NZLR

NOT
RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND 2015
WELLINGTON REGISTRY

CP No 395/92

BETWEEN MAX WINDERS of Rotorua, Farmer, and JANET MARY WINDERS of Rotorua, Farmer

Plaintiffs

609

A N D THE BANK OF NEW ZEALAND a duly incorporated company having its registered office at Wellington

Defendant

Date of Hearing: 26 November 1993

Counsel: J N Briscoe for Plaintiffs
C S Chapman for Defendant

Date of Judgment: 13 MAY 1994

JUDGMENT OF MASTER J C A THOMSON

The applications for decision before the Court are an application by the plaintiff to proceed further pursuant to R426A of the High Court Rules and a cross application by the defendant to strike out the statement of claim. The notice of proceeding and statement of claim were filed in the Auckland High Court on 17 December 1991. The proceeding was served on the defendant on 26 January 1992. A statement of defence was filed on 9 April 1992, having been served by facsimile the previous day. The defendant challenged

the filing of the proceeding in the Auckland Registry. As a result, an application for an order transferring the proceedings to the Wellington High Court, accompanied by a memorandum of consent, was filed on 13 May 1992. A formal order transferring the proceedings was made on 18 May 1992. By letter dated 4 June 1992, the Registrar of the High Court at Auckland sent the documents to the Wellington Registry and they are recorded as having been lodged and filed in that Registry on 8 June 1992. The statement of claim and statement of defence were stamped with that date and a new CP number given to the proceeding.

The plaintiffs served on the defendant a notice for discovery by letter dated 1 October 1992. A copy of the notice for discovery, however, was not filed in the Wellington Registry as required by R293 until 19 August 1993. An application to strike out the defence for failing to comply with the notice for discovery was served by the plaintiffs on the defendant on or about 29 September 1993. It was subsequently abandoned when it was discovered that R293 had not been fully complied with. An application for leave to continue pursuant to R426A was then filed by the plaintiffs. It was served on or about 13 October 1993. Notwithstanding that leave had not been granted, the plaintiffs obtained from the Registry Office a sealed order for discovery on 14 October 1993.

I deal first with the application by the plaintiffs for leave to continue under R426A. It is first necessary to decide whether the serving of a notice for discovery (without filing a copy in Court) on the defendant by letter of 1 October 1992 can properly be considered to be a step in the proceeding. As I said earlier, when the defendant failed to comply with the notice for discovery, the plaintiffs filed an application to strike out the defence. That was in September 1993 and subsequently abandoned.

Mr Chapman for the defendant submits that the mere service of a notice for discovery is not a step in the proceeding because a notice for discovery is not complete under R293 until the notice is both filed in the Registry and served on the other side. He submits that if a notice for discovery is served but not filed, then the party upon whom it is served cannot be required to give discovery.

In his commentary to R426A, the author of McGechan on Procedure comments that the Court will take a liberal approach as to what should be considered a step in the proceedings for the purpose of the Rule. McGechan J, in ***McKee-Fehl Constructors Ltd v Green and McCahill (Contractors) Ltd*** (1988) 4 PRNZ 277, had to consider what constituted a step in a proceeding for the purposes of s5 of the Arbitration Act 1908. The learned Judge surveyed the Courts' approach as to whether or not a defendant was entitled to a stay, because of the existence of an arbitration agreement, after he had taken a step in the proceeding. The Judge pointed out that two lines of authority had developed in the common law and that the New Zealand Courts had favoured the more passive approach, which is that merely by filing an affidavit in the proceeding had the result that the defendant was thereafter debarred from applying for stay. He will be held to have taken a step in the Court proceeding.

