UNREPORTED PRACTICE CASES

DISMISSAL FOR WANT OF PROSECUTION—LEAVE TO TAKE NEXT STEP*

Applications for dismissal for want of prosecution were taken with respect to two actions, and were countered with applications for leave to take the next step. In Action A the Plaintiff (suing both individually and as a firm) sued a corporation for the unlawful termination of a franchise and for wrongful seizure. In Action B the same Plaintiff (suing as an individual) sued for defamation. There was inordinate delay in both actions.

The Master pointed out there were three factors to be considered:

1. Inordinate or excessive delay,
2. Absence of reasonable excuse, and
3. Resulting prejudice.

He said there were no absolute standards and that rarely was the existence of the first element alone a ground for depriving a party of his day in court.

With respect to the question of prejudice, the Defendant argued that there was bound to be prejudice where there had been a delay of four years.

The Court reviewed numerous authorities, including *Marshall* v. *Fire Insurance Co. of Canada et al.* (1969) 71 W.W.R. 647 (Alta. A.D.), and *Tiesmaki et al.* v. *Wilson* [1972] 2 W.W.R. 214 (Alta. A.D.), noting that the Plaintiffs in the latter case were not astute business people. In this case the Plaintiff was a businessman and the Court felt, on review of the facts, that his excuses were inadequate in the case of Action B, a defamation action, where one would expect that he would have been pressing the claim that he was injured as to his credit rating and as to his reputation, both matters of grave importance to a businessman. The Court was left with the doubt that the Plaintiff seriously intended to pursue the action.

In striking the balance to determine how essential justice could be best achieved, the Court had to weigh all the factors. Action A was essentially an interpretation and accounting question, and one could not find or presume prejudice. The Court felt that all assertions of prejudice were of little persuasive effect, a position taken by Kane J. A. in the *Marshall* case, quoting Freedman C.J.M. in the leading Manitoba cases. The Court pointed out that the limitation period for tort was two years, and for contract six years, which supported the argument that prejudice by deterioration of evidence might be presumed. The Court also pointed out that the individual defendant would be prejudiced by the protracted agony to which he had been needlessly subjected.

Leave to proceed was given in Action A on the grounds that although there was inordinate delay, "less than satisfactorily explained", essential justice would be served by permitting the action to proceed, because in the absence of demonstrated prejudice, no substantial injustice to the Defendant was likely to occur.

As regards Action B, in the light of the inordinate and inexcusable delay, coupled with presumed prejudice, essential justice could only be achieved by removing the "Damoclean sword" suspended over the Defendant's head.

(*Nelson et al.* v. *Massey-Ferguson Industries Ltd. et al.*, S.C.A., J.D.C. 91740; *Nelson* v. *Cowie*, S.C.A., J.D.C. 94765, July 8, 1974, A. D., Bessemer, Q.C., Master in Chambers.)

EXEMPTIONS—EXEMPTION ON SURPLUS OF FORECLOSURE—JOINT TENANTS ENTITLED TO EXEMPTION—COSTS*

Property owned by an estranged husband and wife as joint tenants was sold in foreclosure proceedings. A surplus remained after the payment out of three mortgages. The wife applied for distribution, claiming that the surplus was exempt up to an amount of $16,000.00, representing $8,000.00 for each of her and her husband.

It was held that the exemption applied even though the sale came about through foreclosure rather than seizure and sale under writ. The learned Master applied *Re Henwood* (1962) 40 W.W.R. 81 (Alta. T.D.), and *Re Williams* (1962) 40 W.W.R. 84 (Alta. T.D.), two decisions of Riley J. in bankruptcy proceedings. He also held that each of the two joint tenants was entitled to the exemption. He applied *Re Cherniak* [1930] 3 D.L.R. 200 (Alta. T.D.) (affd. on Appeal at 994), and *Neil Ranaghan & Cope Ltd.* v. *Motley* [1930] 4 D.L.R. 69 (Alta. T.D.).

The Master did not allow costs against the execution creditors but decided that the husband's share bear $400.00 in costs incurred by the wife in protecting the application (*C.M.H.C.* v. *Gemmell et al.*, S.C.A., J.D.E., No. 82396, Dec. 20, 1974.)

JUDGMENT—RENEWAL—RESTRICTED USE OF RULE 331—JURISDICTION OF MASTER*

The Applicant, a judgment creditor, filed and served a Notice of Motion for a new Judgment. The Notice of Motion did not contain any express requirement of the Respondent that he appear on the return and show cause in the words of Rule 331.

The Master suggested that the motion should be provided with a notice "worded somewhat as follows":

> AND TAKE NOTICE that you are hereby required to appear in person or by counsel at the above appointed place and time and there and then to show cause why the order applied for should not be granted.

The Master held the requirement to be imperative. Mere reference to the Rule is not enough; it has no more significance to a layman than a foreign licence number. The Master held the error resulted in nullity; fundamental and transgressing against natural justice and an imperative requirement. Moreover, under The Limitation of Actions Act, the filing and service of the Notice of Motion must be the commencement of an action; a civil proceeding commenced in the prescribed manner (The

Judicature Act, s.2). The Notice of Motion and action dependent thereon is a nullity if it fails to comply. Rule 558 is of no assistance because, unless properly commenced, there is no "action" as defined by The Judicature Act.

The Master also suggested that the application should be to a Judge because of the use of that term in Rule 331, and this, perhaps being a matter which "by statute or ordinance are required to be done by a judge" (R.397).

The Master also suggested that the Notice of Motion should be endorsed in accordance with Rule 88 along the lines suggested in *Re Carbonite Coal Co.* [1927] 3 W.W.R. 690.

The Master also pointed out that those who choose to use the Rules in preference to the safer and more conventional Statement of Claim do so only if there is ample time to file and serve the debtor and take remedial steps.

(*Sanders* v. *Nousek et al.*, 1074, S.C.A., J.D.C. No. 63684, A.D., Bessemer Q.C., Master.)

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