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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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CP192/99

BETWEEN	**TECHNIC BITUMEN PACIFIC LIMITED**
	Plaintiff
A N D	**SHELL NEW ZEALAND LIMITED**
	Defendant
A N D	**W H GROVE & SONS LIMITED**
	Third Party

Hearing: 27 March 2003 and 7 April 2003

Counsel: J B M Smith for Plaintiff
J E Sutton for Defendant

Judgment: 23 May 2003

JUDGMENT OF MASTER D I GENDALL

Solicitors:
Russell McVeagh
Minter Ellison Rudd Watts

Introduction

[1] The defendant Shell seeks an order dismissing the plaintiff's proceeding based upon r.477 and r.478 High Court Rules, together with r.426A High Court Rules and s.50 Defamation Act 1992. Broadly speaking the application to dismiss is made for want of prosecution and for failure to take a step in the proceeding within the last 12 months.

[2] The plaintiff opposes this application.

Background facts

[3] The plaintiff is a bitumen company. In 1998 it tendered successfully to the Western Samoan Government for a bitumen supply contract. The plaintiff alleges that Shell the defendant also tendered through the third party, Grove in Auckland, and a company known as Breckwoldt Samoa Indenting Merchandising Co. Limited ("BSIM") in Western Samoa.

[4] The plaintiff contends that after it had been successful in the tender process and the contract awarded to it, Shell defamed it or slandered its bitumen product in a number of ways. This was by publishing defamatory statements to Grove and through Grove to BSIM and ministers and officials in the Western Samoan Government.

[5] The plaintiff Technic holds Shell liable for all these publications.

[6] The plaintiff pleads a wide range of causes of action including defamation, breach of the Fair Trading Act, slander of goods, interference in contractual relations and interference of trade by unlawful means. Its statement of claim claims $500,000 general damages and $600,000 exemplary damages.

[7] Shell, the defendant, in its statement of defence denies that it tendered to the Western Samoan Government for the bitumen supply contract either directly or through Grove or BSIM. Further, it denies making to Grove any publication defamatory of the plaintiff Technic or procuring any of the subsequent defamatory publications.

[8] Grove has been joined as a third party to this proceeding.

Counsels' arguments and my decision

[9] The broad grounds upon which the defendant Shell seeks the order dismissing this proceeding are as follows:

(a) The plaintiff has consistently failed to prosecute its claim in this proceeding;

(b) The only step the plaintiff has taken in the proceeding in the past 17 months is to file and serve a notice to admit facts in August 2002 in an attempt to avoid the ramification of the rule requiring leave to proceed in the event that no step is taken in the proceeding for 12 months;

(c) The only basis upon which this matter has been brought before the Court has been by reason of the "proactive case management" system;

(d) The maintenance of the proceeding constitutes an abuse of process;

(e) It is just and equitable that the proceeding be dismissed.

[10] The grounds upon which the plaintiff Technic opposes the orders sought are broadly as follows:

(a) The limitation period for the causes of action has not expired.

(b) Leave of the Court to take further steps in this proceeding is not required pursuant to r.426A of the High Court Rules 1985 (or s 50 of the Defamation Act 1992) as less than eight months have elapsed since the last step was taken (Notice to Admit Facts dated 16 August 2002).

(c) The proceedings raise a serious issue to be tried.

(d) There is no abuse of process.

(e) There has not been inordinate and inexcusable delay on the part of the plaintiff.

(f) The defendant has not been prejudiced.

(g) It is in the interests of justice that this matter be allowed to proceed.

[11] This application is based principally upon r.426A, r.477 and r.478 of the High Court Rules.

Rule 426A provides:

> **Consequences of failure to set down within 12 months after last step in proceeding** –(1) Where a proceeding has not been set down for trial and at least 12 months have elapsed since the last step was taken in the proceeding, no further steps shall be taken in that proceeding without the leave of the Court.

Rule 477 provides:

> **Summary stay or dismissal** – Where in any proceeding it appears to the Court that in relation to the proceeding generally or in relation to any claim for relief in the proceeding –
>
> (a) no reasonable cause of action is disclosed; or
>
> (b) the proceeding is frivolous or vexatious; or
>
> (c) the proceeding is an abuse of the process of the Court,
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> the Court may order that the proceeding be stayed or dismissed generally or in relation to any claim for relief in the proceeding.

Rule 478 provides:

> **Application to dismiss for want of prosecution** – Where the plaintiff fails to prosecute his proceeding or any part thereof, or the defendant fails to prosecute his counterclaim or any part thereof, to trial and judgment, any

> opposite party may apply to have the proceeding or counterclaim, or such part thereof as aforesaid, dismissed, and the Court may, on such application, make such order as may be just.