Adopting the liberal approach as to what is to be considered a step in the proceeding (it must be more than the writing of a letter), I think it is very arguable that the service of a notice of discovery pursuant to R293 is a step in the proceeding even though at that time a copy of the notice has not been lodged in the High Court Office. I say that because it is not necessary to obtain a Court order prior to issuing a notice for discovery under R293. The lodging of a copy of the notice in the Court is, I think, little more than a

formality. There is nothing in the Rule stating that it must be lodged prior to notice being served on the defendant. The right to issue a notice for discovery under R293 depends upon a statement of defence being filed. After that has been done, any party to the proceeding may file and serve a notice for discovery on any other party who has filed a pleading. Compliance with the notice pursuant to R294(a) runs from the date of service. The date of filing the notice is not referred to. In any event, filing and service do not usually occur contemporaneously. I would have thought it difficult to argue that the filing in Court of any document, be it a notice for discovery or a statement of claim, is not to be classified as a step in a proceeding until a copy of the document is served. If that is so, why should service of a document before filing not also be "a step" in a proceeding? Accordingly, I think, adopting the liberal view, that service of a document is a step in the proceeding. That is the view I expressed in ***D L Francis & Ors v G W Valentine & R I Thompson & Ors***, unreported Wellington CP489/89, 27 May 1993 and I have no reason to change my view. I also think it likely that full compliance with R293 by lodging a notice for discovery in the Court and prior to, or at the same time, serving a copy on the other side may be more honoured in the breach than in the observance. If the serving of the notice for discovery on the defendant by letter of 1 October 1992 can properly be considered to be a step in the proceeding, then it would not be necessary for the plaintiffs to have leave under R426A because the filing of the application to strike out in September 1993, even though subsequently abandoned, would appear to prevent the Rule operating. However, if leave is necessary, then the Court has to consider whether leave should be given in terms of ***Redoubt Farm Ltd (In Receivership and Liquidation) v R R McAnulty Ltd*** (unreported High Court Auckland M2153/90, Barker ACJ, 27 September 1993). The defendant submits that there is no proper issue to be

tried because the plaintiffs are caught by the Limitation Act 1950, but even if not so caught, leave should not be given because:

> "(a) 1985 is now eight years ago
>
> (b) Even if not out of time the proceeding was issued on the eve of the expiry of the limitation period and no further step was taken until what was perceived to be the eve of the year provided by r. 426A.
>
> (c) The plaintiffs have been guilty of inordinate and inexcusable delay in not prosecuting the proceeding."

I think that the plaintiffs have demonstrated, subject to the Limitation Act 1950 issue, that there is a proper issue to be tried. The delay for the purpose of R426A is not serious and indeed it may be even considered excusable; the plaintiffs being under the mistaken impression that they had fully complied with R294 when they served notice of discovery by letter of 1 October 1992 on the defendant. I think one can safely assume that the defendant, when it was served, had no idea whether a copy of the notice had been filed in Court or not. Clearly it was not for that reason that the defendant failed to comply for over 12 months. If the defendant had complied, no doubt the plaintiffs would have completed inspection and taken further steps and R426A would not have come into play. Given that the primary object of the Rule is to bring cases languishing for lack of attention before the Court (to decide whether or not the plaintiffs are dragging the chain) and so that the discipline of timetable orders can be imposed, it seems to me here, that it is quite apparent that the plaintiffs do wish to proceed with their case and get on with it. I hold that (subject to the Limitation argument which I will deal with on the strike out application), if it is necessary for the plaintiffs to have leave under R426A to proceed further, that I should grant such leave.

I also think that the delay to be considered in respect of a R426A application is delay occurring after the 12 month period has expired. As Barker ACJ said in ***Redoubt Farm Ltd***, an application under R426A cannot be a substitute for an application for striking out for want of prosecution.

I deal now with the strike out application and the question of whether or not the action is statute barred because of the provisions of the Limitation Act 1950. This issue also is relevant to the R426A application because if the Court finds that the claim is so barred, then, as far as R426A is concerned, it will conclude that there is not a proper issue to be tried.

The defendant argues that more than 6 years elapsed after the date upon which the causes of action set out in the plaintiffs' statement of claim arose and the time when the proceedings were issued. The defendant relies on s4 of the Limitation Act 1950 and R106 of the High Court Rules and submits that the plaintiffs' claim is statute barred.

