> Notwithstanding anything contained elsewhere in these Rules, costs as between parties in all foreclosure actions shall be determined in accordance with Schedule C with the appropriate column thereof to be applied dependant on that amount claimed in the foreclosure actions, except that the fee for commencement of proceedings in Item 1, shall not exceed the amount fixed in Column 3.

Steer J. rejected the plaintiff's contention that Rule 697 was mandatory:

> I think there was a discretion in the Master and in any judge with regard to the matter of costs within the limits laid down in the cases.

The "limits" referred to by his Lordship are presumably those described above in *Cotterell* v. *Stratton*. In the ordinary course of events the court does not have the power to tax or reduce the mortgagee's costs.[12] These costs are a matter of contract between the mortgagee and mortgagor and they must be paid in accordance with the terms of the contract. Only when "vexatious or oppressive misconduct" is proved, does the court have any discretion which would enable it to reduce or deny the mortgagee its costs. What is "vexatious or oppressive misconduct" is a question or fact in every case, but it is clear, from the cases cited above and from this decision of Steer J. that something more than inaccurate statements and lack of co-operation by the mortgagee must be shown before the mortgagee will be deprived of its costs.

—FRANCIS C. R. PRICE*

[12] *See also Confederation Life Association* v. *Leier*, (1908) 8 W.L.R. 343, 344.

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RENEWAL OF A STATEMENT OF CLAIM UNDER RULE 11: *IRENE MIASEK AND HENRY MIASEK* v. *JAMES BUCHHOLZ*[1]

This is a decision of A. D. Bessemer Esq., Q.C., Master in Chambers in Calgary, which is as yet unreported.[2] In this case, the Master sets out a new test as to when applications for renewal of statements of claim pursuant to Supreme Court Rule 11 will be granted, and further discusses some explanations tendered to the court in order to constitute "sufficient reason" under the Rule.

The action here was based on an automobile accident occurring February 18, 1972, whereby the plaintiff husband claims property damage to his vehicle and the plaintiff wife claims for personal injuries. The plaintiffs issued a statement of claim on February 12, 1974 (six days before the limitation period expired), but service thereof was never effected. The defendant claimed that he first found out about the action in March, 1975, when the plaintiff's solicitor, N, telephoned the adjuster for defendant's insurer. In the interim, it appeared from affidavit evidence that N was awaiting further medical reports and, while he was in communication with the adjuster, M, the existing reports were not disclosed. M claimed that he had checked the Court House two weeks before the limitation period expired under the mistaken impression that

[1] (Unreported) S.C. 113272, Sept. 30, 1976.

[2] The Review is deeply indebted to the Master for supplying these decisions.

it had lapsed and, of course, found no statement of claim had been filed.

Rule 11(1) was amended in 1969 so that:[3]

> . . . the statement of claim may at any time before *or after* its expiration, by order, be renewed . . . (the addition is italicized)

The defendant bases his claim that the application should be denied on the majority decision in *Cook* v. *Szott*.[4] McDermid J.A., speaking for the majority in that case, placed emphasis on the desire for speedy litigation rather than elementary justice for the parties.[5] He also found that neglect and oversight were not sufficient reasons for the court to exercise its overriding discretion in favour of the plaintiff. As a result, the litigant must bear the mistakes of his solicitor,[6] because the Legislature has evidenced an intention that proceedings resulting from automobile actions should be commenced within two years. Porter J.A. dissented in that case, relying on *Simpson* v. *Saskatchewan Government Insurance Office*,[7] and approving a statement by Culliton C.J.S. to the effect that the basis for the discretion must be with the rights of litigants and not with the conduct of solicitors.[8]

Bessemer finds that the addition to Rule 11 in 1969 did nothing "beyond signifying perhaps an ameliorative trend"[9] and the amendment cannot therefore provide an adequate basis for distinguishing the *Cook* decision from the case at bar. In support of this contention, he cites the unreported decision of *Kowalchuk* v. *Kovach*[10] where Milvain C.J.T.D. said that while he agreed with the principles in *Simpson,* he felt bound by *Cook* so that in the case where the plaintiff's solicitor was neglectful, the discretion of the court cannot be exercised in his favour.