[12] It is convenient to deal first with the application based under r.426A. This can be quickly disposed of.

The Rule 426A Argument

[13] The essence of r.426A is that where a proceeding has not been set down for trial and at least 12 months have elapsed since the last step was taken, no further step is to be taken in the proceeding without the leave of the Court.

[14] The plaintiff contends that leave is not required here as the plaintiff has taken an appropriate step – that is a Notice to Admit Facts which was filed by the plaintiff on 16 August 2002. This is within the required 12 months timeframe.

[15] It is clear that any activity taken in a proceeding indicating that it is still active will be sufficient to prevent the 12 month period running.

[16] Examples include service of a notice of discovery - *Bull v J Wattie Foods Limited* (1994) 7 PRNZ 420; forwarding a praecipe to another party – *Longbeach Holdings Limited v Bhanabhai & Co. Limited* (1997) 12 PRNZ 17; and even a request that a conference be convened by the Court under r.441 – *Coffey v Morris* 20 November 1998, Master Venning, High Court Christchurch, CP90/94.

[17] As McGechan J stated in *Mountain Rock Productions v Wellington Newspapers* [1997] 3 NZLR 31 at page 36:

> There is no particular mystery in the concept of "step" "in a proceeding" given contexts ... The Act must, however, be one within and governed by the rules or recognised practice of the Court. Actions outside that area, albeit connected with the litigation, are not "steps" for this purpose. Mere correspondence, or negotiations, or briefing of witnesses are not included.

[18] The defendant contends that the Notice to Admit Facts filed by the plaintiff here was taken simply in order to avoid the consequences of r.426A. In my view this

argument is without merit. I am satisfied that this action taken by the plaintiff is sufficient to be considered a "step in the proceeding" in terms of r.426A.

[19] Accordingly I find that the defendant's argument that leave of the Court is required pursuant to r.426A before a further step in this proceeding is taken must fail.

[20] I turn now to consider the arguments put forward by the defendant under r.477 and r.478. It is convenient to deal first with r.478.

Rule 478 Argument

[21] The principles for striking out proceedings under r.478 are well known – *Lovie v Medical Assurance Society New Zealand* [1992] 2 NZLR 244. In that case Eichelbaum CJ stated (at p248):

> ... the applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58, it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.

[22] As to the need to show inordinate delay, it seems that in this case approximately eight months elapsed since the last step in the proceeding was taken by the plaintiff, and approximately 11 months since the prior step. Further, counsel for the plaintiff contends that, overall, the only substantial period of relative inactivity was from September 2001 to February 2003 being a delay of approximately 17 months. He argued that although this is unsatisfactory, it does not register on the scale of what can ordinarily be characterised as inordinate and inexcusable.

[23] Counsel for the defendant contended, however, that whether delay is inordinate must depend upon the facts of each case and that it is the cumulative effect of the delay that must be considered – see McGechan on Procedure, para HR1.05, and *Allen v Sir Alfred McAlpine and Sons Ltd* [1968] 2 QB 229.

[24] Counsel for the plaintiff also suggested that this application by the defendant must fail in the first instance as it cannot demonstrate inordinate delay has occurred where (as here) the limitation period for the causes of actions pleaded has not expired.

[25] In *Mead v Day* [1985] 1 NZLR 100 (CA), the court held that an application to dismiss should not be granted while the limitation period is still running for the reason that a plaintiff can simply reissue proceedings. At most, it seems from English authorities including *Birkett v James* [1971] 2 All ER 801 that dismissal before expiry of a limitation period is unusual and would only be allowed "in the most rare and exceptional circumstances".

[26] Here the plaintiff accepts that the initial limitation period for three of the five causes of action (defamation, slander of goods and Fair Trading Act breaches) has expired. The remaining two causes of action pleaded, however (interference with contractual relations and interference with trade by unlawful means), are apparently well within their limitation period which will not expire until August 2004.

[27] The argument follows, therefore, that it is inappropriate to strike out the proceeding relating to these last two causes of action at least, when it can simply be reissued at any time before the limitation period would expire. In this event, the defendant would gain nothing.

[28] There is merit in this argument and in my view it serves to assist the plaintiff here.

[29] Weighing up the circumstances prevailing here, there is some doubt in my mind as to whether the plaintiff's delay could be described as "inordinate".