The first argument advanced is a technical one. The defendant maintains that the date which should be taken as the commencement of the proceedings is 8 June 1992, being the date when the documents which had previously been lodged in the Auckland High Court Registry were formally entered in the Wellington Registry and stamped with that date. The defendant argues that, as a matter of the proper construction of RR3 and 106 of the High Court Rules, a proceeding is not, in terms of those Rules, commenced until those Rules are complied with. In this case, Mr Chapman says that was not until 8 June 1992. If that is so, then the plaintiffs' cause of action is out of time. If, however, the time is properly to be taken as 17 December 1992 (the date when the notice of proceeding and statement of claim was lodged in the

Auckland Registry), then arguably the causes of action are within time. I will deal with that issue later.

In arguing that the proceeding is out of time on a proper construction of the Rules, the defendant points to R106 which provides:

> " (1) Every proceeding ... shall be commenced by filing a statement of claim in the proper office of the Court, as determined in accordance with rule 107(1)."

R3 provides that:

> "'To file', in relation to any document, means to lodge the document in the form required by these rules in the proper office of the Court, ..."

Mr Chapman submits that the plaintiffs' statement of claim was not filed "in the proper office of the Court" until the file was transferred to Wellington and the documents date stamped 8 June 1992. It is submitted that the proceeding was not commenced until filed in the proper office of the Court, namely Wellington. All causes of action certainly arose before 8 June 1986. The proceeding is barred by s4 of the Limitation Act 1950.

It is submitted that it is beyond dispute that R106 is not complied with where a proceeding is not issued out of the proper office of the Court and further beyond dispute that the statement of claim has therefore not been "filed" in terms of rule 3. It is submitted that if the statement of claim has not been "filed" then the proceeding cannot have been commenced. If that is so, then R5(1) and (2) must be considered. I set out R5:

"**Non-compliance with rules** - (1) Where, in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceeding there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form, or content or in any other respect, the failure -

(a) Shall be treated as an irregularity; and

(b) Shall not nullify -

(i) The proceeding; or

(ii) Any step taken in the proceeding; or

(iii) Any document, judgment, or order in the proceeding.

(2) Subject to subclauses (3) and (4), the Court may, on the ground that there has been such a failure as is mentioned in subclause (1), and on such terms as to costs or otherwise as it thinks just, -

(a) Set aside, either wholly or in part, -

(i) The proceeding in which the failure occurred; or

(ii) Any step taken in the proceeding in which the failure occurred; or

(iii) Any document, judgment, or order in the proceeding in which the failure occurred; or

(b) Exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceeding generally as it thinks fit.

(3) The Court shall not wholly set aside any proceeding or the originating process by which the proceeding was begun on the ground that the proceeding was required by these rules to be begun by an originating process other than the one employed.

(4) The Court shall not set aside any proceeding or any step taken in a proceeding or any document, judgment, or order in any proceeding on the ground of a failure to which subclause (1) applies on the application of any party unless the application is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity."

The defendant does not, it seems, argue that the proceeding is a nullity in the sense that it has to be struck out and started again, but submits that it cannot be considered as having been commenced until the Rules are complied with.

I find that an artificial argument. I think that a proceeding has to be commenced (or purported to be commenced) before R5 could even come into play. To adopt Mr Chapman's interpretation of the Rules would be to give them a procedural rigidity which is both unsupportable and contrary to the primary objects of achieving the just and expeditious disposal of a proceeding.

Henry J said in *Edgebaston Investments Ltd v S J Edward & Ors* (unreported CP344/93, Auckland Registry, 1.9.1993) at p12:

> "In this regard I have given consideration to Mr Chapman's contention that the ability to plead the Limitation Act 1950 (not presently available) may arise if the order is made because in that event no action would have been commenced (R106). Such a draconian result would appear unjust, but the plea would seemingly have little prospect of success."

The Judge came to the latter conclusion because of the terms of R5, which he went on to consider, and found that the misdemeanour he had to consider in ***Edgebaston*** was to be treated as an irregularity and not a nullity.

I think here that the filing of the documents in the Auckland Registry was an irregularity and not a nullity and is also covered by R5. For the purpose of calculating the time when the proceeding was commenced for the purpose of the Limitation Act 1950, the relevant date is the date it was filed in the Auckland Registry, namely 17 December 1991. Furthermore, it cannot be overlooked that it was the defendant that sought the transfer to Wellington, and which the plaintiffs consented to. One cannot see them consenting if the result was to thereby create a limitation defence which might not be available if the proceeding remained in the Auckland Registry.

