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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M. No. 373/87

UNDER the Family Protection Act 1955

NOT RECOMMENDED

IN THE MATTER of the Estate of the late F CORNWELL of Christchurch, Retired Fitter, Deceased.

BETWEEN C STANBURY of Christchurch, Femme Sole

Plaintiff

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AND J CORNWELL of Christchurch, as Executor and Trustee of the late F CORNWELL

Defendant

Hearing: 18th February 1991.

Counsel: D.R. Webb for the Plaintiff
Miss M. Lai for the Defendant

ORAL JUDGMENT OF MASTER HANSEN

The plaintiff seeks an order extending the time allowed for service of documents in this Family Protection Act proceeding of the beneficiaries.

It is unfortunately necessary to refer briefly to the history of this matter. The statement of claim was filed as long ago as the 16th September, 1987. The deceased died on the 1986. The necessary application for directions as to service was not filed until the 1989. There is some excuse for the period of delay before that application was

made in that the executor, Mr G Brockett, had subsequently died. The date of his death was the 1988. The granted administration de bonis non was made to Mr Cornwell, the present trustee defendant, on the 28th March, 1989. It is clear that the plaintiff's advisers were aware of this because the application for directions for service I referred to earlier referred to Mr Cornwell as the executor and trustee and defendant. That file was referred to me and was minuted that a formal application needed to be made in relation to the naming of the defendant. That was done, and orders were made by Master Towle on the 31st October 1989, both in relation to the substitution of defendant and on the application for directions for service. Inexplicably service was not effected. There is talk in the affidavits filed by the junior staff solicitor of the firm acting for the plaintiff of mislaying the memorandum of the Court and other difficulties. Whatever difficulties that solicitor faced, on the 14th March, 1990, an ex parte notice of interlocutory application was filed by the plaintiff for an order extending time and for an order for substituted service. I note in passing that the solicitors acting for the estate had indicated at a much earlier time that they were authorized to accept service, and, indeed, a follow up letter asking what had happened was sent.

Given the problems that this file had already experienced, it is, perhaps, surprising that the application for the extension of time referred only to service upon the trustee. As I noted before, there is also an application for substituted service. That I do not understand at all, given that the solicitors had already indicated, as I have said, that they were prepared to accept service. An order was made on that application on the 26th March, and on the 4th April the trustee was served. No steps were taken to serve the beneficiaries, and it was not until the 6th November, 1990, that an application was made that leads to this hearing. Quite simply, in this case I am bound to say with regret that the delay is appalling and despite the affidavits filed by the solicitors, is completely inexcusable.

It is impossible to suggest otherwise.

When this matter was first called and was adjourned for a fixture, I referred counsel for the plaintiff to a recent unreported decision of mine Watson v Watson (Christchurch, M.34/89 19/11/90). It is a situation where the circumstances are similar to the present case where the application for extension was refused. One major difference between that case and this is that the delay in the case confronting me now is much more extreme. However, Mr Webb has valiantly tried to persuade me that I should exercise my discretion under Rule 128 and allow the extension of time. He relies heavily on an unreported decision of Jeffries. J. Catley v Sloan and McKay (Napier, A21/81, 22nd October, 1985). That case involved an application under Section 9 of the Family Protection Act for leave to commence proceedings out of time. That for a start seems to me to be a distinguishing feature. However, it was relied on by counsel because of the reference where delay was to be visited at the door of the legal advisers, rather than of the plaintiff. At page 5 His Honour says:-

> " There are occasions when in the proper exercise of its discretion and judgment the court must lay blame for delay caused by solicitors, which is the case in this instance, on the client if it is clear that the client had in some way acquiesced in the delay, or slept on the rights. A popular perception of the workings of the law among ordinary people is that it is arcane, and notorious for its delays. "

In this case, it has been urged upon me that the plaintiff has in no way acquiesced to the very considerable delay that this file reveals. In support of that, Miss Krawszyk in her affidavit at paragraph 11 states:-

> " 11. THAT the Plaintiff in these proceedings at no time was acquiescent in the delays which occurred and has on several occasions contacted Mr Eason of our office by way of telephone and in person. "

Firstly, one is bound to make the comment that such evidence is hearsay and is inadmissible. Secondly, one is bound to say that there is no evidence of the number of occasions the plaintiff contacted the solicitors; the date of such contact; and the content of such contact. It seems to me in an application of this sort it is encumbent on a plaintiff who seeks to rely on the delay of a solicitor to show that there has been no acquiescence in that delay. Quite simply, in this case, there is no evidence before me at all. I find it somewhat staggering that it has not been seen fit to place an affidavit of the plaintiff before this Court. I cannot, on the lack of evidence before me, hold that it is clear that the plaintiff has not acquiesced in this very considerable delay.

