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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 693/80

BETWEEN HYDRA COLD STORAGE CO. LTD
a duly incorporated company having its registered office at Auckland and carrying on business there as cold storers

1064

Plaintiff

A N D THE AUCKLAND CITY COUNCIL
a body corporate pursuant to the Local Government Act 1974 of the Civic Administration Building, Auckland

Defendant

Hearing 23rd July 1986

Counsel M. S. Cole for defendant
R. Johnson for plaintiff

Judgment 6th August 1986

JUDGMENT OF TOMPKINS J

The defendant has moved for an order pursuant to r 478 of the High Court Rules that the plaintiff's proceedings be dismissed upon the grounds that the plaintiff has not actively prosecuted the proceeding, is guilty of delay, that such delay is undue and inordinate and has caused prejudice to the defendant.

The principles upon which the Court should act on such an application were not in dispute. They are, that for the application to succeed the defendant must show that there has been inordinate delay, that that delay is inexcusable, that the

defendants are likely to be seriously prejudiced by the delay and that on balance the interests of justice will best be served by dismissing the action: New Zealand Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58, 61, Fitzgerald v Beattie [1976] 1 NZLR 265, 268 and Mead v Day [1985] 1 NZLR 100. In Mead the Court of Appeal adopted Lord Diplock's summary of the principles in Burkett v James [1977] 2 All ER 801 at 805.

> "The power should be exercised only where the Court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the Court or conduct amounting to an abuse of the process of the Court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or as such as is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiff or between each other or between them and a third party."

The judgment in the Court of Appeal went on to refer to McCarthy P's observation in Fitzgerald v Beattie that the overriding consideration is always whether justice can be done despite the delay and that in determining this the principles mentioned above are not necessarily exclusive.

The sequence of events

It is necessary to relate the sequence of events in some detail.

The plaintiff is in business in Auckland as cold storers. It has a cold store in Margaret Street, Ponsonby.

On 29th June 1978 a water pipe on the footpath outside the plaintiff's premises burst. It caused flooding of the plaintiff's premises.

On 3rd July 1978 two members of the defendant's emergency repair gang that had attended to the repair of the burst water main made a written statement about what had occurred. Although the statement would presumably not be privileged it has not been produced to the plaintiff and has not been put before the Court. Hence I cannot judge how detailed the statement was.

On or shortly before the same day, 3rd July 1978, an assessor inspected the site and made field notes. Based on those field notes he compiled two brief reports dated 3rd July 1978 and 5th July 1978. The field notes have since been destroyed. The two reports, which also presumably would not be privileged, have not been produced so it is not possible to judge to what extent the reports recorded what caused the pipe to burst. These two reports are still available.

Initially the plaintiff made a claim on its insurers. It was not until 9th August 1979 that the plaintiff's insurers declined to accept liability to indemnify the plaintiff for its loss.

On 10th September 1979, that is, some 15 months after the accident, an assessor acting for the plaintiff or its insurers called on the Town Clerk concerning what had occurred. By letter dated 20th September 1979 he wrote to the defendant confirming his verbal advice that a claim may be formulated against the Council for loss sustained by the plaintiff as the result of the burst water main. This letter alleges that the cause was the failure of a gasket on the street side of the water meter immediately outside the cart dock and adjacent to the office of the plaintiff. The loss was estimated at approximately $7,000.

In December 1979 and no doubt as the result of the approach from the plaintiff's assessors, the water works district engineer at the request of the defendant's insurers and its solicitors prepared a report on the claim outlining the action that had been taken by the Council and expressing opinions on the likely cause.

On 3rd July 1980 the plaintiff issued a writ against the defendant claiming $6,825.83 for damage to stock, $11,282.09 for remedial work to the plaintiff's freezer, an unspecified amount for loss of use of the freezer and $5,000 general damages for inconvenience. The claim was based on an allegation that the loss was caused through the negligence of the defendant or its servants in

(a) failing securely to fit the said flange water pipe and meter

(b) failing to ensure that the water pipes provided by it were capable of withstanding the pressures normally to be expected therein

(c) failing to ensure that its system of water pipes was watertight

(d) failing to ensure that the said flange was capable of performing the functions required by its inclusion in the system

(e) otherwise negligently permitting water to escape into the plaintiff's premises.

