NOT RECOMMENDED

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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-1999-485-054
CP192/99

BETWEEN	TECHNIC BITUMEN PACIFIC LIMITED Plaintiff
AND	SHELL NEW ZEALAND LIMITED Defendant
AND	W H GROVE & SON Third Party

Hearing: 30 July 2003

Appearances: J B M Smith for the Plaintiff
J E Sutton for the Defendant
No appearance for the Third Party (to abide decision)

Judgment: 11 November 2003

JUDGMENT OF GODDARD J

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[1] This is an application for review of a decision of Master Gendall in which the Master declined to dismiss the plaintiff's proceeding on application of the defendant. The grounds advanced by the defendant in support of its application were described by the Master as falling into two broad categories: want of prosecution; and failure to take a step in the proceeding within the last 12 months. These grounds, which were essentially the same as those advanced in this Court, were detailed by Ms Sutton as follows:

a) the plaintiff has consistently failed to prosecute its claim and has not in reality pursued its claim since mid 2001. No excuse has been proffered for this delay;

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 ramifications of the rule requiring leave to proceed in the event that no step is taken in the proceeding for 12 months. This inactivity constitutes an abuse of process;

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 evidence of Mr McMillan, the main witness for Shell (who died 7 March 2003, four weeks after this application was filed), is of fundamental importance to the proceeding. The plaintiff was aware of Mr McMillan's ill health from mid 2001. There will be serious prejudice to the defendant if the proceeding is allowed to continue without his evidence.

[2] The application to dismiss was brought pursuant to r477 and r478 of the High Court Rules 1985 and the inherent jurisdiction of the Court to protect its processes from abuse. Section 50 of the Defamation Act 1992 and r426A of the High Court Rules were also said to be relevant.

[3] The Master dismissed the defendant's application, finding that a Notice to Admit Facts filed by the plaintiff within the preceding 12 months (on 16 August 2002) constituted a sufficient "step in the proceeding" so as to avoid the consequences of r426A; that the only substantial period of relative inactivity in the proceeding had been a delay of approximately 17 months which could not be characterised as inordinate or inexcusable; that neither the 17 month period of inactivity or the overall period of delay amounted to an abuse of the Court's process in terms of r477 and s50 Defamation Act 1992; and that the death of Mr McMillan, although creating a difficulty in the case, would not on balance cause such prejudice to the defendant that justice could no longer be achieved.

[4] As noted, essentially the same grounds were argued on review in this Court. Ms Sutton submitted that the Master had incorrectly decided those grounds for a number of reasons, which she stated as:

a) failure to take proper account of the "fair trial" component of the test under r478;

b) making an inconsistent and ill-founded finding when considering whether the defendant would suffer serious prejudice;

c) relying on evidence from the Bar by counsel for the plaintiff, which evidence included an incorrect inference;

d) not considering whether three of the causes of action should be struck out;

e) failing to apply the approach illustrated in *Grovit v Doctor* [1997] 2 All ER 417 and erring in his statement of the ratio of that decision.

[5] All of the reasons are dealt with conveniently under the following heads.

The application was brought in reliance on r477, r478 and the inherent jurisdiction

[6] Ms Sutton submitted that the Master had not approached the exercise before him on the correct basis, because he had considered the application as if it were brought pursuant to r426A, r477, r478 and s50 of the Defamation Act 1992. She emphasised that the defendant's application had not been pursued under Rule 426A and s50: rather, those provisions had been called on simply to support the application, which had primarily been pursued under r478 and r477 and the inherent jurisdiction.

[7] The considerations that require attention on an application to dismiss for want of prosecution, whether under r478 (or r477 and the inherent jurisdiction) are well established. The Court of Appeal in *Commerce Commission v Giltrap City* (1997)

11 PRNZ 573 summarised them succinctly as follows: that there has been inordinate delay; that such delay is inexcusable; that the party affected has suffered serious prejudice; and that it is not in the overall interests of justice to allow the case to proceed (at p577). That test was earlier iterated by Eichelbaum CJ in *Lovie v Medical Assurance Society NZ Ltd* [1992] 2 NZLR 244 at 248 as follows:

> ... 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**. [emphasis added]

[8] In *Commerce Commission v Giltrap City* (and earlier in *McEvoy v Dallison* [1997] 3 NZLR 11) the Court of Appeal made it clear that r426A and r478 raise different considerations. In *Commerce Commission v Giltrap City* the Court said at p576 as follows:

