Cn528

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

28/10

CP 697/91

MEDIUM PRIORITY

1619

BETWEEN	WALLACE LESLIE CONNELL as trustee of the WALLACE LESLIE CONNELL TRUST First Plaintiff
A N D	WALLACE LESLIE CONNELL as trustee of the GWENYTH VALMAE CONNELL TRUST Second Plaintiff
A N D	WALLACE LESLIE CONNELL Third Plaintiff
A N D	CONNELL & MACKAY LIMITED Fourth Plaintiff
A N D	NZI SECURITIES ASIA LIMITED Defendant

Hearing: 14 July 1994

Counsel: N.S. Gedye for Defendant/Applicant
G.N. Jenkins for Plaintiffs

Judgment: 4 October 1994

JUDGMENT OF ANDERSON J

Solicitors for Defendant/Applicant: Bell Gully Buddle Weir
DX 9, Auckland

Solicitors for Plaintiffs: Daniel Overton & Goulding
DX 7305, Onehunga

This application by the defendant, pursuant to Rule 61C of the High Court Rules, seeks orders by way of review of parts of the judgment given by a Master on 2 June 1994 dismissing the defendant's application to strike out the plaintiffs' proceeding and directing the defendant to proceed with an application to strike out one or more of the plaintiffs' causes of action on the grounds that they are statute barred or do not disclose a reasonable cause of action. Because the defendant carried the burden of satisfying the Court, both before the Master and on this application for review, it is unnecessary for me to elect between the alternative approaches in respect of applications to review Masters' decisions, exemplified by *Lovie v Medical Assurance Society NZ Ltd* [1992] 2 NZLR 244, on the one hand, and *Wilson v Neva Holdings Ltd* [1994] 1 NZLR 481, on the other. I do, however, derive assistance from the succinct analysis in *Lovie* of the principles which attend applications to strike out proceedings for want of prosecution.

The present proceedings were commenced at the suit of the first three plaintiffs on 14 May 1991. The fourth plaintiff was joined by consent on 1 November 1991. The original statement of claim had been amended thrice by the time the Master heard argument on the defendant's application to strike out for want of prosecution. Both the second amended statement of claim and third amended statement of claim are lengthy and are replete with certain particulars but lacking in essential particulars. One can ascertain from a consideration of the pleadings that the plaintiffs complain because in 1980 they borrowed money through the defendant from an off-shore source, for the purposes of buying a kiwifruit orchard, and in due course they were unable to meet their debts in respect of such borrowing and replacement borrowing, with the result that they lost their orchard. The plaintiffs assert that the defendant was negligent in various respects in connection with the original borrowing and negligent in the manner in which the loan and replacement borrowings were

managed. Damages are claimed at an amount which has been the subject of adverse judicial comment in interlocutory proceedings. Despite the numerous particulars provided in the pleadings there is nothing on the faces of the statements of claim to suggest why a duty of care to the plaintiffs or any of them reposed on the defendant, whether the breaches of alleged duty are tortious or contractual in nature, or both, or by dint of what defaults and in what way the highly particularised but inadequately analysed damages arise. As a matter of elementary fairness, a defendant is entitled to have a claim pleaded in a comprehensible way. The indications for analytical cogency become even more important when a plaintiff relies on allegations of very old fact, where questions of limitations must inevitably arise. Since the genesis of a cause of action varies in time depending on whether it lies in tort or in contract the plaintiff, no less for its own information than as a matter of fairness to a defendant, ought to plead in a way which allows an assessment of the time when the alleged cause of action arose. Further, it is not sufficient to plead that the defendant was negligent over a period in relation to the management of the affairs of the various plaintiffs without giving particulars, including particulars of time, relative to the specific acts which are impugned.

I make these criticisms of the pleading by the plaintiffs because the defendant is entitled to give consideration to the question of limitations but cannot adequately evaluate its position or without embarrassment argue limitations except on a provisional or assumed assessment of what the plaintiffs are in fact trying to say. Moreover, prejudice to the defendant in meeting a belated, if not stale, claim is a very pertinent consideration in connection with an application to strike out on the grounds of want of prosecution.

