SUPREME COURT OF NOVA SCOTIA
Citation: Palmer Estate v. MacInnis, 2013 NSSC 391

Date: 20131203
Docket: Hfx No. 216171
Registry: Halifax

Between:

Jean Palmer, in her personal capacity
and as representative of the Estate of
Glenn Palmer, deceased

Plaintiff

v.

James MacInnis and Halifax Regional Municipality

Defendants

Judge: The Honourable Justice Glen G. McDougall

Heard: October 31, 2013, in Halifax, Nova Scotia

Counsel: John T. Rafferty, Q.C. and Janus Siebrits, Esq., for the plaintiff
Joseph F. Burke, Esq. and James Green, Esq., for the defendants

By the Court:

INTRODUCTION

[1] This is a motion by the plaintiff for an extension of time to appeal a dismissal order of the prothonotary issued on October 15, 2008, or an order setting aside the dismissal order.

BACKGROUND:

[2] This tragic story began on the evening of February 28, 2003, when Glenn Palmer was struck by a Halifax Metro Transit bus. Mr. Palmer did not survive his injuries. His widow, Jean Palmer, is the Plaintiff in this matter.

[3] Following the sudden loss of her husband, Mrs. Palmer retained lawyer Kent Clarke to commence an action on her behalf and on behalf of her Late husband's Estate against the driver of the bus and Halifax Regional Municipality ("HRM"). On February 24, 2004, an action was filed against the defendants pursuant to the *Fatal Injuries Act*, RSNS 1989, c 163. Matthew Williams, counsel for the defendants, filed a defence on September 13, 2005. Liability for the accident was seriously in issue.

[4] The matter moved slowly. Lists of documents were exchanged and discoveries were scheduled for July of 2007. During the process of arranging the discoveries, however, the parties learned that James MacInnis, the driver of the bus, had suffered a significant stroke in May of 2006. The incident left Mr. MacInnis with cognitive and emotional difficulties and his discovery was postponed on the advice of his physician. Mrs. Palmer's discovery went ahead as scheduled.

[5] On September 14, 2007, the prothonotary, Annette Boucher, issued a Notice to Appear returnable on October 5, 2007. Both counsel responded to the Notice and advised Ms. Boucher of the status of the matter which was then placed in abeyance for six months.

[6] On April 7, 2008, after the expiry of the six months, Ms. Boucher contacted counsel seeking a further update on the status of the matter. Mr. Williams advised Ms. Boucher that no progress had been made on the file since discoveries in July of 2007. He indicated that if he and Mr. Clarke were unable to agree on a litigation schedule within the next several days, he wanted the matter placed on the Appearance Day docket. Mr. Williams told Ms. Boucher that either he or Mr. Clarke would be in touch shortly to advise. Mr. Clarke also responded to Ms. Boucher and adopted the comments of Mr. Williams. The matter was again placed in abeyance pending word from counsel.

[7] On April 16, 2008, Mr. Clarke submitted a settlement proposal to the defendants on his client's behalf. Mr. Williams responded on May 22, 2008 with a counter-offer. Mr. Clarke did not respond to the counter-offer nor to a follow-up fax sent by Mr. Williams on June 16, 2008.

[8] On September 15, 2008, having heard nothing from counsel since April, the prothonotary issued a Notice of Intention to Proceed. Unless plaintiff's counsel

responded within 30 days, the action would be dismissed. Mr. Clarke denies receiving a copy of this Notice.

[9] On October 15, 2008, the prothonotary issued an order dismissing the action. Mr. Clarke, having not received the prior Notice, was surprised to learn of the dismissal order. He says that he reviewed the case law and satisfied himself that the order, being of a procedural nature, could be easily set aside.

[10] On October 29, 2008, Mr. Clarke wrote to Mrs. Palmer advising her that they should meet to discuss the progress of her claim. In that letter, he wrote:

> We need to meet to discuss with you the progress of your claim. There has been a procedural development that we can set aside but we must review with you the circumstances.

Mrs. Palmer says she never received this letter.

[11] In the years that followed, Mr. Clarke met with Mrs. Palmer on six occasions and spoke with her by telephone at four other times. According to the evidence of both Mr. Clarke and Mrs. Palmer, at no time during their discussions did Mr. Clarke specifically advise Mrs. Palmer that her claim had been dismissed.