> **Rule 478 is concerned with the question whether, in spite of the delay, justice can still be done. Rule 426A is concerned primarily with case management and the due progress of litigation**. Essentially, leave should be granted under r 426A unless the case is such that an order under r 478 striking out for want of prosecution would be justified. If this were not the position, r 426A would become a basis for de facto striking out (by refusal of leave to proceed) in circumstances not justifying a direct order for striking out. **The purpose behind r 426A is obviously to promote due diligence and expedition in the progress of litigation; but the rule cannot be allowed to become an indirect basis for striking out unless direct striking out is justified**. [emphasis added]

[9] Analysed briefly, the various rules, provisions and powers at issue in this case, whilst raising different considerations, are nevertheless complementary and overlapping. Rule 477 provides inter alia for the stay or dismissal of any proceeding where that proceeding is an abuse of the processes of the Court. It reflects the inherent jurisdiction of the Court to also dismiss any proceeding that is an abuse of its processes. Rule 478 provides for the dismissal of a proceeding or part of a proceeding if a plaintiff has failed to prosecute that proceeding or any part thereof to trial and judgment. Section 50 of the Defamation Act 1992 permits the Court to strike out proceedings for defamation for want of prosecution if no date has been fixed for trial and no step taken in the 12 months immediately preceding. In almost

mirror image, but with the opposite emphasis, r426A provides 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 in the proceeding is to be taken without the leave of the Court.

[10] Ms Sutton is correct when she says that the Master approached the task of determining whether the plaintiff's proceeding is an abuse of the process of the Court, by examining, as a first step, whether any sufficient step in the proceeding had been taken within the preceding 12 months, in terms of Rule 426A and s50 Defamation Act 1992. However, as I understood Ms Sutton's argument, she did not contend that the Master failed to also consider the effect of r477 and r478, for indeed he did not. A substantial part of his judgment was devoted to discussing and applying the principles underpinning r478 to the specific grounds of complaint raised by the defendant. This exercise included standing back and having regard to the overall interests of justice in the case, which the Master did by conducting a balancing act (para [44]) and by weighing up all the relevant circumstances (para [45]). Therefore, and notwithstanding the fact that the Master commenced his analytical exercise by reference to r426A, it is difficult to see any substance in Ms Sutton's complaint, when regard is had to the Master's detailed analysis and focus on the factual situation in light of r478 (and also r477 and the inherent jurisdiction); and when regard is had to the overall effect of his judgment.

[11] The real issue arising on review of the Master's judgment is not the sequence in which he considered the Rules, provisions and powers expressly relied on by the defendant: rather, it turns on his application of the principles underpinning r478, r477 and the inherent jurisdiction to the facts in this case, and the weight that he gave to those facts. There is no issue that those principles formed the basis of his task or that they were undeniably assisted by a consideration of r426A and s50 Defamation Act 1992. Ms Sutton clearly recognised that when she relied on the latter as supporting her application for dismissal.

[12] As is clear from the conjunctive nature of the test in *Lovie*, inordinate delay of itself is unlikely to suffice as a basis for strike out or dismissal. In this vein the Court of Appeal in *Commerce Commission v Giltrap City Ltd* found that where

nothing additional to delay is raised amounting to abuse in the context of Rule 477, then if the delay does not qualify in terms of Rule 478, the delay cannot qualify under Rule 477. Although acknowledging this, Ms Sutton nevertheless argued that the Master had not taken sufficient account of or had made "an inconsistent and ill-founded finding" when considering the additional features of this case, such as the prejudice, as these features had merited dismissal.

[13] Taken in combination, the features additional to delay relied on by the defendant as requiring dismissal of the plaintiff's proceeding in the interests of justice were: the fact of delay itself and the natural prejudice that lengthy delay brings; the death of an important witness (Mr McMillan, the Bitumen Manager of the defendant); and the inexcusable nature of the delay, occasioned by alleged deliberate deleteriousness on the plaintiff's part in failing to prosecute its proceeding. Ms Sutton's submission was that these factors, particularly when taken together, constituted an abuse of the Court's process that justified dismissal of the proceeding under r477 and the inherent jurisdiction, even if not under r478. In that regard, she emphasised that an abuse of process argument under r477 or pursuant to the inherent jurisdiction, is not precluded even where limitation periods have not expired. Specifically she submitted that the statement of principle in *Birkett v James* [1977] 2 All ER 801, that dismissal of proceedings for want of prosecution (r478) before the expiry of a limitation period is "unusual and would only be allowed in 'the most rare and exceptional circumstances'", did not "prevent an argument succeeding on the basis of abuse of process (r477 and inherent jurisdiction)".