After some correspondence between the defendant's solicitors and the plaintiff's, a statement of defence was filed on 12th September 1980 and in January 1981 the plaintiff served an order for discovery. That order was not complied with. On 13th April 1981 the plaintiff applied to the Court for an order to strike out the defence. This application was not brought on for hearing - the defendant's affidavit of documents was filed and served on 11th May 1981.

There followed 15 months of what appeared to the defendant to be no activity by the plaintiff, but the plaintiff's solicitor deposes to, during that period, referring to a consulting engineer relating to the cause of the damage, the remedial work required and likely costs.

On 18th October 1982 the plaintiff filed an amended statement of claim. The allegation of negligence remained the same, but the claim was increased to special damages of $117,390.93 and general damages of $10,000. On 2nd November 1982 the plaintiff's solicitors asked the defendant's solicitors to

sign a praecipe. This request was declined because the plaintiff had not complied with the order for discovery served on it in May 1981. The plaintiff's affidavit of documents was filed on 13th December 1982 but the defendant claimed it was inadequate. A second affidavit of documents was filed by the plaintiff in June 1983. On 25th August 1983 the plaintiff's solicitors, for the second time, sent a praecipe to the defendant's solicitors for completion but again they declined raising further discovery issues. There followed spasmodic correspondence between the solicitors including meetings until 14th May 1985 when the plaintiff's solicitors for the third time sent a praecipe to the defendant's solicitors. They received no reply. In October 1985 the plaintiff's solicitors filed a praecipe unilaterally. During November 1985 there was further correspondence concerning discovery. The case was called at various callovers during the first half of this year. Finally, on 28th May 1986 the defendant filed this present motion.

The delay

It was Mr Cole's submission that the delay of six years and eight and a half months from the happening of the accident until the motion to strike out was both inordinate and inexcusable. He pointed not only to substantial periods, such as two years, between the accident and the issue of the writ, but also to the period between May 1981 when the defendant's order for discovery was filed and served to June 1983 when the plaintiff's supplementary affidavit of documents was filed. He then referred

to periods frequently of some months between correspondence or the taking of the next procedural steps by the plaintiff.

In submitting that the delays that occurred were excusable Mr Johnson emphasised the steps that the plaintiff did take during this six year period and also pointed to the difficulties that the plaintiff had with its insurers, particularly the initial indication it had received that liability to indemnify would be accepted - an attitude that was not reversed until the insurers declined to accept liability in August 1979.

Undoubtedly the defendant could have forced the claim to a hearing had it wished but it is clear that in considering an application of this kind the defendant's inactivity does not make the plaintiff's inactivity excusable though it may have a bearing on the final question whether it is just that an order should be made; New Zealand Industrial Gases at 63. And in Burkett v James Lord Salmon referred to the possibility that the defendant's solicitors may have been able to take steps to compel the plaintiffs to get on with their actions. He went on to say at 814

> "Not unnaturally they rarely did so, relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to believe that a dog which had remained unconscious for such long periods of time might well die a natural death at no expense to their client; whereas if they were to take the necessary steps to force the action to trial they would merely be waking up a dog for the purpose of killing it at great expense to their clients which they would have no chance of recovering. Accordingly it was unusual for summonses to dismiss actions for want of prosecution or for peremptory

> orders to be taken out. I do not think that defendant's solicitors can be blamed for this practice nor that the plaintiffs or their solicitors should be entitled to derive any benefit from it."

But here, to adopt Lord Salmon's analogy, the dog was not unconscious for such long periods of time. It may be that occasionally it went to sleep and that for other periods it was moving about only sluggishly, but every now and then it let out a growl if not a bark. That should have been sufficient to alert the defendant to the possibility that at any time it might even threaten to bite.

There were undoubtedly periods when the plaintiff delayed significantly and even some periods while that delay could be said to have been inordinate, but looked at over all I do not find the delay inexcusable. This is particularly so since the amended statement of claim was filed in October 1982. Although again there were some periods of delay since then, relating to discovery, that ought not to have occurred, but the plaintiff's actions in sending praecipes to set down to the defendant on three occasions as well as the other communications between the plaintiff and the defendant must have made it perfectly clear to the defendant that the plaintiff intended to continue with its claim.

The limitation period of six years expired on 29th June 1984. It has frequently been said that the expiration of the period of limitation is a material aspect which often - indeed

normally - leads to striking out; New Zealand Industrial Gases at 62, Fitzgerald at 269. But the amended statement of claim was filed well before the expiration of the limitation period and as the events I have recounted make clear, the plaintiff was endeavouring, if somewhat ineffectually, to prosecute its claim before the expiration period expired.