The most interesting aspect of the case is the plaintiff's submission that principles applicable to Rule 11 are the same as those taken into account regarding Rule 243 (leave to take a new step) and Rule 244 (dismissal for want of prosecution). If this submission is correct, then the principles laid down by Salmon L.J. in the trilogy of English cases commonly known as *Allen* v. *Sir Alfred McAlpine & Sons Ltd.*[11] are applicable. To succeed in an action for want of prosecution, Salmon held that the defendant must prove: (1) an inordinate delay; (2) that such delay is inexcusable; and (3) that he is likely to be seriously prejudiced. Bessemer then states that *Marshall* v. *Fire Insurance Co. of Canada Ltd. et al.*[12] applies these principles to leave to take the next step, and therefore concludes that these cases plus the recent decision in *Tiesmaki* v. *Wilson*[13] are applicable to the case at bar.

Bessemer sets out four reasons why there is an analogy between leave to take the next step and renewal of a statement of claim:

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[3] (1969) Supreme Court Rules.

[4] (1968) 65 W.W.R. 362 (Alberta Appellate Division).

[5] He quotes Dickens, *Bleak House:* "*Jarndyce* and *Jarndyce* still drags its dreary length before the court, perenially hopeless."

[6] While this may seem harsh to the plaintiff, it must be remembered that most solicitors now have negligence insurance which would satisfy the plaintiff's claims in all likelihood.

[7] (1967) 61 W.W.R. 741 (Sask. C.A.).

[8] In this case, the application was granted. While not affecting this general statement of Culliton, it should be noted that the delay was only of a twenty-six day duration. It was admitted that the only reason for the delay was inadvertence.

[9] *Supra*, n. 1 at 6.

[10] (Unreported) S.C. 98794.

[11] [1968] 2 Q.B. 229.

[12] (1970) 71 W.W.R. 647 (Alberta Appellate Division).

[13] [1972] 2 W.W.R. 214 (Alberta Appellate Division).

1. Service of a statement of claim is essentially a new step although it is thought of generally as contemporaneous with its filing;
2. The underlying principle in both cases is that delay is inordinate;
3. Both are not to be granted unless there is "sufficient reason" (Rule 11) or "credible excuse" (implied under Rule 243);
4. Resulting prejudice is an important consideration.

He does however realize that the three month renewal period provided for under Rule 11 implies greater urgency, but he continues:[14]

> This to my mind however, is not so much indicative of any dissimilarity of principle, as of the respective standards to be enacted.

Bessemer then quotes the *Marshall* and *Tiesmaki* decisions and admits that the latter is "an example in extreme exercise of the court's indulgence."[15] He comes up against a problem here in that these two cases are more consonant with the rationale of the dissent in *Cook*.[16] He solves this problem by stating that "principle should triumph over identity"[17] and concludes that these decisions should not be ignored due to the doctrine of *stare decisis* which has little if any application to procedural cases.

He then quotes Salmon L.J. and Diplock L.J. in the *Allen* case and Freedman J.A. in *Ross* v. *Crown Fuel Co.*[18] and *Shura* v. *Silver*[19] where these learned judges expressed the opinion that the court has an ultimate discretion even if the defendant establishes the three requirements as stated above. For example, it may be unjust for the plaintiff to lose when he would otherwise have won if the delay is entirely due to the negligence of his solicitor. Bessemer thus concludes that the distinction between *Cook* and *Tiesmaki* is a divergent application of the court's ultimate discretion.

Applying these principles to the case at bar, Bessemer concludes that the delay of two years in effecting service is inordinate in light of the language of Rule 11. However, there was no prejudice made out in the defendant's affadavit. Bessemer finds that the evidence is not likely to have been lost, misplaced, or forgotten due to the fact that the adjuster likely kept a record. He seems to conclude that the defendant is not likely to be so seriously prejudiced that he will be denied essential justice if forced to trial.

In N's affidavit, the excuse put forth was that settlement could not be negotiated until his client's health stabilized so as a final medical assessment could be obtained. Bessemer states:[20]

> This commends itself to my judgment as an excellent reason and one which, subject to all requisite *bona fides* and within reasonable time limits, affords effective excuse for the delay complained of.