[14] As I earlier stated, I see no error in approach in the Master having commenced his analytical exercise by examining, as a first step, whether any sufficient step in the proceeding had been taken within the preceding 12 months in terms of r426A. That rule was also relied on by the defendant, and the Master found it "convenient to deal first with the application based under r426A" which he said "can be quickly disposed of". It is clear that he saw little merit in the argument under r426A and for reasons I shall later give I cannot disagree with him. It was, therefore, logical and tidy to dispose of that due process rule as a first step and, with it, s50 Defamation Act 1992.

[15] The more important issue on review is to consider whether the Master erred in his application of the principles in rr478, 477 and the inherent jurisdiction, when he assessed the justice of permitting the proceeding to continue, in light of the allegations of inordinate and inexcusable delay, and the actual prejudice resulting from Mr McMillan's death.

Inordinate and inexcusable delay

[16] On the premise that an assessment as to whether delay is inordinate must turn on the facts of each case, and that it is the cumulative effect of delay that will dictate the interests of justice, a number of factors were relevant to the Master's consideration of delay in this case. These were the period of delay overall and in the context of any steps taken by the plaintiff to prosecute the proceeding; whether the limitation periods for any of the causes of action have expired; whether the plaintiff has any excuse for the delay; whether the plaintiff has misused the Court's processes for any ulterior or improper purpose; and whether the defendant will suffer serious prejudice if the matter now proceeds to trial in the face of the delays that have occurred. The latter factor concerns very much the effect of Mr McMillan's death, which I will deal with under a separate head.

[17] The Statement of Claim consists of five causes of action: defamation; breach of the Fair Trading Act 1986; slander of goods/injurious falsehood; interference with contractual relations; and interference with trade by unlawful means. Two of those causes of action have now expired (defamation and breach of the Fair Trading Act 1986) and there is a question mark as to whether the cause of action in slander of goods/injurious falsehood has also expired or yet has time to run. The two causes of action in tort (interference with contractual relations and interference with trade by unlawful means) remain however, well within the limitation period, which does not expire until August 2004.

[18] A plea of inordinate delay will inevitably be inhibited where causes of action have not expired. As earlier recorded, in *Birkett v James* the House of Lords observed that dismissal of proceedings for want of prosecution before the expiry of a limitation period will be "unusual and only be allowed in 'the most rare and

exceptional circumstances'". This statement recognises the futility of dismissing for want of prosecution where the Court has no power, in the absence of special circumstances, to prevent a plaintiff from starting a fresh action within the limitation period and proceeding with it with all proper diligence. Thus the fact that the limitation periods in at least two of the causes of action in this proceeding have not yet expired is, as the House of Lords said, in itself a conclusive reason for refusing to dismiss the action only on the ground that the plaintiff has been guilty of inordinate and inexcusable delay in prosecuting its case. Dismissal requires rare and exceptional circumstances beyond inordinate and inexcusable delay simpliciter.

[19] In relation to inordinate delay, the Master observed (under r478) that two of the causes of action (at least) are still well within their limitation period and thus it was inappropriate to strike out the proceeding relating to these two causes of action. He further doubted that, in any case, the overall delay in this case could be described as inordinate.

[20] I have already referred to the Master's finding under r426A that the filing of the Notice to Admit Facts on the cusp of the 12 month period constituted a step in the proceeding within the required timeframe, and was not a "merely colourable" act or device to attempt to avoid the effect of s50 Defamation Act 1992 or r426A: per McGechan J *Mountain Rock Productions v Wellington Newspapers* (1997) 11 PRNZ 13. The Master found that, on the contrary, the filing of the Notice constituted, in the words of McGechan J, a "genuine and authorised procedural act within the limits of the rules and recognised practice of the Court". Therefore and despite Ms Sutton's submission that the filing of the Notice to Admit Facts was not "a bona fide step to progress the claim" but a "mere façade" to defeat r426A, the Master was not prepared to draw that inference. I have no difficulty agreeing with the master's approach in that regard.

