

## UNREPORTED PRACTICE CASES\*

### LEAVE TO TAKE NEXT STEP—INEXCUSABLE DELAY AND PREJUDICE NECESSARY

No steps in an action had been taken for 3 years when discoveries were held. The solicitor for the defendant had apparently had no communication from the plaintiff's solicitor and thought the plaintiff had lost interest.

On the facts the master said that the explanations for the delay were far from satisfactory; "But there are other factors to consider, namely the questions of injustice to the plaintiff and prejudice, or lack of it, to the defendant".

The master applied *Marshall v. Busby* (an unreported decision of the Appellate Division, Dec. 4, 1969). The principles on cases of dismissal for want of prosecution are pertinent. The onus lies on the applicant to explain the delay but even if the explanation is unsatisfactory the court may still allow the action to proceed. It may be permitted where injustice would result. It should be shown that there is prejudice from the delay. No such suggestion was made in this case except that memories become less dependable. In this case discoveries had already been held.

The court cited *Ross v. Crown Fuel Co. Ltd.* (1963) 37 D.L.R. (2d) 30, and *Allen v. Sir Alfred McAlpine* [1968] 1 All E.R. 543. In view of the fact that the delay was "almost inexcusable" the plaintiff was required to pay the defendant's costs of the application forthwith, with an allowance towards solicitor and client costs.

(*MacLean v. McFaul* et al., S.C.A., J.D.E., No. 45008, January 14, 1970; The Master, L. D. Hyndman, Q.C.)

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