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NZLR

IN THE HIGH COURT OF NEW ZEALAND 28/10
AUCKLAND REGISTRY

CP.113/92

LOW PRIORITY

1643

BETWEEN	K.W. & R.A. CRAZE	
	Plaintiffs	
AND	R.B. EDMUNDS & ASSOCIATES LIMITED	
	First Defendant	
AND	R.B. EDMUNDS	
	Second Defendant	

Hearing: 11 October 1994

Counsel: M. J. Koppens for Plaintiffs
I. F. Williams for First and Second Defendants

Judgment:

13 OCT 1994

JUDGMENT OF BLANCHARD, J.

Solicitors: Wynyard Wood, Auckland for Plaintiffs

Shieff Angland, Auckland for First and Second Defendants

Application is made for review of the Master's decision refusing the plaintiffs leave to take further steps pursuant to Rule 426A and granting the defendants' their application for dismissal of the proceedings for want of prosecution under Rule 478. The first defendant, R. B. Edmunds and Associates Ltd sold a bakery business to the plaintiffs in September 1990. The transaction was settled and possession given and taken on 1 October 1990. The first sign of a claim emerged about a year later. Proceedings were issued on 4 February 1992, the plaintiffs claiming breach of the Fair Trading Act and misrepresentation concerning the profitability of the business. It was also alleged that before the agreement was signed the plaintiffs had made inquiry of the second defendant, Mr Edmunds, a director of the first defendant, concerning profitability and that he had misrepresented the situation to them. Relief was sought against him personally under the Contractual Remedies Act and for negligent misrepresentation. (A claim of fraud has now been abandoned, although that was notified only at the hearing before me.) The plaintiffs also claim against the second defendant pursuant to the provisions of the Fair Trading Act.

Immediately after the proceedings were issued the defendants sought further particulars (on 11 March 1992). On 16 March 1992 the plaintiff undertook to give particulars and agreed that filing of a statement of defence could be deferred until they were available. No such particulars have ever been supplied. On 6 October 1992 the plaintiffs undertook to file an amended statement of claim. This also has not yet been done. One year seven months later on 18 July 1994 the plaintiffs applied under Rule 426A for leave to take further steps in the matter. That was two years five months after the proceedings were issued and about three years nine months after the business was handed over to the plaintiffs.

The first issue raised before me was whether a decision of a Master dismissing an action for want of prosecution could be the subject of a review application or whether, on the other hand, relief could be obtained only by way of appeal. Mr Koppens has satisfied me by reference to ***Sutton v New Zealand Guardian Trust Ltd*** (1989) 2 PRNZ 111 that there can be review. At pages 114 and 115 of his decision Gault, J. looked at this question and concluded that, although such an order had the effect of finally determining the rights of the parties to the proceedings, it was nevertheless an interlocutory application. Indeed, it is plain on the face of Rule 264 that the only interlocutory application where a review is not available is an interlocutory application for judgment under Rule 136 or Rule 137. Mr Williams referred to ***Rakich v Wrightson NMA Ltd*** (unreported, High Court, Whangarei, B.25/89, 16 November 1989, Henry, J.) but all that was there determined was that an interlocutory application for an adjournment is spent once a final decision has been made on the substantive proceeding. Reference can also be made to my own decision in ***Pegasus Leasing Ltd v Thoroughbred Management Ltd (In Receivership)*** (1992) 6 PRNZ 325 in which I held that the Court has no jurisdiction to review a decision not to grant an adjournment once a Master has made a decision on a summary judgment application. The interlocutory decision in relation to the adjournment is then spent and no longer subject to review. But that is a completely different situation from the present one.

Master Feenstra heard full argument on this matter and gave a reserved decision. The onus is therefore on the plaintiff applicants to show that his decision was wrong: ***Wilson v Neva Holdings Ltd*** [1994] 1 NZLR 481.

The hurdle which a plaintiff has to overcome in order to obtain an order under Rule 426A is not high, although the longer the delay, the higher the hurdle. The purpose of the rule is to identify for the Court's attention cases which are lagging so that the Court can be satisfied that there is still a proper issue to be tried and can impose the discipline of timetable orders: ***Redoubt Farm Ltd v R. R. McAnulty Ltd*** [1994] 1 NZLR 451. As Barker, ACJ remarked in that case, it is not a substitute for an application to strike out for want of prosecution. However, as in this case the Master had at the same time to consider an application to strike out for want of prosecution and the review application relates to both matters, it is appropriate to proceed straight to the latter since, if the proceedings ought not to have been struck out, it will be appropriate for an order to be made under Rule 426A and, even more obviously, if the Master was correct in striking the proceedings out no order would be made under Rule 426A.