[21] Ms Sutton also raised, as a further criticism, the fact that the Master had relied on evidence from the bar which was not accurate. The relevant passage from the Master's judgment is at para [51], where he made the following statement:

> 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.

[22] This statement by the Master was made in reliance on a written submission by Mr Smith, in which Mr Smith had advised the Court that:

> ... In this present matter, it was merely 8 months (approximately) since the last step was taken, and approximately 11 months since the prior step. Further, this proceeding has had activity during this time. There has been correspondence between the party's solicitors regarding the possibility of a mediation or settlement conference, and the taking of the evidence of Mr McMillan.

[23] This submission was apparently amplified in oral submission by Mr Smith at the hearing before the Master.

[24] The defendant has moved to counter Mr Smith's submission and the finding of the Master in reliance upon it, by filing an affidavit sworn by Mr McGuire, Senior Legal Counsel of the defendant, in which Mr McGuire states that the position was not correctly summarised by Master Gendall. He says that:

> Except for the notice to admit facts filed by the plaintiff in August 2002 (and a letter sent in response on 23 August 2002), there was no activity or correspondence whatsoever between the plaintiff and the defendant (or their solicitors) from 6 November 2001 (when a letter was sent from the defendant's solicitors to the plaintiff's solicitors through to the filing of the defendant's application dated 7 February 2003. To be precise, prior to the notice to admit facts, dated 16 August 2002, the last document or correspondence the defendant received from the plaintiff was the notice under section 41 of the Defamation Act, dated 31 August 2001. There were sporadic telephone discussions through September and October 2001 regarding the possibility of a settlement process being implemented. They were not pursued by any party after 6 November 2001.

[25] Mr McGuire has also referred to the last activity or correspondence between the defendant and the third party as being a letter dated 19 November 2001 and referred to correspondence from the Court Registry to counsel dated 20 March and 17 December 2002 enquiring why the proceeding ought not be set down for trial.

[26] From Mr McGuire's evidence, it seems clear that during the 17 month period in question there was minimal activity, apart from the issuing of the Notice to Admit Facts, although there was at least some communication between counsel, including a rather desultory attempt to convene a judicial settlement conference. The only real step that was taken was, however, the filing of the Notice to Admit Facts. The pivot of the Master's enquiry was therefore (and correctly) into the sufficiency of this Notice to Admit Facts as a step in the proceeding. And whilst he clearly relied on some incorrect information about the actual timeframe in which certain correspondence had been exchanged, his finding in para [15] of his judgment is not in fact inaccurate in its portrayal of the situation. Although the correspondence between the parties' solicitors, regarding the taking of the evidence of Mr McMillan, did predate the period 6 November 2001 to 7 February 2003 as Mr McGuire makes clear, the exchange of that correspondence did not take place until later, in July and August 2001, so not very long prior to the 17 month period under examination. Taking all of that into account, it cannot be said that any inadvertent inaccuracy on the part of the Master relating to the particular period of inactivity under the micropscope was of any real consequence. Furthermore, the 12 month parameter in Rule 426A and s50 Defamation Act 1992 was no more than a supporting factor relied on by the defendant, and was thus not central to its case on delay.

[27] Further criticisms raised by Ms Sutton were that the Master had not found any excuse for the delays that had occurred, yet had still found against the defendant; that he had misinterpreted the ratio of *Grovit v Doctor* at 424(e)-(h); that he had relied on the decision in *Johnstone v Bell Chambers Lowe & ors* (unreported, HC Wanganui, CP4484, 30 July 1991); and that he had not referred to the decision in *Hemmes v Young* [2003] 1 NZLR 193 para [33] which had been cited to him. These criticisms in the main related to the Master's findings under r477.

[28] The Master's findings under r477 followed his findings under r478 and adopted the same reasoning. Expressly, the Master found under r477:

> Aside from r478 the court has inherent jurisdiction and power under r477 to prevent abuse of process.
>
> 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).
>
> 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.
>
> Given my findings above with respect to the defendant's r478 arguments, I am satisfied that the inactivity by the plaintiff here could not be considered an abuse of process in terms of r477.