Prejudice

Mr Cole points to four aspects of prejudice which he submits the defendant has suffered as the result of the delay and cumulatively are of such significance as to justify the striking out order.

First there are affidavits by five City Council staff deposing to their initial involvement in the accident, each of which state that although they may have made statements or prepared reports at the time, it now occurred so long ago that they have no first hand recollection of the events so that their ability to give evidence from their own memory of the events that occurred have been significantly affected. Mr Cole emphasises that this is not a case where liability can be determined on documentary evidence. The witnesses will be required to state what they saw to be the condition of the water mains, flange and other equipment. This, he submits, distinguishes the case from Rowe v Cullinane Turnbull Steel & Partners [1985] 1 NZLR 33 and from Mead v Day.

I have no doubt that these witnesses first hand direct recollection of events over eight years ago would now be minimal, but most if not all of them did in some form or other record their views at the time so that this material is available at least to refresh their memory if not admissible under the Evidence Amendment Act 1945. Further, I, in this context also, regard as significant the filing of the amended statement of claim in October 1982. The defendant then appreciated that it was facing a claim of considerable magnitude. One would certainly expect that that would cause the defendant's advisers to ensure that all the necessary documentary material was preserved and that the memory of witnesses of fact would be refreshed.

Secondly, he pointed to the death in August 1985 of Mr Nathan, the defendant's water works foreman. The law clerk from the defendant's solicitors who swore an affidavit deposing to this fact, states that it appears from the defendant's files that Mr Nathan inspected the site the morning after the incident. He prepared a report on 7th December 1979. She goes on to say that it appears from the report and the file as if Mr Nathan's evidence would have been critical to the defendant as it appears clear that he carried out a fairly full inspection of the plaintiff's premises and had also established for himself what appeared to be the likely cause of the failure of the water main. Undoubtedly there is an element of prejudice in this respect but it does appear that Mr Nathan prepared a full report setting out

what had occurred and his opinion of the cause. These documents may be admissible under s 3 of the Evidence Amendment Act 1945, although there is also a possibility that the statements would be excluded pursuant to subs(3) as being made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish. This statement and the other statements to which I have referred, would undoubtedly be admissible under the Evidence Amendment Act (No.2) 1980 but that Act which came into force on 1st January 1981 does not apply to any proceedings commenced before that date.

Thirdly, Mr Cole referred to the evidence from two assessors that their records were destroyed some time during 1985. But the reports that the assessors prepared are available. What apparently has been lost is the field notes. It is also relevant to consider that these files were destroyed well after the amended statement of claim was filed so well after the defendant knew that the claim was probably going to be prosecuted. It appears that the defendant did not consider it necessary to ask the assessors to preserve their files.

Fourthly, Mr Cole referred to the increased difficulty the defendant may have in meeting the claim as to quantum resulting from the delay. He pointed to the correspondence concerning the alleged inadequacy of the plaintiff's discovery of documents relating to damages. He submitted that proper particulars and

discovery had not been given. It is difficult to judge the extent to which delay may prejudice the defendant in this respect when discovery is apparently incomplete. It may well be that when discovery and inspection is completed then the documentary material available now is at least as complete as it would have been had the claim been prosecuted with normal diligence. But even if it is not, it does not necessarily follow that it is the defendant that will be prejudiced by the delay. It is more probable that the plaintiff, upon whom the onus of proof would lie, would be prejudiced in establishing its claim if the documentary material available is not itself sufficient to establish the claim's validity.

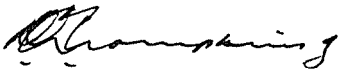
Having regard to all these particular aspects and generally the disadvantage that any defendant suffers when meeting a claim years after the event, I am satisfied that there has been demonstrated some degree of prejudice but not to a degree that the defendants are likely to be seriously prejudiced by the delay.

The justice of the case

It follows from the findings that I have already made that looked at broadly the defendant has not persuaded me that the over all justice of the case requires the action to be dismissed.

Conclusion

The defendant's application is dismissed. But I consider that the defendant was justified in bringing its application having regard to the delays that have occurred attributable to the plaintiff. So I award the defendant costs which I fix at $750 to be payable by the plaintiff irrespective of the final result.



Solicitors

Messrs Simpson Grierson Butler White, Auckland for defendant
Messrs Hunt Hunt & Chamberlain, Auckland for plaintiff