IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

29/4

CP 918/88

BETWEEN WALTER HAWEA HIKO and ROSALIE MARY HIKO

Plaintiffs

A N D FAYE ELIZABETH PAKU and TERENCE JOSEPH HERTNON

First Defendants

A N D ROBERT GERARD METCALF and MICHAEL CHUNG trading as BURNS METCALF CHUNG & CO

Second Defendants

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Hearing: 18 April 1994

Counsel: P.D. McKenzie for the plaintiffs
K.I. Murray for the second defendants

Judgment: 18 April 1994

JUDGMENT OF DOOGUE J

THE APPLICATION

1. This is an application by the second defendants to strike out the plaintiffs' claim against them for want of prosecution. There is no dispute about the essential facts which lie behind the plaintiffs' claim against the second defendants, although understandably there is a dispute about the plaintiffs' claim against them.

THE FACTS

2. The plaintiffs sought to assist a daughter and an intended son-in-law to borrow some $30,000. As a result, their house property was taken as security for an advance to the daughter and intended son-in-law, who are the first defendants in these proceedings, by the second defendants' nominee company. The mortgage was executed on 6 December 1982 and on that day the plaintiffs together with the first defendants attended on the second defendants and received certain advices. In 1984 the first defendants defaulted under the mortgage and a mortgagee sale of the plaintiffs' property resulted, with their property being sold on 12 July 1984. At some time by or subsequent to that date there were communications between the then solicitor for the plaintiffs and the second defendants. Certainly on 19 September 1984 the plaintiffs' then solicitor wrote a letter to the second defendants making plain that a claim was likely to be pursued and that there was conflict between the second defendants and the plaintiffs as to whether the plaintiffs had been offered the opportunity for independent advice in respect of the transaction which led to them granting the mortgage over their property. However, for reasons which on the evidence before me relate to defaults by the plaintiffs' then solicitor and counsel, the proceedings by the plaintiffs against the second

defendants were not commenced until 2 December 1988, a period of over four years from the date when the plaintiffs had suffered the loss as a result of the mortgagee sale and a period of almost six years from the advice from the solicitors to them in respect of the mortgage.

3. The proceedings were not served on the second defendants until some seven months later. It is suggested that that delay is of itself inordinate, but I cannot accept that suggestion. The second defendants filed their statement of defence on 21 July 1989. There was then a delay of almost two years before any notice for discovery was served on the second defendants, although the counsel then acting for the plaintiffs deposes that he had hoped to achieve voluntary discovery from the second defendants. There was then a further delay of approximately 18 months during which the second defendants failed to comply with the notice for discovery and the plaintiffs were obliged to apply to the Court for discovery, with that application being lodged on 23 December 1992. The second defendants responded more promptly in respect of that application and filed and served a list of documents early in February 1993. There was then a further period of delay which is reasonably explained by the plaintiffs as their original solicitor was no longer in practice and their second counsel had to endeavour to obtain new

representation for them because of the previous solicitor's defaults. As a result, inspection by the plaintiff of the second defendants' documents did not take place until 8 September 1993. Following inspection counsel for the plaintiffs sought further documentation within a reasonable period thereafter. It was only following the provision of such documents by the second defendants' solicitors to the plaintiffs that the second defendants themselves gave notice of discovery on 27 January 1994.

4. On 10 February 1994 the second defendants applied for a stay of proceedings. As a result, the plaintiffs have not complied with the notice of discovery to them but have awaited the determination of that application and of the present application which was filed on 11 March 1994. In keeping with the general dilatoriness which has occurred throughout these proceedings the second defendants themselves did not file and serve information which they rely upon in respect of their present application until the hearing itself, when it was adduced by consent.

THE LAW

5. There is no dispute as to the general principles applicable to applications under R 478 which were conveniently summarised by the present Chief Justice

in Lovie v Medical Assurance Society New Zealand Ltd [1992] 2 NZLR 244, 253; (1991) 4 PRNZ 662, 671:

> "1. By itself, delay prior to the issue of proceedings cannot constitute inordinate and inexcusable delay for purposes of a striking out application.
>
> 2. If such delay has occurred, further delay after issue of proceedings will be looked at more critically by the Court, and will be regarded more readily as inordinate and inexcusable than if the proceeding had been commenced earlier.
>
> 3. The defendant must show prejudice caused by the post-issue delay. If however the defendant has suffered prejudice as a result of pre-issue delay, he will need to show only something more than minimal additional prejudice to justify striking out the proceeding.
>
> 4. An overriding consideration is whether justice can be done despite the delay. As to that, all factors, including pre-issue prejudice and delay, have to be taken into account."

DECISION

6. It is submitted for the second defendants that there has been inexcusable and inordinate delay by the plaintiffs which has resulted in serious prejudice to the second defendants and that overall justice requires the claim to be struck out. The periods of delay relied upon are, first, the pre-proceeding period of delay, although, as already noted, the second defendants were given substantial information about the nature of the proposed claim within a couple of months of the plaintiffs suffering their loss and the proceedings themselves were commenced within some four years of that date, even if almost

at the end of any limitation period in respect of a claim in contract. Any claims on behalf of the plaintiffs in tort and equity would run from the July 1984 date.

7. The second period of delay relied upon is the short period of delay in service, which I have already put to one side.

8. The next period of delay relied upon by the defendants is perhaps the only substantial period of delay by the plaintiffs after the commencement of the proceedings, namely the period before discovery was sought from the second defendants of almost two years. That is in part explained by the legal advisers to the plaintiffs at that time. As already noted, counsel had thought that voluntary discovery was likely. Certainly to my mind this is the only particular period of delay which could be said to verge upon the inordinate. I will return to it a little later.

