Date: 20021002
Docket: CA 178260

NOVA SCOTIA COURT OF APPEAL
[Cite as: *Burke v. Sitser*, 2002 NSCA 115**]**

Roscoe, Cromwell and Oland, JJ.A.

BETWEEN:

JEFFREY BURKE

Appellant

- and -

JOHN SITSER, THE MUNICIPALITY OF THE COUNTY OF COLCHESTER and BLAIKIES DODGE CHRYSLER LTD.

Respondents

REASONS FOR JUDGMENT

Counsel:	David S. Green and Rebecca Lamb for the appellant Glenn R. Anderson for the respondents
Appeal Heard:	September 17, 2002
Judgment Delivered:	October 2, 2002

THE COURT: The appeal is allowed, the order dismissing the action is set aside and costs of the appeal are costs in the cause fixed at $1,500.00

OLAND, J.A.:

[1] This is an appeal of a decision of Associate Chief Justice MacDonald in Supreme Court chambers dismissing the appellant's personal injury action for want of prosecution and delay under *Civil Procedure Rule* 28.13. The appeal was allowed at the hearing, with reasons to follow. These are the reasons.

[2] Several times during the history of this proceeding, the appellant did not move along his claim pertaining to alleged injuries sustained in a 1993 motor vehicle accident. It is also clear that the appellant responded slowly to the respondents' frequent requests for production and answers. Indeed it seems that sometimes only an imminent application to strike garnered any reaction from the appellant.

[3] This litigation has included three chambers appearances initiated by the respondents. They successfully applied to Justice William B. Kelly on October 19, 2000 for an order compelling the appellant to answer or further answer questions asked at the appellant's discovery and to produce relevant documents. They subsequently brought two applications to strike, both before MacDonald, A.C.J. Their first application to strike which was heard on May 16, 2001, after having been adjourned from March 2001, was dismissed. While he found that there had been inordinate and inexcusable delay giving rise to a presumption of prejudice, the chambers judge determined that while the outstanding matters amounted to "some prejudice," they were not the type of serious prejudice envisaged in *Martell v. Robert McAlpine Ltd.* (1978), 25 N.S.R. (2d) 540 (C.A.). His order included costs in any event of the cause against the appellant and was without prejudice to any further application the respondents may take.

[4] That chambers judge heard the respondents' second application to strike for delay on March 21, 2002 and gave his oral decision at the conclusion of the hearing. After finding that there had been inordinate and inexcusable delay which gave rise to a presumption of prejudice, he also found that there had been actual prejudice which he specified as including:

1. The death of the appellant's family physician, Dr. R. Boodoosingh. He was no longer available to testify and his records were missing;

2. The records of Dr. Eapen had not been located; and

3. Employment insurance records were unavailable.

The chambers judge pointed out that the appellant had one pre-existing injury and two injuries after this motor vehicle accident, further complicating his claim. He commented that it seemed that very little had happened in the year since he dismissed the earlier application.

[5] The decision on the second application to strike concluded:

> Back in May of 2001, the plaintiff was given an opportunity to salvage this case and to aggressively bring it to trial. It is now simply too late and too little has been done to do so. I repeat the admonitions for the purposes of this decision that I had given the plaintiff in March and in May of 2001. Here, with failing memories, lost records, dead physicians and other prejudice, I am satisfied the defendant, unfortunately, cannot get a fair trial, and I am left with no course but to dismiss the action.
>
> (emphasis added)

[6] The day following the hearing of the chambers application, counsel for the appellant wrote the chambers judge enclosing a copy of Dr. Eapen's records which included the records of the late Dr. Boodoosingh. They had arrived while the application was being heard. In a letter response to counsel's request that he reconsider his decision of a day earlier, the chambers judge stated that he had rendered his decision based on the evidence before him and "my role is now *functus*. It would be inappropriate for me to have any further involvement in this matter." His order issued on April 16, 2002.

[7] In our respectful opinion, the chambers judge erred in determining that he was *functus.* Until the order issued, he had the discretion to withdraw, modify, or even reverse his decision. In *Lunenburg v. Bridgewater Public Service Commission* (1983), 59 N.S.R. (2d) 23 (N.S.S.C.A.D.), where the issue was whether the judge erred in reversing his oral decision, Cooper, J.A. reviewed the case authority pertaining to *functus officio* at ¶ 8 and ¶ 9. He stated at ¶ 10:

> . . . in my view Judge Clements was here not *functus.* He could only be so if an order giving effect as a judgment to his oral decision had been entered. I quite recognize the word of caution entered by Bridges, J., in the *Fruehauf Trailer Co.* case, supra, to the effect that the right to modify or vary a decision in circumstances such as we have here is one which "a court should be most reluctant to exercise and should only do so in an exceptional case", but in my opinion this is such a case. Judge Clements frankly said that he had not clearly

> dealt with the main argument of the Commission and, that being so, it seems to me highly desirable that he exercise his right to vary his oral decision.

[8] We would also refer to *Temple v. Riley*, [2001] N.S.J. No. 66 (QL) wherein Saunders, J.A. stated at ¶ 60:

> The general rule is that a trial judge may change or amend his/her judgment at any time before issue and entry thereof, but that after the judgment has been issued and entered, he/she is functus officio and relinquishes any power to do so, subject of course to the provisions of the Rules. See, for example, The Law of Civil Procedure, W.B. Williston and R.J. Rolls, Vol. 2, Butterworths (Toronto: 1970), p. 1059.

This court also reviewed the legal principles relating to the reopening of a proceeding after the judge has made a decision and issued reasons but before the formal judgment has issued in *Griffin v. Corcoran*, [2001] N.S.J. No. 158.

[9] We think it clear that the chambers judge here had a discretion to reopen the matter prior to the issuance of the formal order. While this power is, as noted, discretionary, so that the judge was not obliged to reopen the matter, he had the authority to do so and erred in finding otherwise. Given that the absence of the now located records formed an apparently significant part of the basis of his decision to dismiss the action, we cannot say that the judge's error of law was immaterial to the result which he reached.

[10] The appeal is allowed. The order dismissing the action is set aside without prejudice to any further application the respondents may bring to strike for delay. The costs of the appeal fixed at $1,500.00 will be costs in the cause.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Cromwell, J.A.