[29] Ms Sutton submitted that the above reference to "gross disregard for timetable orders" had not come directly from the *Grovit* judgment and there had been no "gross disregard of timetable orders" in *Grovit*, simply inactivity by the plaintiff over a period of two years. She cited the ratio for the decision in *Grovit*, by reference both to the head note and to the following passage from the judgment of Lord Woolf at 424(e)-(h), as correctly finding:

> I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to a conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceeding is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v James*. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining stale proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.

[30] The situation in *Grovit* is, however, quite different to the situation in this case. Whilst there is no palpable excuse for the periods of inactivity that have occurred in this case, the delay overall has not been inordinate and there is no evidence that either the plaintiff or its counsel have been deliberately maintaining a stale proceeding with no intention of prosecuting the case to trial. Indeed, in submissions to this Court Mr Smith advised that the plaintiff has every intention of proceeding to trial, that it wishes to proceed to trial and that it is ready for trial. Thus there is no evidence of the plaintiff seeking to abuse the Court's process by maintaining a stale proceeding or for some other ulterior or improper purpose.

[31] In relation to the other criticisms raised by Ms Sutton, as listed in para [27] above, I find no substance in these either.

[32] As I stated at the commencement of discussion under this head, whether delay is inordinate in any case will always be a question of fact and degree. The citation of relevant authorities dealing with other cases of delay, whilst helpful to an extent, turns on their own facts. In summary, in the present case, it cannot be said that the 17 month delay was, of itself, prima facie inordinate, given there was at least minimal communication during that period. In addition, the Notice to Admit Facts did constitute a "genuine and authorised procedural act within the limits of the rules and recognised practice of the Court" and a step in the proceeding for the purposes of r426A and s50 Defamation Act 1992. Therefore, and leaving aside the issue of possible prejudice arising from Mr McMillan's death, there is no evidence of abuse of process or prejudice to the defendant arising by the virtue of the passage of time.

[33] In the end, I am unable to differ from the Master's findings on the delay issue, whether under r478, r477 or the inherent jurisdiction; or to differ from his conclusions under r426A and s50 Defamation Act 1992.

Whether a fair trial is no longer possible in the absence of Mr McMillan being able to give evidence

[34] In considering whether the overall interests of justice would permit the case to proceed in the absence of Mr McMillan being able to give evidence, the central

issue is whether the defendant will be seriously prejudiced by his absence to such an extent that a fair trial is not possible and justice can no longer be achieved. On that important issue, the Master made the following findings:

> The death of Mr McMillan may raise fair trial issues and questions as to whether justice can be done between the parties in his absence. [para 42]
>
> A balancing act is required in the interest of justice. The issue here is whether with the death of Mr McMillan the defendant has suffered serious prejudice to such an extent that justice can no longer be achieved. [para 44]
>
> 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. [para 45]

[35] The Master also found that:

> 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. [para 45]

[36] In determining whether the Master was correct in his assessment that a fair trial is possible in this case, it is helpful to identify and assess what Mr McMillan might have been able to say in evidence, were he still available, and what the value of his viva voce evidence might have been to each of the parties. It is also necessary to assess what other evidence remains available to the parties; and whether there was time and opportunity for Mr McMillan to have made a statement or to have had his evidence taken before his death. If he has made a statement (as one would expect he has) then the defendant will be entitled to apply to have that read pursuant to s3 Evidence Amendment Act 1980 (No 2).

[37] Ms Sutton's assessment of the situation is as recorded in her submissions as follows:

> This claim turns on oral testimony and in particular a conflict of evidence in relation to (amongst other things) the allegations in paragraphs 11 and 12 of the statement of claim where there are allegations regarding telephone conversations with Mr McMillan. This is a defamation case. All of the causes of action flow out of the defamation allegations. A fair and just assessment of the credibility of the relevant witnesses at the same hearing is paramount. With the death of Mr McMillan that can no longer occur.

[38] As Ms Sutton states, this proceeding concerns defamation, alleged to have originated from Mr McMillan in two telephone conversations that he had with Mr Muir of W H Grove & Sons ("Grove") between 25 and 27 August 1998 (or close thereto).

[39] Those two telephone conversations constitute the first publication of the alleged defamatory statements which give rise to each of the causes of action. The particulars state that Mr McMillan made a number of allegations during those conversations regarding the quality of the plaintiff's bitumen and the honesty of its business practices. It is further alleged that not only did Mr McMillan make the defamatory statements, but that he also asked Mr Muir to draw them to the attention of the Western Samoan Government, or to cause them to be drawn to the attention of the Western Samoan Government.