[30] On the issue of whether the delay in question is inexcusable the defendant contended that the plaintiff appears to offer no real excuse for the delay here. This being so then, it would be difficult for the plaintiff to argue that its delay was excusable. Certainly before me counsel for the plaintiff did not appear to advance cogent reasons for the plaintiff's lack of progress here, and there is therefore some force in the defendant's arguments as to this aspect.

[31] I turn now to consider the final element of r.478 and that is whether the defendant has suffered serious prejudice as a result of the delay.

[32] As to this aspect, McGechan states at para HR 478.07:

> This factor is perhaps the most important, as it goes directly to the ultimate consideration of justice. In most if not all cases there are some prejudice arising from mere passage of time, dimming of memories, physical changes etc. Situations can exist which are so badly effected by mere passage of time that an order can be made on that basis alone, but in "most cases" courts look for some "special prejudice": NZ Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58, 63. The absence of serious prejudice was decisive in Commerce Commission v Giltrap City Ltd (1997) 11 PRNZ 573.

[33] Here the defendant contends that serious prejudice will be suffered by it should this matter proceed to trial due to the recent death on 7 March 2003 of one of its witnesses Mr J M McMillan.

[34] The defendant claims that Mr McMillan is a pivotal witness in this proceeding as he was the Bitumen Manager of the defendant Shell at the operative time.

[35] Counsel for the defendant noted that the death of a witness is a significant factor relevant in assessing serious prejudice – see McGechan on Procedure HR 478.07, *Riesterer v Western Bay of Plenty District Court* (1997) 11 PRNZ 563, 568 and 570, *Whitby Forest v Buchanan* (unreported, High Court, Masterton Registry, CP10/86, 19 November 1991, Master Williams QC), and *Manson v New Zealand Meat Workers Union* [1990] 3 NZLR 615, 622.

[36] Opposing this, counsel for the plaintiff contended that death or unavailability of a witness is not necessarily a decisive factor. He referred me to *Johnstone v Bell Chambers Low and Ors* (High Court, Wanganui Registry, CP44/84, 30 July 1991, Master J H Williams QC) and *Hydra Cold Storage Co. Ltd v Auckland City Council* (High Court, Auckland Registry, A693/80, 6 August 1986, Tompkins J). In each of those cases a material witness died and the action was not struck out.

[37] The plaintiff contends that, analogous to the present case, the Master in *Johnstone* said that prior to the death of the key witness there was ample opportunity for a full signed brief to be taken.

[38] Here the witness, Mr McMillan, swore an affidavit initially on 2 May 1999 with respect to a pre-commencement discovery matter. Also, in July 2001 Mr McMillan responded to interrogatories sought by the plaintiff.

[39] It was indicated to me that Mr McMillan's death came after a long illness which was diagnosed in early 2000. Given this, counsel for the plaintiff maintained that there has been ample opportunity for the defendant to obtain a full brief of evidence from Mr McMillan. Mr McMillan has been in the frame from the outset and it is likely he would have been interviewed and statements obtained from him by the defendant both before and after diagnosis of his illness. The plaintiff did not become aware of Mr McMillan's illness until mid 2001.

[40] As to prejudice, counsel for the defendant referred me to *Fitzgerald v Beattie* [1976] 1 NZLR 265. Here at p269 the court stated:

> ...delay is particularly important in a prejudicial sense when the case will depend wholly, or to an important extent, on oral evidence based upon recollection, as distinct from business records or other temporary documentary evidence. The more important the oral evidence, the critical the delay.

[41] This element of prejudice clearly must go directly to ultimate considerations of justice in any case. It goes without saying that in most cases there is some prejudice arising from delay of any nature, regardless of whether such delay satisfies the "inordinate and inexcusable" criteria. The authorities are clear that the court must therefore only allow dismissal where "serious prejudice" exists – *Commerce Commission v Giltrap.*

[42] This is a defamation case. All causes of action here flow out of the allegations that defamatory statements were made. Ideally, a fair assessment of the credibility of the relevant witnesses at the hearing would be important. In paragraphs 11 and 12 of the statement of claim the plaintiff pleads that the first of five publications of the

allegedly defamatory statements was made by way of two telephone conversations between Mr McMillan and a Mr Muir of Grove. These allegations are denied in the statement of defence and it is possible that a conflict of evidence as to these conversations may become relevant. The death of Mr McMillan may create a difficulty in this regard. His evidence may well be important to the findings which are in dispute, although as I understand it, this evidence will relate to only one of the five alleged publications of the statements in question. As a result, this may raise fair trial issues and questions as to whether justice can be done between the parties in his absence.

