N2LR.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.402/81

1925

BETWEEN	GRAHAM HIRST	
	Plaintiff	
AND	BANK OF NEW ZEALAND	
	First Defendant	
AND	REGINALD ELCOAT TREVOR ELCOAT	
	Second Defendants	
AND	JOSEPHINE AUDREY HIRST	
	Third Defendant	

Hearing: 5 December 1986

Counsel: Mr Lee for Second Defendant in Support
Mr Ringwood for First Defendant in Support
Mr Illingworth for Plaintiff to Oppose
No appearance of Third Defendant

Judgment: 5 December 1986

ORAL JUDGMENT OF WYLIE, J.

I have before me an application by the second defendant to strike out the plaintiff's proceeding, that application not expressly limiting itself to a striking out as against the second defendants only. The first defendant also appears by counsel and supports the second defendants' application, but has not itself filed a separate application, but submits that it is entitled to join in and support the second defendants' application.

The proceedings themselves were issued in April of 1981. The plaintiff alleges against the Bank of New Zealand as first defendant, against the second defendants as solicitors and against the third defendant, his former wife, that he has suffered loss because of a mortgage document entered into by himself and his former wife in 1976 giving security to the Bank in common bank form securing an initial advance and all other monies becoming owing. The plaintiff alleges negligence against the second defendants in failing to advise him properly as to the effect of that mortgage, in particular that he could be liable in respect of monies beyond those for which the mortgage was originally taken out. That is a very abbreviated summary of his allegations, but I think it will suffice for present purposes.

The loss claimed by the plaintiff arises from a further advance obtained by his former wife in 1978 without his knowledge and from a guarantee given by his former wife in 1979 which also resulted in the Bank charging the joint account of the plaintiff and the third defendant in respect of monies met under that gurantee. There is no evidence before me to indicate precisely when the plaintiff became aware of these further debits to the account for which he was ultimately held jointly liable, but it is apparent he must have known in 1980 because at that point the Bank began to put pressure on to the plaintiff and the third defendant. This eventually resulted in the sale of the property against which

the mortgage was secured out of the proceeds of which the indebtedness to the Bank was paid and the loss at that point incurred by the plaintiff.

As I have said, the proceedings were issued in April 1981. That was almost five years after the events which gave rise to the claim for negligence against the second defendants, those claims relating as I read the statement of claim, solely to the participation by the second defendants in the execution of the mortgage in 1976. It was, however, probably only about one year after the plaintiff first became aware of the additional liabilities to which he was being subjected by the Bank. After the issue of the proceedings there were various interlocutory steps taken and I do not need to recite them in detail. There were also two amended statements of claim filed by the plaintiff, the second of these being in September 1984. Materially, however, there was an application which came before Wallace, J. in April 1983 relating to inspection of documents. That matter was not finally resolved, but Wallace, J. issued a minute which from a practical point of view resulted in no further steps being taken by the plaintiff in respect of that application. However, I am informed from the bar that as a result of the minute of Wallace, J. indicating that the plaintiff was not entitled to inspection as against the second defendants further steps were taken which ultimately resulted in discovery being obtained by other means, so that it is clear that steps were being taken by the plaintiff between that time

in April 1983 and the filing of the second amended statement of claim in September 1984.

There was no response to the second amended statement of claim filed in September 1984 and the plaintiff forwarded a praecipe to the solicitors involved for the other parties in December 1984. This praecipe was not signed by the second defendants in particular, and I think possibly by one or more of the other defendants as well. Thereafter the plaintiff filed a unilateral application for fixture, but for a variety of reasons which I need not go into there was some confusion between the plaintiff and the Court Registry as to the effect of the filing of the praecipe by the plaintiff on a unilateral basis and it would appear from an affidavit filed by the solicitor for the plaintiff that there was some correspondence between the Court Office and his firm which was, I think, misplaced or not received and that the plaintiff and its solicitors were in the meantime assuming that the matter had been set down and was awaiting hearing. The net result of that confusion was that it was not apparent until comparatively recently that the matter had not been set down and a fresh praecipe was filed in August of this year and notice given to the other parties in accordance with the new High Court Rules. Thereupon the second defendant made the present application in September of this year.

The application is based on the customary grounds that there has been inordinate delay, that such delay is

inexcusable and that the second defendants will suffer prejudice by reason of such delay. It is urged upon me that the claim against the second defendants is essentially in negligence and relates to what passed between the parties at what was probably a single meeting in 1976, over ten years ago, and I am asked to infer that inevitably there is serious prejudice to the second defendants by reason of the dimming of memories in particular and the other elements of prejudice that can arise inherently from delay. Counsel for the second defendants has made it plain to me that the second defendants themselves and in particular the principal of the firm of the second defendants who dealt with the matter in 1976 does not claim that he has no recollection of the events, but rather the second defendants' position is that the second defendants are put at risk by reason of the dimming of memories and possible faulty recollections of other persons.

