly six years in the case of the first defendants, and for an even longer period in the case of the second defendant, they were in default in complying with an order of the court.

When an order for discovery is issued it is not for the parties to say - "I shall comply or not as I choose". If they choose not to comply with that order then in my view they cannot subsequently come to the court and say - "During the period that I was in default the plaintiff was guilty of excessive delay and it would be unjust to allow the plaintiff to proceed".

The matter has been put in other contexts - "that a person who comes to equity must come with clean hands". In my view the first thing a person contemplating delay on the part of an opponent must do, is to put his own house in order.

Where a party is in default in complying with an order of the court, it comes ill from him in my view to say - "I didn't think the other side was serious about it". If they choose not to comply with the order they cannot subsequently say - "Strike out the plaintiff's claim because the plaintiff has delayed".

In my discretion therefore, for these reasons, I decline the order that was sought and I direct that the action proceed. It need hardly be said that any further delay on the part of the plaintiff will receive no more sympathetic consideration. As I earlier indicated, all the goodwill the plaintiff may ever have had has been used up.

I do not on this motion, for the reasons I have indicated, allow costs to the plaintiff. It is clear that there was inordinate delay on the part of the plaintiff and I do not consider it would be proper to allow costs to the plaintiff in those circumstances, even though nominally it is the successful party on this motion.

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Solicitors

Rudd Watts & Stone, Auckland for Plaintiff
Jordan Smith & Davies, Auckland for First Defendants
Macalister Mazengarb Parkin & Rose, Wellington for Second Defendant