IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

CL.12/97

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LOW PRIORITY

BETWEEN: IAN KEITH FINLAYSON
First Plaintiff

AND JOHN BERNARD McCORMACK
Second Plaintiff

AND BARBARA SETON BEASLEY
Third Plaintiff

A N D: NEW ZEALAND INSURANCE LIFE LTD

Defendant

Hearing: 1 May 1998

Oral Judgment: 1 May 1998

Counsel: *Roger Partridge* and *David Cooper* for defendant in support
Russell Fairbrother for plaintiffs

ORAL JUDGMENT OF WILLIAMS J.
ON STRIKING-OUT APPLICATION

Solicitors:
Leo Lafferty, PO Box 322 Napier for plaintiffs
Bell Gully Buddle Weir, DX 20509 Auckland, for defendant

Copy for:
R Fairbrother Esq., P O Box 339 Napier.

This is an application by the defendant (for convenience called NZI) to strike out this claim on the grounds that the plaintiffs have been persistently in breach of various directions and interlocutory orders and that, even now, the plaintiffs have not fully complied with their obligations under orders made by Elias J on 3 April 1998. When those orders were not complied with NZI filed the present application.

There is also an application for costs and as a result of the plaintiffs' non-compliance and the possible attribution of the blame for that to their legal advisers, a subsidiary question to be considered today is whether the plaintiffs' legal advisers should be directed to meet any costs order personally.

The background to the matter is that the plaintiffs (or to be accurate they and Mr Beasley the late husband of the first plaintiff) were members of a company called Accord Brokerage Consultants Limited which entered into an agency agreement with NZI between February and August 1987. The plaintiffs plead that they entered into those agency contracts pursuant to representations in 1986-1987, and their amended statement of claim makes it clear that those representations are said to have been principally oral but in part written.

The plaintiffs plead that they acted as agents until February 1991 when the relationship between Accord Brokerage Consultants and NZI came to an end. The plaintiffs claim that NZI was in breach of the contract between them in bringing that relationship to an end on 7 February 1991. The company was later dissolved.

As a result, the plaintiffs claim substantial sums for damages arising out of what they plead was an expectation that they would be able to continue to earn income from their agency contracts. The sums are something over $200,000, $300,000 and $31,500 for the plaintiffs respectively. Each of them also seeks general damages of $75,000 in respect of the first and second plaintiffs and $25,000 in respect of the third, and each also seeks exemplary damages of $25,000 for what they claim is contumelious conduct by NZI.

The claim was commenced in the Napier Registry on 15 January 1997 so that on the most benign view of limitation it was commenced less than a month before the limitation period must have expired. The defendant takes the view that the claim was commenced well outside the limitation period but that because there are factual differences between the parties on that issue which could not be resolved on an application to strike out the claim as being outside the limitation period, it is prepared to raise and debate that issue at the hearing of the claim, if there is one.

On 16 April 1997 Barker J ordered that the proceedings be transferred to Auckland and entered in the Commercial List and made initial timetable orders. Thereafter there has been what can only be described as persistent and, by comparison with the rate of progress normally to be found in Commercial List matters, long-standing breaches by the plaintiffs of various timetable orders and directions.

On 1 August 1997 Fisher J made timetable orders, including requiring inspection by both parties within four weeks. The plaintiffs' documents, however, were not made available for over two months.

In the interval between 24 April 1998 and today, there has been a flurry of activity by the plaintiffs. They have, earlier this week, filed and served a further supplementary list of documents; a notice of opposition has been filed to the striking-out application; and the plaintiffs have sought enlargement of time for the filing of their amended list and for the answering of the request for particulars.

Mr Fairbrother advised during submissions that the plaintiffs do not wish to serve interrogatories, although that was the first indication to the defendant that that would be the case.

Mr Fairbrother submitted that the claim ought not to be struck out. The plaintiffs, he said, are persons of modest means, who have a genuine claim which they should be entitled to prosecute. He said that they have done the best they can in those circumstances to comply with the Court's orders and that has been made somewhat more difficult by their having to deal with litigation at some distance from where they reside.

Even so, it seems clear that the latest list of documents is deficient. The earlier list of documents apparently discovered a larger number of documents than that in the latest list. Mr Partridge advised that there were about 430 fewer documents in the latest list than in the original. That, Mr Fairbrother explained, was because the original list was not prepared with his assistance and it was only when he personally took command of the discovery process and made appropriate decisions as to relevance that a number of documents were deleted.

However Part B of the list must be wrong. The only documents which it says the plaintiffs had but no longer have in their possession or power are the originals of documents listed as copies. They have been asked to provide discovery of commission statements relating to earnings from other insurers, tax returns and bank statements, but apart from a brief period in 1990 no such commission statements have been discovered and there are no tax returns or bank statements.

The position is clearly one where the plaintiffs have been persistently in breach of their obligations to the Court. They may be persons of modest means endeavouring to conduct litigation at a distance but that does not, of course, free them from the obligations of any litigant to continue to pursue their case particularly when they are required to follow certain steps within certain times by Court orders. That is especially the case in the modern era of case management and is even more particularly the case with the discipline of the Commercial List to which they have now been subject for about a year.

The Court, of course, is reluctant to strike out cases for breaches of procedural orders. It is always to be preferred that cases are determined on their merits rather than on procedural points. However, it is clear that the Courts have that power under R 277 and there is ample authority to the effect that they will unhesitatingly use that power if they take the view that litigants are consistently in breach of their requirements. The decision in ***Samuels v Linzi Dresses Ltd*** [1980] 1 All ER 803 is a graphic example but there are many others within the Commercial List files.

In the end, however, the Court reaches the view that belatedly the plaintiffs have made some attempt to honour their obligations and that they should be given

one final brief period to comply with the balance. Discovery by them remains clearly deficient. Secondly, they have not provided the particulars to which NZI is entitled pursuant to orders of this Court. They will be given one further week, until *4:00pm* on *Thursday 7 May 1998,* to comply with all their outstanding obligations in full.

The matter will be re-called on *Friday 8 May* at *9:00a.m.* and the position will then be reconsidered. If they are and continue to be in breach of their obligations in any substantial way, pursuant to the orders made, it is virtually inevitable that their claim will be struck out.

The Court will therefore adjourn this application part-heard to *8 May* at *9:00a.m.* to reconsider the matter. It is a matter for counsel for the plaintiffs whether he attends the further hearing by telephone or in person.

Turning to the question of costs. On the information now available to the Court there is insufficient material which would justify an order that counsel meet personally the costs which are about to be ordered against the plaintiffs.

The Court, however, orders the plaintiffs to pay costs to the defendant in relation to this application to date which are fixed in the sum of $1500 and disbursements. Payment of that sum is directed to be made by no later than *4:00pm* on *7 May 1998*. If the plaintiffs are in breach of that order, as with the other orders to which they are subject, it is virtually inevitable that the defendant's application to strike out this claim will be granted.

There will be orders accordingly.

Just to make it clear, if there is a difference between the parties as to whether full compliance has been effected or not, I will hear counsel on that issue.

WILLIAMS J.

1 May 1998