At the outset I note that the learned Master was in error in saying in his decision that when the plaintiffs applied for leave to take further steps it was then three years and nine months since the proceedings were issued. I have already mentioned the correct period, which was two years five months. The figure of three years nine months was the period between the settlement of the sale and purchase of the business and the date on which the application was made by the plaintiffs under Rule 426A.

Although any period of significant delay in the course of litigation is to be deprecated and the recently instituted experiment with case flow management has as one of its objectives ensuring that litigation is moved along the path to trial as speedily as possible under the control of the Court at all times, it has to be said that in the past applications to strike out have often failed where the period of abnormal or even inexcusable delay was a

great deal longer than has occurred here. It is true that the defendants here are able to point to some evidence that they may have suffered prejudice because of the delay. They can say that when their application for dismissal was made it was getting on for four years since the events that gave rise to the litigation. When the proceedings were issued, the defendants say, they contacted 12 former customers of the business who had, since the plaintiffs took it over, ceased to be customers. They say that 12 of the customers who had left gave as their reason for no longer being customers that they were dissatisfied with the business service given by the plaintiffs. Nine of the 12 former customers gave letters or made statements as potential witnesses for the defence. Recently, however, when the defendants tried to contact those nine persons only four of them could be found and three of those four were very reluctant to become involved in such an old matter which was no longer of concern to them. The learned Master commented that this was not surprising nor was it surprising, that the defendants should say that it was difficult now to remember in detail events which took place four years ago. The Master went on to say that serious but unspecified allegations of fraud were faced and there would be a need to have available all witnesses who could be of assistance in the defence. However, the force of that point, which was validly made by the Master, has now diminished since the allegation of fraud has been dropped.

The learned Master considered that in the circumstances proper trial could no longer take place and it would be unjust to grant leave to proceed, though he noted that the limitation period had not yet expired and that the plaintiffs said that they would start afresh.

This is the real difficulty for the defendants in this matter and the reason why I think that the application for review must succeed. When the

applications were made the limitation period in relation to the alleged misrepresentations had nowhere near come to an end; it still today has a long way to go. It is true that the limitation period under the Fair Trading Act (three years from the matter complained of) is much shorter. It appears to have expired by 18 July 1994 since any deceptive or misleading conduct must have occurred, at the latest, by 1 October 1990. Nevertheless, the allegations under the Fair Trading Act tread the very same ground as the misrepresentation claims and, as the latter can be relitigated in fresh proceedings, any prejudice which the defendants may be able to point to is something that they will simply have to bearin any event.

The principles to be applied on an application for dismissal for want of prosecution are extensively reviewed in the decision of the Chief Justice in ***Lovie v Medical Assurance Society NZ Ltd*** [1992] 2 NZLR 244. The Chief Justice referred to the decision of the House of Lords in ***Birkett v James*** [1978] AC 297. He noted that a prime holding in that case was that since a plaintiff whose action was dismissed for want of prosecution before the limitation period had expired was generally entitled to issue a fresh writ for the same cause of action, the power to dismiss should not normally be exercised within the currency of the limitation period. To strike such an action out would only aggravate the prejudice to the defendant from delay and add to costs.

Further, I am not convinced that the prejudice to the defendants, particularly now that the fraud allegation has been dropped, will be as great as they are contending. Much of the case will turn upon the evidence of the parties themselves about their negotiations and upon documents relating to the financial position of the business at various times. The defendants, if they make renewed efforts, may be able to make contact with more of the

former customers. Even if they cannot, they know the whereabouts of four of them who can be brought along, reluctantly or not, as witnesses. The memory of those persons can be refreshed by producing to them their own written statements.

The overriding consideration in an application of this kind is whether justice can be done despite the delay. I think that it can. This consideration, together with the fact that new proceedings could be started in respect of the common law claims, convinces me that the decision of the learned Master to dismiss the proceedings for want of prosecution was incorrect. It follows also that leave should have been granted under Rule 426A. The decisions of the Master are therefore quashed, the defendants' application is dismissed and leave is granted under Rule 426A for the plaintiffs to file amended pleadings incorporating the further particulars sought by the defendants. I order that that must be done within ten working days of the date of delivery of this judgment.

It appears from the material placed before me that there may also have been some argument before the Master on an application for the defendants to strike out causes of action. The notice of application which I find in the file is not particularised. The learned Master's judgment records only the hearing of two applications, namely those which I have already discussed. The only reference that I can find in his judgment which may be to an application to strike out is a statement in which he says that he accepts the submissions that on the pleadings alone there is no case made out against the second defendant. It seems plain that the learned Master, for obvious reasons, has made no decision in relation to the striking out application. It remains on foot and can be renewed (but should be particularised) when the amended statement of claim has been filed.

The plaintiffs have succeeded in their application for review but, as a mark of the Court's disapproval of the way in which they have conducted the litigation to date, I make no award of costs. Necessarily however, the order for costs and disbursements made by the learned Master is set aside.