Because the plaintiffs' pleadings are so wanting in essential particulars, to the extent indicated above, it is not possible to fix with certainty the duration

of pre litigation delay because such delay commences with the genesis of a cause of action. Prima facie, however, no loss or damage sustained before 14 May 1985 is likely to be recoverable, by reason of limitations. Similarly, any contractual negligence by the defendant before 14 May 1985 is unlikely to be able to escape a plea of limitations notwithstanding that loss referable to such alleged negligence may have occurred after 14 May 1985.

One of the complaints made by the plaintiffs against the defendant is that on 12 December 1985 the defendant brought the loan facility on-shore without advice to the first, second and third plaintiffs, with a consequent doubling of the effective interest rate. I leave aside any consideration of the possible paradox in connection with the plaintiffs' complaint that the loan was placed off-shore rather than on-shore at material times and take that alleged default by the defendant as a reference point in connection with the issuing of proceedings almost six years later. It is the case, of course, that in connection with applications to strike out for want of prosecution an omission to litigate at the earliest reasonable opportunity is not considered to be inordinate and inexcusable delay by a plaintiff. To hold otherwise would derogate from the effect of the statute of limitations itself. Once proceedings are commenced, however, the Court's supervisory jurisdiction can lead to the striking out of claims which are not fairly pursued. The fact of lengthy delay before commencing proceedings becomes relevant for striking out purposes when, for example, a litigant continues to be dilatory or where, after the commencement of litigation, the prejudicial impact of post-commencement delay is exacerbated by the passage of time since the events or alleged events, upon which a plaintiff seeks to rely. In the present case proceedings were commenced 11 years after events relied on by the plaintiffs although, for the reasons hereinbefore indicated, events prior to mid 1985 may be rendered irrelevant by the statute of limitations. In any event the proceeding was commenced at the

tail end of a limitation period in circumstances where the plaintiffs' explanations for not litigating sooner must attract some measure of scepticism.

The affidavits show that the defendant called up the plaintiffs' indebtedness in May 1986 and went into possession of the kiwifruit property a year later. Between October 1986 and June 1989 the property was sold off in different parcels. On 3 February 1988 the third plaintiff was adjudicated bankrupt and was not discharged from bankruptcy until 5 October 1990. He explains the delay in commencing proceedings as referable to his inability to find a solicitor who understood the intricacies of the currency loans with a consequential need to educate himself regarding such loans, and to the fact of his bankruptcy. In my judgment it is understandable, and not a matter for undue criticism, that the plaintiffs did not embark upon litigation during the period they were coping with the undoubtedly distressing loss of the kiwifruit property, and the unhappy status of a bankrupt which obtained in the case of Mr Connell. The defendant, by counsel, submitted that bankruptcy ought not to have been a reason for not litigating and that it was difficult to accept that the plaintiff could not find a legal advisor who understood the factual situation. The latter criticism, of course, assumes that the case may be far more simple than the plaintiffs perceive, and such may in fact be the case. The statements of claim are highly but inadequately particularised and may in due course be shown to have a spurious complexity disguising essentially untenable litigation. However, the plaintiffs see the matter in a complex way and if their perception should be correct then the question whether they in fact could litigate and the nature of such litigation may not have been apparent until a time not unacceptably distant from the time the litigation was commenced. However the stale nature of many of the assertions in the presumed causes of action were really such as to require the plaintiffs to prosecute the litigation with

reasonable vigour. They have not done so. The following delays are identifiable since the proceedings were commenced:-

(i) Three months between commencement of the proceeding and service on the defendant.

(ii) Two and a half months before the application for joinder of the fourth plaintiff.

(iii) Ten and a half months before the service of a second amended statement of claim.

(iv) Nine months between September 1992, when the defendant applied for security for costs, and June 1993, such period of dormancy having been requested by the plaintiffs.

(v) Seven months between the dismissal of an application for review of a Master's order in respect of security for costs, until provision of such security.

The periods of delay identified above do not cover the whole of the passage of time from the commencement of proceedings down to the provision of security but they do amount to those periods of delay which generally speaking are attributable to the plaintiffs. Such delay is excessive and therefore inordinate, particularly having regard to the staleness of the claims at the time the proceedings were commenced. Such delays are also in the main inexcusable. I acknowledge that the nature of the original order for security for costs had inherent problems for which the plaintiffs cannot be held responsible.