[43] In litigation before the courts that potential witnesses may die on occasions is sadly an inevitable fact.

[44] A balancing act is required in the interests of justice. The issue here is whether, with the death of Mr McMillan, the defendant has suffered prejudice to such an extent that justice can no longer be achieved.

[45] This is not an easy question. Weighing up all the relevant circumstances I find by a small margin, however, that the answer to this question is no. Mr McMillan's health difficulties were known to all for some time. If the defendants have not obtained a full brief of evidence from Mr McMillan, it could not be said that it was for lack of opportunity to do so. Further, it does not necessarily follow that it is the defendant that would be prejudiced by the delay and the unavailability of Mr McMillan to testify in person and be cross-examined. On balance, to deprive the plaintiff of an opportunity to have its claim put before the court would not, in my view, be in the interests of justice.

[46] Taking into account all these matters, I conclude:

(a) The plaintiff's argument that although some delay has occurred, it cannot be considered to be "inordinate" given all the surrounding circumstances, has some merit. This is particularly so in light of the fact that the delay in question in cases such as *Reisterer v Western Bay of Plenty District Council* amounted to over 13 years,

and in *Whitby Forest v Buchanan* amounted to approximately 10 years.

(b) This is despite the fact that the plaintiff has provided no real excuse for any delay which has occurred.

(c) As to prejudice, notwithstanding the death of one of the defendant's significant witnesses here, under the circumstances, I find that the defendant has not suffered serious prejudice or special prejudice of such a nature that considerations of justice would require the plaintiff's proceeding to be dismissed.

[47] Accordingly, I am satisfied that the defendant has been unable to establish that the strike out principles under r.478 have been met here. Its application under this rule fails.

[48] I now turn to consider the defendant's arguments under r.477

Rule 477 Argument

[49] Aside from r.478 the court has inherent jurisdiction and power under r.477 to prevent abuse of process.

[50] Abuse of process as defined in *Commerce Commission v Giltrap* involves use by a litigant of the processes of the court for an ulterior or improper purpose. It is necessary for a defendant to show that this has caused or will cause it to be prejudiced in some way. In *Grovit v Doctor* (1997) 2 All ER 417 it was held that maintenance of a stale proceeding and gross disregard for timetable orders may be a sufficient abuse of process without the defendant having to make out prejudice to sustain a strike out application. As to this see also *Barbary Holdings Ltd v BNZ* (High Court, Wellington Registry, 17 June 1999, CP257/92, Master Thomson).

[51] Counsel for the plaintiff submits that the proceedings here are not an abuse of the court process. In *Grovit* there was complete inactivity on behalf of the plaintiff for a period of two years and in *Barbary Holdings Ltd* inactivity for five years

respectively. Here, the last period of inactivity was eight months approximately and counsel for the plaintiff contends that during this and earlier periods there had been some dealings involving correspondence between the parties' solicitors regarding the possibility of a mediation or settlement conference, and the taking of the evidence of Mr McMillan.

[52] Given my findings above with respect to the defendant's r.478 arguments, I am satisfied that the inactivity by the plaintiff here could not be considered an abuse of process in terms of r.477.

[53] Accordingly, the defendant's application based upon r.477 must also fail.

[54] One final matter requires consideration. This is the defendant's contention that s50 Defamation Act 1992 also assists its application here.

Section 50 Defamation Act 1992 Argument

[55] Section 50 states:

> (1) In any proceedings for defamation, unless the Court in its discretion orders otherwise, the Court shall, on the application of the defendant, order the proceedings to be struck out for want of prosecution if—
>
> (a) No date has been fixed for the trial of the proceedings; and
>
> (b) No other step has been taken in the proceedings within the period of 12 months immediately preceding the date of the defendant's application.

[56] In the light of my finding in paragraph [19] above with respect to r.426A the defendant's argument under s.50 must also fail.

[57] As I noted earlier, I am satisfied that the plaintiff here has taken a step in the proceeding within the 12 months immediately preceding the date of the defendant's application. There is therefore no jurisdiction to strike out the plaintiff's proceeding for want of prosecution pursuant to s.50.

[58] The defendant's application based upon s.50 must also fail.

Conclusion

[59] It will apparent from my findings above that the defendant's application for an order dismissing this proceeding fails.

[60] Costs are reserved.

[61] As a further event and to consider the timetable order sought by counsel for the plaintiff in his Application for Directions dated 24 March 2003, this matter is to be listed in the Masters Chambers List for call on Tuesday 17 June 2003.

Master D I Gendall

Delivered at 4.00 pm on 23 May 2003.