This, he states, is necessary before the solicitor can decide whether to attempt settlement or go to trial. This was not sufficient here because there was no evidence that N attempted to get any further medical

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[14] *Supra*, n. 1 at 11.

[15] *Id.* at 12.

[16] It is interesting to note that McDermid J.A. who wrote the majority judgment in *Cook*, dissented in *Tiesmaki*—the majority judgment in that case being written by Johnson J.A. who was the dissident in *Cook*.

[17] *Supra*, n. 1 at 13.

[18] (1963) 41 W.W.R. 65 at 87.

[19] (1963) 43 W.W.R. 272 at 276.

[20] *Supra*, n. 1 at 18.

reports after 1973, nor would N allow the adjuster to evaluate those reports that were obtained.

N further claimed that the only issue remaining concerned quantum but Bessemer is not willing to accept this excuse because the defendant had never admitted liability. N claimed that the defendant knew what was occurring, but Bessemer follows *Cook* to the effect that such knowledge (if proven) has no significance beyond bearing upon the question of prejudice. N further admitted in his affidavit that he was inadvertent in not effecting service and Bessemer finds that this, coupled with the failure to keep the defendant informed, is fatal and there is therefore no credible excuse for their inordinate delay.

This, plus "a presumption of at least some resulting prejudice to the defendant however slight" satisfies Salmon's test. As well, there is nothing to show that the plaintiff tried to 'push his solicitors along', and this points to a tacit acquiescence of their solicitor's inadvertence. The application was consequently dismissed.

The statement by Bessemer that the amendment to Rule 11 did nothing more than signify an ameliorative trend appears to be correct in light of earlier decisions. Despite the fact that the old Rule 15 allowed renewal only before the expiration of the twelve month period, in *Cook* it was impliedly considered at least possible that an application could be made after the expiration of that period. Support for such a contention cannot come from the *Simpson* case because the Saskatchewan Rules of Court allowed a renewal application to be made during the twelve months or within six months thereafter. Thus, while the *Cook* case was more properly one in which Rule 640 (now 548) should have been used to "enlarge" the period of service, the court found that it had the power to renew under Rule 15 despite its wording. This power has now been embodied in the new Rule 11.

The unique facet of this case—the application of principles concerning Rules 243 and 244 to Rule 11—has both its good and its bad aspects. The general requirements set out by Salmon L.J. in *Allen, supra,* give the courts some guidelines in applying their discretion to the facts of the case. This has received judicial recognition in the words of Culliton in the *Simpson* case:[21]

> I know of no reason why the same principles should not govern the court in the exercise of its discretion under that Rule [our Rule 11] as governs it in the exercise of its discretion under other Rules where it may relieve against an irregularity.

Therefore, I would respectfully agree with the learned Master when he finds that under both Rules, inordinate delay and resulting prejudice are important factors which should be considered together with the requirement of some credible reason for the delay. However, these are just principles and the facts in each case must determine their application. Bessemer states that decided cases concerning Rules 243 and 244 are applicable to the one at bar because service of a statement of claim is essentially a next step. With this, I respectfully disagree. In cases concerning the next step, the defendant is well aware that there is an action against him which will possibly reach trial sometime in the future. However, before the statement of claim is served on the defendant, he has no absolute knowledge that he is going to be sued as was the case here. This has important ramifications. A defendant in

[21] *Supra*, n. 7 at 750.

such circumstances is more likely to misplace evidence or lose touch with possible witnesses than one who knows of an impending trial. And the defendant's witnesses themselves would be more likely to let valuable evidence slip from the forefront of their minds. Thus, in *Tiesmaki*, the degree of prejudice to the defendant was small because everyone knew of the incident and that there was a likelihood of a large court case. This is the reason why in Rule 11 the intention is that service be effected within a further limited period of time (three months) and such limitation is absent in Rules 243 and 244. I would submit therefore, that this is the correct distinction between *Cook* on the one hand and *Tiesmaki* and *Marshall* on the other, as opposed to Bessemer's rationale that they are divergent applications of the court's ultimate discretion. Thus, were it to accept my submission, a court would not look at actual cases concerning Rules 243 and 244.