So far as the first defendant the Bank is concerned, in seeking to support the application of the second defendant I propose to deal with its position on the basis that it is entitled to support the second defendants' application, notwithstanding that it has not filed an application on its own behalf and also on the basis that the second defendant would be entitled to an order dismissing the whole of the proceedings against all defendants and not merely against the second defendants themselves, thus possibly entitling the first defendant to support the second defendants' application in such a way as itself to be dismissed from the action. I am

prepared to make those assumptions for the purpose of dealing with this application, but I would not wish it to be thought that I was necessarily concluding that those assumptions were correct as a matter of law. The Bank only yesterday filed an affidavit which indicated that the person who had a direct involvement with the plaintiff and third defendant in the events which give rise to this action has retired from the Bank, that the deponent was unaware of that former bank officer's present whereabouts, and that although there may have been some minor involvement by other bank officers, either those bank officers' whereabouts were not presently known or those whose whereabouts were known had either no recollection or only a very vague recollection of the events. That affidavit, however, was answered by an affidavit by the plaintiff's solicitor showing that even since the receipt of the Bank affidavit yesterday he had been able to locate the former bank officer principally involved in the matter by the simple expedient of looking in the telephone book.

I turn to the principles applicable to an application such as this. They are encapsulated in the grounds on which the second defendants advance their application, that is that there must be inordinate delay, that the delay must be inexcusable and that above all there must be a risk of serious prejudice to the applicant. There is also as I understand it, a further over-riding consideration of the justice of the case which is cumulative on the three matters I have must mentioned.

In my opinion the applicants' here have shown no real likelihood of serious prejudice by the delay that has occurred. I do not propose to go into any detail as to whether or not they have shown inordinate delay and that such delay was inexcusable. There has undoubtedly been some degree of delay. I am inclined to think that a full examination of the history of the matter may not show that delay to be as serious as the applicant would suggest, but it is sufficient for present purposes that I conclude that the applicants have not shown any likelihood of serious prejudice. The affidavit sworn by the applicants' solicitor, Mr Thompson, does no more than summarise the history of the matter and makes no assertions as to prejudice whatever. In so far as the Bank as first defendant is concerned, the affidavit I have referred to might, had it not been answered in the way it has by the plaintiff, have suggested some possibility of prejudice but I am satisfied that any weight I might have attached to that affidavit has been seriously undermined if not eliminated entirely by the affidavit of the plaintiff's solicitor filed this morning.

I do not think that I am in a position to infer from the mere fact of the lapse of time since the cause of action may have arisen that there must inevitably be a risk of serious prejudice. It is true, as was urged upon me by counsel for the applicants, that the trial of the issues may depend to a large extent on recollections of what was said or not said on the occasion in 1976 giving rise to these proceedings. I am

satisfied, however, from submissions by counsel for the plaintiff that the matter will not be entirely dependent on recollections of verbal exchanges, it appearing that there is a considerable volume of documentary evidence as is apparent from the affidavits of discovery on the Court file. I also accept the submission of Mr Illingworth for the plaintiff in reliance on the decision of Mead v Day [1985] 1 NZLR 100 that the circumstances here were such that both the first and the second defendants in particular were defendants of a kind who could have been expected as soon as the likelihood of these proceedings was brought to their notice to have taken particular care to document their respective cases so far as the recollections of potential witnesses were concerned. Having regard to that matter I am not prepared to infer a risk of serious prejudice merely because of the dimming of memories and faulty recollections.

For those reasons I am satisfied that the second defendants have not made out a case for dismissal of the proceedings either generally or against them in particular and for the same reasons I hold that the first defendant has likewise not made out such a case. Accordingly the application will be dismissed.

The plaintiff will be allowed costs against the second defendant in the sum of $350.

Although the appearance on behalf of the first defendant

has not materially added to the time taken by this application, nevertheless it is appropriate to order some costs against the first defendant in relation to the affidavit filed on its behalf and the necessity for the plaintiff to answer the same. Accordingly there will be costs of $75 against the first defendant.

Solicitors: Mr Illingworth, Auckland for Plaintiff
Bell Gully Buddle & Weir, Auckland for First Defendant
Mr Lee, Auckland for Second Defendant
No appearance of Third Defendant