

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-005222

BETWEEN

JOHN EVANS DORBU
Plaintiff

AND

DAVID COOKE AND ORS
Defendant

Hearing: 18 March 2008

Appearances: S Judd for the Plaintiff
J Cox for the first, second and third defendants
R Hay for the fourth defendant

Judgment: 18 March 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ROBINSON

Solicitors: Murdoch Price, PO Box 23-620 Auckland
Morgan Coakle, PO Box 114, Auckland
Rennie Cox, PO Box 6647, Auckland

[1] The plaintiff applies for an adjournment of the applications set down for hearing this morning for summary judgment against him. Mr Judd, who has instructions to represent the plaintiff should the plaintiff's application for adjournment be declined made no submissions in support of the plaintiff's application for adjournment. The ground advanced by the plaintiff is in his written submissions that there has been a breach by the defendants of rule 251(A) of the High Court Rules which requires the defendants to serve the plaintiff in this case with a synopsis of their arguments and bundle of documents three working days prior to the hearing.

[2] Although the plaintiff refers to rule 251(A) in his submissions the correct rule is rule 7.39 and that rule does provide for the defendants to serve the plaintiff with the synopsis of argument, chronology and other documents referred to in that rule at least three working days before the hearing. The rule goes on to provide that in this case the plaintiff, is to have at least one working day prior to the hearing to file his synopsis in reply

[3] The plaintiff is at present overseas. Clearly, he had no intention of appearing at this hearing. In his submissions he points out that he was going to instruct counsel. The plaintiff is a practising barrister and I can assume that he has some knowledge of Court procedure and the consequences of breach of the High Court Rules. A possible consequence of a breach is that the Court would grant the plaintiff in this case an adjournment. However, a party can by no means assume that because another party has been in breach of this rule then the proceedings will be automatically adjourned. In the present case, there is nothing advanced by the plaintiff to justify his conclusion that because the defendants were, in his opinion, in breach of the rules the matter would not be proceeding.

[4] The defendants deny that they have been in breach of the rules. The first, second and third defendants point out that their submissions were made available to the plaintiff's representatives on 13 March 2009. There may well have been a technical breach because the service of documents on 13 March 2009 would not

have given the plaintiff three working days before today's hearing if you exclude 13 March 2009 and today. I presume that I am not entitled to take into account in calculating the time the fact that on 13 March 2009, the plaintiff was overseas and if in the northern hemisphere he would have had his three working days because of course the Friday in the northern hemisphere would not have commenced until the Friday evening our time.

[5] The fourth defendant has provided evidence of the efforts made to serve the plaintiff with the synopsis of argument and other documents. They include unsuccessful efforts to fax the documents to the fax number provided by the plaintiff. It appears that the plaintiff had not made arrangements for that fax number to be operated whilst he is overseas. The fourth defendant has gone to considerable lengths to serve the documents on the plaintiff not only by fax but also arranging for the documents to be delivered to the plaintiff's solicitors.

[6] I conclude that there is no basis for the plaintiff's belief that the defendants were not intending to proceed. Even if they had been in breach of the rules, having regard to the intervening weekend and the fact that the plaintiff was overseas, there would, I am satisfied be no basis for the plaintiff assuming that the matter was not proceeding and I certainly would not grant an adjournment on that ground.

[7] As it happens, the plaintiff has now prepared written submissions which have been received by counsel. They complain that those submissions have been received by them out of time. However, I am prepared to deal with the matter as are they on the basis that those submissions are to be considered and taken into account.

[8] The plaintiff has also prepared an amended statement of claim. There may be some issue as to whether the amended statement of claim has been filed. However, I am prepared to take a pragmatic approach and if any problem with the pleadings can be cured from the plaintiff's point of view by the amendment contained in the amended pleading he wishes to file, then I would certainly give him time to file that amended pleading on the basis that the pleading would be in answer to the application for summary judgment. In other words, counsel for the defendants would need to meet the plaintiff's defence on the basis that the amended pleading is to be

taken into account when considering whether its appropriate to enter summary judgment.

[9] In summary therefore the plaintiff's application for an adjournment will be refused. However, the Court will take into account the submissions that have been filed by him and will also have regard to the amended pleading and of course will hear submissions in due course from Mr Judd who has recently been instructed to act for the plaintiff at this hearing.

Associate Judge Robinson