When applying Salmon's tripartite test to the facts at bar, Bessemer appears to state that the defendant is not prejudiced. He then inquires as to whether the court should exercise its ultimate discretion in favour of the plaintiff. While this would imply perhaps that Salmon's test is of the "and/or" variety, I think it is clear that all three must be satisfied. Bessemer himself impliedly agrees with this by concluding his judgment with an indication that all three were in fact satisfied here—he presumes a slight prejudice to have resulted to the defendant.

This brings me to some practical considerations. Firstly, it should be remembered that the defendant was left in a somewhat precarious position because he never alleged any prejudice in his affadavit and it would therefore appear that the inclusion of such evidence, however slight, would be advantageous, Secondly, from the plaintiff's position, it would appear to be wise to inquire of the defendant whether any records were kept concerning the cause of action because an affirmative answer tends to negative an allegation of prejudice. Lastly, it seems to be unwise to admit in the affadavit that inadvertence was a cause of the delay. Far from misleading the court, this merely has the practical effect of not having the other reasons which may be "sufficient" and "credible" under Rule 11, "being cast in a further pall of doubt" (to paraphrase Bessemer).[22]

Bessemer classifies N's contention that the delay occurred due to the instability of the plaintiff's health as being "an excellent reason". While this is certainly a more credible excuse than mere inadvertence, I would, with respect, question this opinion. While there is favorable judicial consideration of this in other cases, it mostly concerns delays in proceeding to trial, *i.e.*, when all preliminary steps have been completed. In such circumstances, the trial cannot be stalled any longer and a delay may be deemed necessary. But there is nothing necessary about delaying service because the statement of claim has already been filed. Why not serve it within the year and if circumstances change, then the statement of claim can be amended? It is also logical that if the defendant has been served, he will be more inclined to talk settlement. Judicial consideration of the problem can be found in the judgment of Miller C.J.M. in *Ross* v. *Crown Fuel Co.*:[23]

> Medical men cannot, by waiting for complete certainty, unnecessarily delay the trial of actions and counsel have no right to rely on medical opinions as to whether or not

[22] *Supra*, n. 1 at 21.

[23] *Supra*, n. 18 at 69.

> actions should proceed to trial. However, when the plaintiff's doctors are unable as yet to determine the nature and extent of her injuries and disability, a consequent delay in proceeding to trial is necessary and is satisfactorily explained thereby.

As well, many actions proceed to trial without the injury being permanently defined. It is the nature of our judicial system that the court will indemnify the result of injuries *in futuro* through the device of a lump sum award and they use their foresight as best they can.

It should also be noted that in England:[24]

> Negotiations for a settlement do not afford any excuse for failing to serve a writ in time or to renew it.

The decision of Denning M.R. in *Easy* v. *Universal Anchorage Co.*[25] is cited in support of this contention. While the position in Canada appears unclear, it is suggested that the existence of negotiations should not alter the fact that the statement of claim need be served. Certainly, as shown in the case at bar, the lack of negotiations may prejudice the plaintiff in his attempt to obtain renewal.

NEWMAN v. *D. L. DAWSON AND SECURITY STORAGE DIVISION OF MOTORWAYS VAN LINES LTD.*[26]

This decision is again one of A. D. Bessemer Esq., Q.C., Master in Chambers in Calgary, as yet unreported. The Master discusses the relevance of Rule 548 to applications to make subsequent renewals under Rule 11.

The cause of action here arose out of a car accident which occurred on July 12, 1969. The statement of claim was filed on June 4, 1971. Riley J. renewed it for three months which meant that it would expire on September 2, 1971. It was in fact never served and this application was brought after a three year delay from the expiry date.

Rule 11(2) in part reads:

> . . . the statement of claim may at any time *before or after its expiration,* by order, be renewed for three months and so from time to time *during the currency of the renewed statement of claim.* (emphasis added)

From the literal wording of this rule, it can be taken that a statement of claim expires after an initial twelve month period, but that a plaintiff may, during that initial period or after its expiration, apply to obtain a three month's renewal. But it would appear that application for a subsequent renewal must take place during an existing renewal period and that if it ever expires after a renewal, the statement of claim becomes inoperative. Bessemer follows the rule literally but states that a plaintiff under the latter circumstance may still rely on Rule 548, part (2) of which reads:

> An enlargement may be ordered although the application thereof is not made until after the expiration of the time appointed or allowed.