The more difficult issue is whether or not the action must be taken as statute barred by the Limitation Act 1950, even if the proceeding is properly taken to have been commenced on 17 December 1991 when lodged in the Auckland High Court. Section 4 of the Act states that an action founded on a simple contract or tort shall not be brought after the expiration of 6 years from the date upon which the cause of action accrued. The defendant argues that, on the facts, the plaintiffs' causes of action must all be taken to have accrued on 11 December 1985 with the "closing out" of the hedging contract. At that time the defendant argues the amount of the hedging loss was determined and the plaintiffs incurred the liability (albeit payable seven days later) to the United Building Society. Halsbury's Laws of England Vol 9 at p277, para 622 is relied on and I quote:

> "In general the period of limitation under the Limitation Act 1939 begins to run when the cause of action accrues. The day on which the cause of action arose is excluded."

and para 662 where it states:

> "In an action for a breach of contract cause of action is the breach; ***Gould v Johnson*** (1702) 2 Salk 422. Accordingly, an action must be brought within six years of the breach; after the expiration of that period the action will be barred although damage may have accrued to the plaintiff within six years of action brought."

Mr Chapman also relies on ***Williams v Attorney-General*** [1990] 1 NZLR 646, 678, where Richardson J said:

> "A cause of action accrues when every fact exists which it would be necessary for the plaintiff to prove in order to support its right to the judgment of the Court ... The elements of a cause of action for negligence are the existence of a duty of

> care, breach of that duty, material injury to the interests of the plaintiff, a proximate cause or link between the defendant's conduct and the resulting injury and the absence of disqualifying conduct on the part of the plaintiff (Fleming The Law of Torts) (7th ed 1987) at p95."

The defendant analyses each of the plaintiffs' causes of action and submits that, whether in contract or tort, the date of the breach must be taken as 11 December 1985 when the defendant closed out the hedging contract.

I have been supplied with an example as to how hedging works. One thing is very clear from the example and that is that hedging is, or can be, complicated, as appears from the Privy Council decision in ***Citybank NA v Stafford Mall Ltd*** (unreported 16.11.1993).

The principles relating to applications to strike out proceedings are well settled. The jurisdiction is to be exercised sparingly and is not to be used except in a clear case where the Court is satisfied that it has the requisite material to enable it to determine that the case (allowing for any amendment to cure defects) is clearly untenable and cannot succeed. If there are disputed questions of fact, the case must go to trial. In ***Matai Industries Limited v Jensen*** [1989] 1 NZLR 525, Tipping J said at 532:

> "The onus is clearly on the defendants to show that the plaintiffs' claim or at least part of it, is statute barred. Evidence can be tendered either way by affidavit and that is what has occurred in the present case. If the plaintiff in opposition to the defendant's proposition can show that it has a fair argument that the claim is not statute barred or that the limitation period does not apply, or is extended for any reason, then of course the matter must go to trial. To hold the interests of the plaintiffs and defendants in fair balance in this context, the Court should, in my view, be slow to strike out a claim or cause of action together in limine but against that, if the position is quite clear, then a defendant should not be vexed by

> having to go to full trial when the answer is obvious and inevitable."

It is claimed by the plaintiffs here that the defendant undertook to manage and advise on the plaintiffs' foreign exchange loan. The plaintiffs' action has been pleaded in both contract and in tort. The plaintiffs' allegation is that the defendant both mismanaged and negligently advised on the loan causing loss to the plaintiffs. The basic facts are that on 11 December 1985 the defendant closed out the New Zealand dollar hedging cover of the plaintiffs, such closing out being operative from 18 December 1985. As a consequence there was a loss of $46,723.68 which the plaintiffs had to bear. The plaintiffs argue that liability for that loss did not arise until 18 December 1985. That was when their liability to a third party, the United Building Society, arose. It was only from 18 December 1985 the plaintiffs say that they could be sued.