For the reasons I have indicated the defendant has demonstrated that the plaintiffs' delays since the commencement of the proceeding are inordinate and inexcusable. Yet the defendant must also show that such delay has seriously prejudiced it in connection with the litigation. It seeks to show such prejudice

by reference to affidavits of persons associated with the defendant at times relevant to the allegations made by the plaintiffs. For example, they have filed an affidavit by Mr D.W. Dorward who was the Corporate Services Manager of Marac Corporation Limited which is alleged to have been the agent of the defendant at material times. The plaintiffs rely on advice said to have been given to the first, second and third plaintiffs in or about 1980 when the original borrowing occurred. Mr Dorward has deposed that he has virtually no recall of any of the events relevant to the borrowing in 1980 and that a memorandum by him, dated 29 August 1980, does not revive any memory of the matters therein. An affidavit has been sworn by a Mr B.J. Lloyd, a Manager employed by an associate company of the defendant. He deposes to the absence of documentation in connection with matters alleged by the plaintiffs, such evidence showing the difficulties the defendant would have in meeting allegations on behalf of the plaintiffs concerning oral representations or advice said to have been given to the plaintiffs.

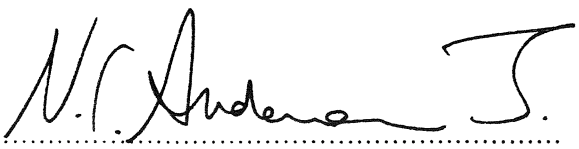
The difficulties, indeed grave difficulties, the defendant might have in meeting allegations on behalf of the plaintiffs concerning oral discussions cannot be said to have arisen or to have been aggravated by inordinate and inexcusable delay since the proceedings commenced. In mid 1991, when the litigation started, the defendant would still have been required to meet allegations of oral discussions extending back more than 10 years. The defendant's difficulties arise out of delay in the commencement of proceedings, not out of delay in the prosecution of them once commenced. Further, the defendant may not have to meet such allegations at trial if in due course, once the plaintiffs have pleaded with essential rather than mere particularity, the impact of limitations will be known.

It follows from what I have indicated above that the defendant does not satisfy me that the first cause of action should be struck out for want of prosecution. I do not, however, exclude from appropriate consideration any future application by the defendant to strike out for want of prosecution on the grounds of delay, including any implication of abuse of process which might be said to exist in keeping extant but not pursuing stale proceedings which do not disclose or scarcely disclose a reasonable cause of action. The application to review the Master in respect of the request to strike out is dismissed. On the other hand, even though the defendant did not actively pursue the Master's order requiring the defendant to make an application based on limitations, I review that order by rescinding it. The reasons will be obvious from the course of this judgment. I am quite satisfied that the defendant cannot fairly assess or advance its case in respect of limitations until the plaintiffs shall have provided particularity in connection with specific alleged breaches of contract or duties of care, particulars of the damages said to be referable to any particular breach, and such other matters as I have discussed earlier in this judgment. The initiative must now lie with the defendant to make a formal request for particulars to which it is entitled in order to be fully and fairly informed of the nature of the claim. I do not consider it appropriate to indicate in any greater detail what particulars the defendant could properly request. Naturally any party can apply to the Court for such orders as may be necessary or expedient to facilitate the process of provision of particulars.

For the reasons hereinbefore indicated the defendant's application to strike out the first cause of action in the second and third amended statements of claim is dismissed. Also for the reasons hereinbefore given the decision of the Master requiring the defendant to file an application to strike out on the grounds of limitations or failure to disclose a reasonable cause of action is

reviewed by way of rescission thereof. In the matter of costs I make no order in this regard because:-

1. The delay on the part of the plaintiffs was inordinate and inexcusable and the defendant's inability to show prejudice arises in part from the unhelpful want of essential particularity in relation to the plaintiffs' pleadings.
2. The defendant's application to rescind the order in respect of an application based on limitations and failure to disclose a reasonable cause of action, although not actively argued before me, was justifiably brought.
3. The preparation by the defendant of a casebook of essential documents in the application before me was most helpful, facilitated the hearing of the application, and is to be encouraged amongst litigants by appropriate responses in connection with costs.



N.C. Anderson, J.