Bessemer quotes the recent decision of *Colbourne* v. *Pollock*,[27] where Bowen J. appeared to be following the *Cook* rationale. Bessemer found that Bowen appeared to state that the old enlargement rule (640) no longer applied to Rule 11 because now a statement of claim may be

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[24] *Odgers on Pleadings and Practice* (20th ed.) at 52.

[25] [1974] 1 W.L.R. 899 at 902.

[26] (Unreported) S.C. 102515, Oct. 8, 1976.

[27] [1975] W.W.D. 149. S.C. 79413.

renewed both before or after its expiration and that such an application must be considered only in the light of Rule 11 provisions. Bessemer states that he is in agreement if Bowen means that Rule 548 is rendered superfluous by the phrase "or after" in Rule 11 where, as in that case, the application is made after the twelve month expiry date. But if Bowen can be taken to mean that, because of the amendment, Rule 548 is without application to any circumstances normally calling for the application of Rule 11, then Bessemer is in disagreement. Bessemer contends that Rule 548 is still applicable due to its opening words—"unless there is express provision that this Rule does not apply"—there being no such provision in Rule 11. As well, since both Rules were amended at the same time, it seems reasonable that they were not intended to be mutually exclusive. Otherwise, he points out, a deprivation may occur to a deserving plaintiff.

Applying Salmon's test here, Bessemer found the three year delay to be *a fortiori* inordinate and was prepared to infer prejudice. The plaintiff's lawyer advanced the argument that he thought proceedings were heading towards a satisfactory settlement and he did not want to incur active litigant expenses, but Bessemer declared that this lacked persuasive value. The second contention was the desire to wait for the physical condition of the plaintiff to stabilize. Bessemer concludes that the evidence as to this as claimed in the affidavit was "too perfunctory" and a sufficient reason was not advanced in his opinion.

In sum therefore, the action was dismissed but with leave to reapply under Rule 548 and to file a further and more complete affidavit. This was due to the lack of prejudice resulting to the defendant and the probability that the plaintiff could advance sufficient reasons.

The judgment of Bowen J. in the *Colbourne* case is indeed unclear as to the effect of Rule 548 on a Rule 11 application. The reason for this uncertainty can be traced back to the amendments of 1969. Confronted with courts who were at least considering making decisions which flew in the face of the literal interpretation of the old Rule 15,[28] the persons responsible for amending our Rules of Court wisely decided that the Rule should state that applications for renewal may be made before or after the expiration of the twelve month period. However, they did not amend that portion of the old Rule which required a further renewal to be made during the subsistence of an earlier renewal period. There would seem to be no logical basis for this distinction except perhaps that it would be inconsistent for a plaintiff who has already renewed not to do so again right away. But the possible results of applying Rule 11 only are somewhat ludicrous. Assuming that "sufficient reason" could be shown, it would be possible for a plaintiff who had not served for five years to have his statement of claim renewed, whereas a plaintiff who renewed during the twelve month initial period and still did not serve during the three month renewal period would have an instrument which would be incapable of revival.

Because of the possibility of such unjust results, Bessemer finds that Rule 548 is applicable in circumstances of an attempted second renewal not made during the existence of a renewal period. While this is logical in the face of the language of Rule 548(1), *supra*, it would seem inconsistent that this Rule can only be applicable to one-half of Rule 11.

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[28] *For example, Cook* v. *Szott, supra*, n. 4.

The other solution available to Bessemer was to disregard the literal effects of Rule 11 and allow the application if sufficient reasons were proven. This would be in accord with the attitude of earlier courts to the problems inherent in the old Rule 15.

The only effective and permanent solution to the problem is to have Rule 11 amended so that an application to renew may be made at any time. This would leave the courts only to determine whether sufficient reasons exist to allow the application and it is submitted that this should indeed be their paramount concern. It is hoped that the problems faced by the Master in this case will be recognized and subsequently alleviated when it comes time for further amendments to the Rules of Court.

—STEPHEN G. RABY*

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