Mr Webb also referred me to a decision of Master Towle Thompson v Martin & Stevenson (Auckland, M 209/86, 11 April, 1990). In that particular case it would appear from the brief reading of the case that I have made that the delay is similar to here. It appears, again, surprisingly, that there was no evidence from the plaintiff. At page 7 of that case, Master Towle, in discussing the overall justice of the situation, says:

> " If therefore I were to refuse an extension of time against him and the other grandchildren, this would mean that his claims and those of his other siblings who were also in contemplation by the original testator, would not be heard at all yet an order might still be made which could effect the disposition of the testator's home which was the only significant asset which he had. It seems to me therefore that there is a risk that a material miscarriage of justice could occur if the proceedings against John Martin and those unserved were simply deemed to be discontinued yet the provision made in favour of his mother Mrs Martin could be still the subject of challenge."

It seems to me, with the greatest respect to Master Towle, that the cited passage overlooks the provisions of Section 9 of the Family Protection Act, and there is nothing to prevent this plaintiff and the other grand-daughters in a similar position to her, from seeking the Court's leave under Section 9 when

different considerations would apply. This is a course of action that found favour with Holland J. in an unreported decision Simpson v The Public Trustee (Christchurch 377/83, 7/3/86). At page 6 His Honour said:

> " Although one can have some sympathy for the solicitors of the plaintiff in doing nothing following the request to the Public Trustee in their letter of May 1984, such cannot justify doing nothing for the ensuing 6 months and permitting the 12 month period to go by. It may be that the fault is the fault of the solicitor rather than the plaintiff, but refusal of this motion will not be an absolute bar to the plaintiff's claim if he can establish its merit. In any event the Court must be conscious of its obligation to ensure that litigation is not unnecessarily delayed. "

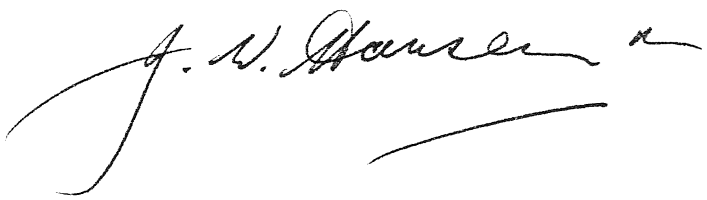
Of course, His Honour has made it clear in another unreported decision in Van Grinsven v Penter and Walker (Christchurch M21/90 6/3/90), that where application is made for leave to commence family protection proceedings out of time the proper course is for such an application to be heard with a substantive application when the merits can be considered. That seems to me what ought to occur here and it was what occurred in the other unreported decision of mine I referred to, the Watson case.

Much reliance has also been placed on the decision of the Court of Appeal in Hibbs v Towle (C.A. 60/87, Richardson, McMullin Bisson JJ unreported decision of 21/7/88). Again there seems to be important distinctions between the present case and that. In that particular case, money was held back pending the resolution of the dispute. There had been defacto service of the proceedings. There was evidence from the plaintiffs to show that they had a strongly arguable case, and there was further evidence, clearly from the plaintiffs themselves that they were of limited means and they would face considerable difficulties and injustice if their application was refused. In this particular case, again, I repeat, there is no such evidence before me. I am satisfied that the discretion vested in me by Rule 128 must be exercised against this application. I can see

no great injustice to the plaintiff in that course. I can see considerable injustice to the beneficiaries if another result was reached. I repeat, the delay here is extreme and inexcusable. There is no satisfactory evidence adduced before the Court that it has not been acquiesced in by the plaintiff because the plaintiff for some reason has declined to place any evidence before the Court other than that of the assistant staff solicitor. Such evidence she seeks to place before the Court is inadmissible.

This application is dismissed.

There will be costs to the defendant in the sum of $750, plus disbursements as fixed by the Registrar.



Solicitors for the Plaintiff: Parry Field & Co., Christchurch.
Solicitors for the Defendant: Major Gooding & Partners, Masterton, by their Agent Nigel Dunlop, Christchurch.