[40] In respect of the four further publications, the substance of those is said to have been essentially the same on each occasion. The second publication was allegedly made by way of facsimile from Mr Muir to an employee of Breckwoldt Samoa Indent & Merchandising Co Ltd ("BSIM") an indent agent in Apia, Western Samoa asking him to draw Mr McMillan's defamatory statements about the plaintiff's bitumen and its business practices to the attention of the Western Samoan Government. The third publication is alleged to have been the publication of Mr McMillan's allegations to the (now deceased) Minister of Works for Western Samoa. That publication was in the form of a letter dated August 27 1998 from the employee of BSIM on BSIM letterhead. That particular publication is referred to as the "Allegations Memorandum". The dates of the last two publications are not known but are said to have been on or before 8 September 1998. These were further publications of the Allegations Memorandum. The recipients are said to have been the Director and Assistant Director of Works for Western Samoa. The central allegation involving Mr McMillan is that, through him, Shell initiated this chain of publications in New Zealand, Western Samoa and possibly other places.

[41] Underpinning the plaintiff's case is its allegation that the defendant unsuccessfully tendered for the Western Samoan contract through Grove at Auckland and BSIM at Apia. However, the defendant denies this and says that, prior

to the issue of pre-commencement discovery, it had no knowledge of or dealings with BSIM. It says that, on the contrary, BSIM was acting as agent, or at the instigation of, Grove, and that if the Allegations Memorandum is actionable, the question is where responsibility lies for the procurement of that letter. The defendant says that Mr McMillan's evidence would clearly have been pivotal to establish where responsibility for this lies, emphasising that the plaintiff was in fact the successful tenderer.

[42] In the absence of any statement or brief of evidence from Mr McMillan, it is difficult to infer other than complete denial by him that he was the originator of the alleged defamatory statements and/or that they were defamatory. In its Amended Statement of Defence, the defendant has essentially denied all of the allegations. Before his death and during the course of preparation for the proceedings, Mr McMillan was similarly circumspect about his involvement in the alleged defamation.

[43] In a reply affidavit filed in response to an application by the plaintiff for pre-commencement discovery, Mr McMillan made no acknowledgement of the Allegations Memorandum and nor did he acknowledge any other copy documents that had been exhibited to an affidavit filed by Mr Marr, the Company Manager of the plaintiff in Fiji. Instead, Mr McMillan simply referred to having undertaken enquiries regarding the documents (which include correspondence from Grove to Shell dated 25 and 26 August 1998) and said:

> I have discussed this matter in some detail both with the senior legal counsel of Shell and also with the solicitor for Shell in this litigation. I am aware that inquiries have been made by Shell of its representatives to ascertain whether any member of Shell had approached the Minister of Public Works in Western Samoa in terms of the allegations made by Technic. No response has been received to suggest that any approach was made by Shell to the Minister as would appear to be alleged in the documents filed by Technic.
>
> ...
>
> Except for the documents referred to in paragraphs 8(a) and 8(e) of this affidavit I cannot recall having received the documents provided by Grove's solicitor until I received a copy of the letter from Kensington Swan dated 9 February 1999. In particular, in the course of my recent inquiries and searches for documents at Shell, I have not located the document identified in paragraph 8(b) of this affidavit.

[44] The documents referred to by Mr McMillan as "8(a) and 8(e)" do not appear particularly relevant. However, documents 8(b), (c) and (d) seem particularly relevant. These are letters written by Mr Muir to Mr McMillan which, on their face, confirm that discussion by way of telephone conversation had taken place between the two men as alleged, and that these had concerned the possibility of the Western Samoan contract being awarded to the plaintiff. The Allegations Memorandum, not referred to or acknowledged by Mr McMillan, suggested that the Minister of Works should feel free to call Mr McMillan of Shell to discuss the quality of the plaintiff's bitumen.

