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IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL JURISDICTION

CAUSE NO.363 OF 1990

BETWEEN:	HARVEY'S CONSTRUCTION LTD.	PLAINTIFF
AND:	DANIEL (DANNY) SCOTT	DEFENDANT

For the plaintiff: Mr. T. Shea
For the defendant: Norman Hill Q.C. and Mr. M. Garcia

HARRE C.J. **RULING**

In this matter I have simply to apply well known principles to the facts which have led to the defendant's summons with which I now deal and I shall not refer to a wealth of authorities. It seeks the dismissal of the plaintiff's action for want of prosecution.

A specially endorsed writ claiming the balance due for building works done was filed on 19th September 1990, some two years after the alleged cause of action arose. Further and better particulars were given and a defence and counterclaim alleging defective workmanship and other matters was filed on 5th December 1990. The counterclaim substantially exceeded the amount of the plaintiff's claim. No reply and defence to the counterclaim has been filed.

The defendant changed his attorney in 1991 but the file shows no further step in the action until 23rd April 1992 when the plaintiff

filed a notice of intention to proceed. Following the usual summons there was an order for directions on 16th November 1992, following which there was another period of procedural inactivity until the filing of another notice of intention to proceed on 15th February 1994. There was a second summons for directions filed on 19th April 1994, followed by the defendant's summons to dismiss the action.

The onus is on the defendant to establish that the delay has been inordinate and inexcusable and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant.

In my view a period of 3 1/2 years in a simple case of this kind between issue of the writ and the matter being ready to set down for trial and indeed, as it now transpires, close of pleadings, is materially longer than that which is usually regarded as acceptable and is therefore inordinate.

I take no account of the delay between the first appearance of the problem in 1988 and the issue of the writ in 1990. Clearly there were settlement negotiations of some kind on foot before then (though their extent and nature is not agreed). And it would be unfortunate, particularly in a matter of this kind, if time and money had to be wasted, and negotiations possibly prejudiced, by the issue of legal proceedings before they were clearly seen to be necessary.

There is a difference of opinion about how matters were left at a meeting between Mr. Shea, the plaintiff's attorney, and the defendant on or about 18th December 1992. The defendant says that he made a counter-proposal in response to a suggestion for settlement made by the plaintiff's attorney and was "left with the clear impression" that the plaintiff would consider his stated position and revert to him. He says he informed his attorney of this and that the attorney wrote a letter to the plaintiff's attorney in the following terms -

> "We have received the Order on Summons for Directions made on the 12th November 1992.
>
> We are instructed that, via your offices, the parties are negotiating in good faith to resolve the matter.
>
> Accordingly, we take it that there is no rush in complying with the said Order. We would be grateful if you could let us know if this accords with your position.".

It is conceded that no written reply to this was sent but there is dispute as to whether or not there were subsequent discussions between the attorneys.

On any view, it is clear that both sides felt there was "no rush" in the matter, and certainly no complaint about delay was being made at that time, I prefer the Plaintiff's view that whatever breach of the order of 12th November 1992 there was, was mutual. The defendant showed as little haste in pursuing his counterclaim as the plaintiff his claim.

In that connection, and another which applies also to our case, I refer to what was said by Lord Denning MR in Instrumatic Ltd v Supabrace Ltd. 2 All ER 131 at 133.

> "The defendants had a counterclaim. If they had any faith in it, they should hve pressed on with it. They cannot justly complain of delay of the plaintiffs on the claim, when they were equally guilty of delay on the counterclaim. It was as much their own fault as the plaintiff's. There is another point too. The period of limitation is six years. It has not run. If this action were dismissed, the plaintiff could start another action tomorrow. So what good is it to dismiss the claim for want of prosecution? Having regard to all these points, I think that the official referee was wrong in the way he exercised his discretion.".

In the end I have to consider where the justice of the case lies.

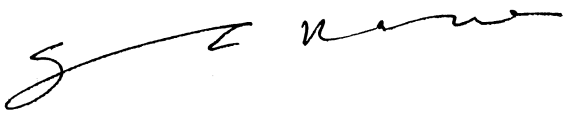
The defendant says he has lost many relevant papers. That showed a high degree of ineptitude in a person who knew an action to which they related was pending. He has not shown that this misfortune was caused by the plaintiff's delay or that the lack of the documents will so seriously prejudice the trial as to make it unjust to proceed. The same applies to the unavailability of building workers. They are a migratory class of persons and in any event experts on each side were assessing the matter as early as April 1990, according to an affidavit by one of them, Mr. Richard Jones.

In the end, the test which overrides everything else was enunciated by the master of the Rolls in Allen v Sir Alfred McAlpine & Sons Ltd (1968) 2 Q.B. 229 at 245 -

> "The principle upon which we go is clear: When the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straightaway.".

But two things are certain in this case. If the action were to be dismissed the plaintiff would either be deprived of what may be a just claim or the whole process of dismissal may be rendered nugatory by his issuing a new writ within the limitation period. If the defendant's summons is dismissed he will suffer from one disadvantage - the loss of documents - of which he is himself the author and another - the departure of witnesses - which cannot be shown to be attributable to the delay.

The balance in my judgment falls in favour of allowing the action to take its course, taking into account the pleadings as they stand, and the defendant's summons is dismissed.



G. E. Harre
Chief Justice

25th July 1994.