9. The next period of delay is the period of default by the second defendants themselves in complying with the notice for discovery. In respect of that period the plaintiffs refer to the decision of the House of Lords in Roebuck v Mungovin [1994] 2 WLR 290, 298, where the Court was considering subsequent conduct by a defendant which had induced a plaintiff to incur further expense in pursuing an action. The Court noted that that did not

> "constitute an absolute bar preventing the defendant from obtaining a striking-out order. Such conduct of the defendant is, of course, a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case."

10. Whilst the second defendants have made something of the delay since the plaintiffs formally sought discovery from the second defendants, in my view there is nothing about such delay which could be said to be inordinate and certainly it is excusable in the circumstances which are before the Court and which have already been touched upon above.

11. The second defendants claim serious prejudice largely because of the inevitable delay between the advice to the plaintiffs in December 1982 and the ultimate hearing of this proceeding, a delay which will be considerably in excess of 11 years by the time the proceeding comes to trial, if it is permitted to proceed.

12. The nature of the injustice alleged is that the solicitor who gave the advice will be in a difficult position to give clear evidence as to the crucial meeting between him and the plaintiffs and that the plaintiffs and their daughter, one of the first defendants, may all be able to give self-serving evidence adverse to that solicitor. The other first defendant, it is said, may not be able to be summoned, but it is clear that the position in respect of him remains substantially the same as at

the time the proceedings were issued, namely that he is in Australia.

13. The second defendants further rely upon their inability to obtain mitigation of any judgment which the plaintiffs might achieve against them in respect of the man Hertnon, who is the first defendant. The daughter of the plaintiffs is herself a bankrupt and the position in respect of her is hopeless. With all respect to this part of the second defendants' submission, the point goes to mitigation, and I cannot see that the situation is any different from at any other time during the course of the proceedings.

14. The essential element of injustice relied upon by the second defendants relates to the recall of the solicitor involved and the opposing recall of the plaintiffs and their daughter. With all respect to the application on behalf of the second defendants, this aspect of possible injustice has hardly changed during the whole of the course of the proceedings and, in particular, if it is relevant, not during the period during which the plaintiffs delayed in seeking discovery from the second defendants. The second defendants had been promptly put on notice as to the nature of the claim against them. One would have expected in the ordinary course that the solicitor would at that time have refreshed his memory as to the events relied upon by the plaintiffs and supplemented his contemporaneous file

note as to what occurred at the time that he gave advice to them. If he did not do it then, he certainly could have been expected to have done it when the proceedings were issued, well within the limitation period in respect of tort and equity if at the end of that period in respect of contract.

15. This is not a case therefore where the prejudice to the defendants could be said to be greater now than at the time when proceedings were issued. It does not fall within the principle number 3 expressed in Lovie's case.

16. For my part the only period of delay by the plaintiffs that could have been relevant in respect of the submissions for the second defendants is the period during which there was a delay in seeking discovery. Given the position deposed to by the then counsel for the plaintiffs, I would not for my part have regarded that delay as being shown to be inordinate or inexcusable having regard to the previous history of the proceeding and having regard to the further history of the proceeding. It may have been a different matter if the second defendants had chosen to apply to strike out within that period. They have, however, chosen not to do so. They have let the proceeding continue. They have themselves been dilatory. They have themselves contributed towards the costs of the plaintiffs. Even in respect of the present application they have been dilatory in the filing of their affidavits.

17. Whilst, therefore, the overall delay connected with this proceeding is substantial and thoroughly regrettable, it is not delay which in my view could lead to the second defendants' application succeeding. The second defendants have not persuaded me that there has been any inexcusable inordinate delay; nor have they persuaded me that there is any prejudice to the second defendants other than the inevitable difficulties which result in the hearing of any proceeding being delayed. Certainly they have not persuaded me that there is any overall injustice. Indeed, to dismiss the clair for want of prosecution given the history of this particular proceeding could only result in an injustice to the plaintiffs.

RESULT

18. The application must be dismissed.

COSTS

19. I consider that the plaintiffs are entitled to their costs in any event given the timing of this particular application in respect of the other steps taken in the proceedings. It is apparent that the second defendants have brought the present application simply because they are now aware that the plaintiffs' claim is being actively pursued and the plaintiffs have sought to set the proceedings down. The present application, like the application

to stay proceedings and their dilatory application for discovery on their own behalf, is merely an indication that at this time they seek of their own accord to delay the hearing of the proceeding. The plaintiffs have sought costs of $500, which are entirely reasonable, and there will be an award in that amount together with any reasonable disbursements incurred by the plaintiffs in opposing the present application, such disbursements to be fixed by the Registrar in accordance with Item 34 of the Second Schedule to the High Court Rules in the event of there being any disagreement.

STAY OF PROCEEDINGS APPLICATION

20. The second defendants' application for a stay was not prosecuted and is dismissed.

TIMETABLE ORDERS

21.(i) The plaintiffs are to complete discovery to the second defendants within 28 days of today.

(ii) Any further interlocutory applications are to be made within six weeks of today.

(iii) In the event of there being no further interlocutory applications the parties are to co-operate in the completion of a praecipe to set down within eight weeks of today.

(iv) Liberty to apply.

Solicitors for plaintiffs:
Hollings Partners, Dunedin

Solicitors for second defendants:
Chapman Tripp Sheffield Young, Wellington

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