[45] The proceedings were subsequently issued on 30 July 2000. Following this the defendant sought to have Grove joined as a defendant in the proceeding. The application was granted by the Master and taken on review by the plaintiff. On review, Wild J upheld the decision of the Master. The plaintiff then declined to file an amended Statement of Claim to include a claim against Grove, and Grove consequently applied for judgment in its favour against the plaintiff. That application came before Wild J on 29 September 2000 but was opposed by the defendant. In the event, Wild J allowed Grove's application and entered judgment in Grove's favour against the plaintiff. Following this, the defendant applied and was granted leave to join Grove as a third party. The defendant's position (as stated) is that if anyone is liable to the plaintiff in the context of the matters alleged, then it was Grove and not the plaintiff.

[46] During the course of preparations for the hearing, Mr McMillan answered various interrogatories but became very ill in early 2000. The plaintiff did not have the serious nature of his illness confirmed to it until mid 2001. Upon receiving confirmation of the seriousness of Mr McMillan's illness, the plaintiff's solicitors advised the defendant's solicitors in a letter dated 31 July 2001 as follows:

> At that telephone conference Mr McMillan's unfortunate position was confirmed for the first time. We regret that he is seriously ill.
>
> Nevertheless, this raises the question of whether Mr McMillan will give evidence at trial and if so in what form.
>
> Given that procedures in the High Court Rules exist for the taking of this person's evidence now (procedures referred to in our letter of 14 June 2001)

> we would strongly oppose any attempt to adduce any evidence by Mr McMillan under the Evidence Amendment Act or any other procedure on the basis that he is unavailable to give evidence at trial. At the very least, supposing our objection to the tendering of his evidence in any form other than viva voce was unsuccessful, we would ask the Judge to direct the jury that such evidence, tendered in such circumstances and untested by cross-examination, must carry little weight. This would be so, given that it has been possible for some time (if it is not still possible) for Mr McMillan to give his evidence prior to trial and your client has not availed itself of this opportunity.

[47] Ms Sutton responded on behalf of the defendant's solicitors, advising as follows:

> We advise that, at this stage, it appears that Mr McMillan's health is unlikely to prevent him from giving evidence at any hearing early next year. Accordingly, we presently see no need for Mr McMillan to give his evidence prior to trial.

[48] On 10 February 2003, in an affidavit filed in support of the defendant's application to dismiss the plaintiff's proceeding for want of prosecution, Mr McGuire said:

> Having made enquiries, I understand that Mr McMillan's health at this point in time is such that he remains able to give evidence.
>
> It is clear that the plaintiff is not actively [pursuing] its claim. I believe this may be because it had assumed that the health of Mr McMillan would deteriorate and/or because of the risks and costs involved in [pursuing] the claim particularly now that Grove is a party to the proceeding.
>
> I can verify that Shell is obviously concerned by the delay; in that delay may well prejudice its position in the litigation having regard to the concerns held as to the health of Mr McMillan. However, despite the delay Shell had not wished to bring to life what is a sleeping piece of litigation.

[49] Unfortunately however, less than a month later, Mr McMillan died. This was on 7 March 2003.

[50] As is evident from the above extracts from Mr McGuire's affidavit, the defendant has made a number of tactical decisions. If those included not agreeing to a taking of evidence or not having a formal statement taken from Mr McMillan, then the defendant cannot claim unforeseen prejudice. In *Commerce Commission v Giltrap City* the Court of Appeal was not impressed by prejudice asserted by Giltrap

City in relation to its failure to take a statement from a former employee before he quit.

[51] Prima facie, however, where a central witness has died before trial and there is no signed statement or deposition that can be read in evidence at trial, the indication is that a fair trial may be precluded and the interests of justice will require that the case be dismissed. Counsel for both parties referred to a number of cases in which the courts had been required to deal with potential prejudice arising from the death of a witness.

[52] Ms Sutton was critical of the Master's apparent reliance on the case of *Johnstone v Bell Chambers Lowe and ors*, in which a material witness had died and the action not been struck out. She pointed out that *Johnstone* was not a defamation proceeding but a building dispute and also said that the decision had predated the case management regime. The analogous point in *Johnstone*, however, was that the defendants there had been in receipt of legal advice for at least 18 months before the death of the witness and the witness had been in a position to swear an affidavit of documents for nearly a year before he died. On that basis, Master Williams found there had been "... ample opportunity for a full, signed brief of [Mr Lowe's] evidence to be taken prior to his death". This is very similar to the present case.

[53] A perusal of the relevant decisions reveals that the death or unavailability of a witness (even a material witness) is not necessarily a decisive factor and may be only one of a number of factors that require to be taken into account.