In ***Barberry Holdings Limited and Anor v Bank of New Zealand*** (unreported Wellington CP257/90, 28.7.93), a similar case to this, Neazor J said at p6, in respect of the contract causes of action:

> "Mr Chapman offered no authority for the proposition that where what is pleaded is breach of a management contract with continuing responsibility and loss, which may be indicative of breach, at more than one date, some at least apparently not outside the limitation period, the Limitation Act has the effect of barring all claims under the contract and I do not perceive the basis on which his argument must prevail. It appears to me, particularly having regard to the sparse evidence presently before the Court not to be a case where the defendant has satisfied the onus on it."

On the issue of negligent advice, the learned Judge said, at p7:

> "This case again however appears to me to be arguably distinguishable from ***Bell v Peter Browne*** [[1990] 3 All ER 124] because of the question whether the relevant loss is the first loss caused in an operation were losses *and* gains might have been contemplated or the end result of the operation when it was reasonably ascertainable that the plaintiff is worse off then if he had not entered the transaction - per Brennan J in ***Wardley Australia Limited v Western Australia*** 109 ALR 247, 263. It is at that stage that the liability becomes absolute."

I think those comments apply equally here.

Mr Briscoe for the plaintiffs made the following submissions.

Firstly, in an action in tort, where the wrong is not actionable without actual damage, the period of limitation does not begin until that damage happens. Here, he says, the damage happened on the 18th December 1985 when the Plaintiffs became liable for payment to a third party. These are matters of fact which would be canvassed at the substantive hearing. See ***BCNZ v Progeny International*** [1991] NZLR 109. In ***Matai Industries Ltd v Jensen*** the Court said, at Page 533:

> "A cause of action in contract arises upon breach, irrespective of resultant damage because nominal damages can be awarded for a breach of contract. It may well be, as Cooke P observed when discussing concurrent liability in contract and tort in ***Day v Mead*** [1987] 2 NZLR 443 that a cause of action for negligence should not be held to arise either in tort or in contract unless and until damage accrues. However, for present purposes it is quite clear, this being an action for the tort of negligence, that the cause of action does not arise until damage results from the negligence. It follows therefore that Mr. Atkinson was right in submitting that time begins to run from the date when the damage is suffered rather than the date of the negligence although, of course, in many cases the two date will coincide."

Secondly, Mr Briscoe submits, there is nothing before the Court to establish that at some stage between the 11th and 18th December 1985, the resulting loss could not have been alleviated, or indeed, avoided by the actions of the Defendant. The negligence continued up to the 18th December 1985 (and beyond). These are factual issues which will need to be traversed at trial.

Thirdly, he says the contract between the Plaintiffs and the Defendant was an ongoing contract. It extended past the 18th December 1985. In the Plaintiffs' pleadings (Paragraph 40) the Plaintiffs allege that the Defendant was in breach of its duty of care to:

(a) Manage the Plaintiffs' foreign exchange loan

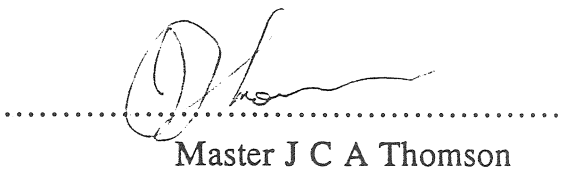
(b) Properly advise the Plaintiffs on the risks involved in their foreign exchange loan.

This cause of action contemplates a claim against the Defendant that is not restricted to any loss arising on the 18th December 1985 only. The closing out on the 11th December 1985 by the Defendant was one part only of the mismanagement of the Plaintiffs' loan.

I think there is force in those submissions and that the limitation question can only be determined after hearing evidence. I think that it would be wrong at this stage to hold that there is no action available in either contract or in tort. It seems to me that the business of hedging is a highly technical procedure and the limitation issue not so clear that the proceeding could possibly be struck out at this stage. Certainly, I do not think the facts here are so obviously distinguishable from those in ***Barberry*** that I should take a different view from that Neazor J came to in that case.

That cross-application to strike out is accordingly dismissed. The plaintiffs are given leave to proceed under R426A. I think in the circumstances that

the plaintiffs are entitled to costs which I fix at $1,000.00. I will accept a memorandum as to timetabling orders.



Master J C A Thomson

Solicitors: O'Sullivan Clemens Briscoe & Hughes, Rotorua for Plaintiffs
Buddle Findlay, Wellington for Defendant

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