[54] In relation to whether there was time available to obtain a statement or brief of evidence from Mr McMillan, or to have a taking of his evidence, Ms Sutton rejected these as possibilities, saying:

> The death of Mr McMillan was unexpected, as is evident from Mr McGuire's affidavit dated 10 February 2003.
>
> This is a case where by reason of the nature of the plaintiff's claim, oral testimony at trial by the crucial witnesses is required in order for a fair trial.

[55] In her submissions to the Master, however, Ms Sutton had acknowledged and confirmed Mr McGuire's affidavit evidence that, whilst the concern as to Mr

McMillan's health meant delay was a prejudicial factor, despite the delays the defendant did not wish to bring to life what was a sleeping piece of litigation and was not required or expected to do so. What Ms Sutton has stated is correct, but it also involved a deliberate tactical decision that requires balancing against the dictates of prudence and precaution.

[56] I have already set out the Master's findings in relation to the prejudice arising from the death of Mr McMillan, in paras [34] and [35] above. On the basis of those findings the Master concluded, at para 46(c) of his judgment:

> 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.

[57] Whilst it is undeniable that Mr McMillan was an important witness (indeed one of the two central witnesses) so too is Mr Muir of Grove and there is no issue as to his availability to give evidence at the trial if it proceeds. There are also other material witnesses who can be called in relation to the chain of publications from Mr Grove onwards. In relation to the first publication, there is documentary evidence in the form of the correspondence exhibited to Mr Marr's affidavit.

[58] I accept the Master's conclusion that, notwithstanding the death of Mr McMillan, the defendant has not suffered serious prejudice or special prejudice of such a nature that considerations of justice require that the plaintiff now be deprived of its day in court. I am satisfied of this for five reasons:

a) It is inconceivable that Mr McMillan has not made a formal statement in some form, for example to the plaintiff's solicitors or by way of report to its board of directors. It is not for the Court to speculate about this but it would have been most imprudent for no formal statement to have been taken from Mr McMillan before his death, or for the plaintiff not to have made an obvious enquiry of him, at least from the time the pre-commencement proceedings were served. Any statement or brief of evidence taken can be the subject of an

application under s3 Evidence Amendment Act 1980 (No 2). The plaintiff, as advised to the defendant before Mr McMillan's death, will likely oppose any such application and the trial Judge will have to determine the matter;

b) If the defendant has never taken any step to obtain a full brief of evidence from Mr McMillan, that cannot be said to be because of lack of opportunity to do so. His health difficulties were known to all for some considerable period of time. For this related reason it would be wrong to deprive the plaintiff of the opportunity to prosecute its case now;

c) There is clearly a good deal of other evidence that can be adduced and examined. Mr Muir's availability is not in question. It is not for the Court to speculate on the means by which his evidence may be adduced at trial but it is available. In addition, there is the documentary trail and presumably evidence from persons in BSIM and others further down the chain of subsequent publications. The issue of whether the defamatory statements originated from Mr McMillan (speaking on behalf of the defendant) will have to be established by all of these evidentiary means;

d) I also agree with the Master's observation that it does not necessarily follow that it is the defendant or only the defendant that will be prejudiced by the unavailability of Mr McMillan to testify in person and be cross-examined at the trial. Indeed, the greater disadvantage is probably to the plaintiff. This aspect has significance in the balancing exercise.

Not considering whether three causes of action should be struck out

[59] This ground of review can be dealt with shortly. It applies to two or three of the five causes of action. The other causes of action are extant, as their limitation period has not yet expired. The striking out of the expired causes of action will not

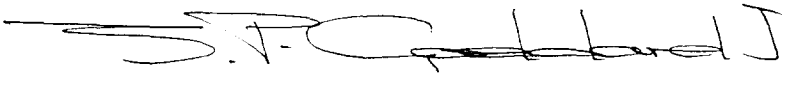
therefore bring the proceeding as a whole to an end and, in any event, the same facts constitute each cause of action. In my view, the appropriate course is for the trial Judge to deal with all of the causes of action at the time of trial. Dismissal at that stage, rather than striking out on review of the Master, is the preferable course.

Judgment

[60] The defendant's application for review of the Master's decision is dismissed.

Costs

[61] Counsel may submit memoranda as to costs.



Solicitors:
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Delivered at 11 am/~~pm~~ on Tuesday 11 November 2003.