[12] In January of 2013, frustrated with the lack of progress on her claim, Mrs. Palmer retained Janus Siebrits to take carriage of her file. Mr. Siebrits made multiple attempts in the months that followed to obtain Mrs. Palmer's file from Mr. Clarke. Mr. Clarke did not respond to these requests.

[13] In May, Mr. Siebrits contacted Mr. Williams to inform him that he was now acting on Mrs. Palmer's behalf and to request the name of the lawyer now representing HRM. Mr. Williams advised Mr. Siebrits that the action had been dismissed five years earlier.

[14] According to Mrs. Palmer, she was shocked to learn from Mr. Siebrits that her claim had been dismissed. She filed this motion in August for an extension of time to appeal the prothonotary's dismissal order or an order setting aside the dismissal order. Unfortunately, Mr. MacInnis, the bus driver, passed away several weeks later on September 3, 2013.

ISSUES

1. Should the time for appealing the prothonotary's 2008 dismissal order be extended?

2. If so, should the dismissal order be set aside?

1972 RULES VS. 2009 RULES

[15] This action was commenced under the **Nova Scotia Civil Procedure Rules** (1972). The 2008 dismissal order was issued by the prothonotary pursuant to 1972 **Rule** 28.11(3):

> 28.11 (3) Where the parties do not indicate their intention to proceed within the time set out in subsection 2, the prothonotary shall issue an order in Form 28.11C dismissing the proceeding.

[16] The prothonotary had no discretion under the **Rule** not to dismiss the proceeding if the parties failed to respond within the requisite time period. A party who wished to appeal an order issued under **Rule** 28.11(3) could do so under 1972 **Rule** 51.05(3):

> 51.05 (3) Any person affected by an order of a prothonotary made pursuant to Rule 51.05(1)(b), Rule 51.05(1)(c) or Rule 28.11(3) may appeal therefrom to a judge in chambers within ten (10) days after the order complained of has been served upon him in cases where service is required, and within (10) days after the making of the order in all other cases, and the judge may make such order as is just.

[17] Although **Rule** 51.05(3) required that an appeal be filed within 10 days, the Court could exercise its discretion under 1972 **Rule** 3.03 to extend the time period:

> 3.03 (1) The court may, on such terms as it thinks just, extend or abridge the period within which a person is required or authorized by these Rules, or by any order, to do or abstain from doing any act in a proceeding.
>
> (2) he court may extend any period referred to in paragraph (1) although the application for extension is not made until after the expiration of the period.

[18] On January 1, 2009, the **Nova Scotia Civil Procedure Rules** (2009) superseded the 1972 **Rules**. Under the current **Rules**, the Court retains the discretion to extend time periods pursuant to **Rule** 2.03:

> 2.03 (1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:
>
> (a) give directions for the conduct of a proceeding before the trial or hearing;
>
> (b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
>
> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

[19] The scope of the prothonotary's authority, however, was narrowed with the introduction of the 2009 **Rules**. Under the current **Rules**, the prothonotary is no longer empowered to issue dismissal orders. **Rule** 4.22 provides that a prothonotary must now make a motion to dismiss an action after five years when there has been no movement on the file. The decision whether to dismiss the proceeding is made by a judge in Chambers after hearing from the parties. As a natural consequence of this change, there is no longer a **Rule** allowing for an appeal of a dismissal order issued by the prothonotary. Accordingly, the first issue I must decide is how best to deal with this procedural conundrum.

[20] The plaintiff submits that the most appropriate course of action is for the Court to exercise its discretion under **Rule** 92.08(2)(b) to apply the 1972 **Rules** to this motion. The defendants offered no objection to the plaintiff's position.

[21] The proper application of the **Rules** to matters commenced prior to January 1, 2009 is addressed in **Rule** 92. **Rule** 92.02(1) dictates that the current **Rules** are to be applied to all steps taken in a non-family proceeding after January 1, 2009, unless **Rule** 92 provides or a judge orders otherwise. Under **Rule** 92.08(2)(b), a judge who is satisfied that the application of the current **Rules** to a proceeding commenced prior to January 1, 2009 will cause one party to gain an unfair advantage over another party may order that the 1972 **Rules** apply to the entire proceeding or part of the proceeding.

[22] Under the 1972 **Rules**, the plaintiff has a right to appeal the prothonotary's order dismissing her action. Under the 2009 **Rules**, she has no such right. I am satisfied that the application of the 2009 **Rules** would bestow an unfair advantage on the defendants and the 1972 **Rules** should therefore be applied to this motion.

[23] Even if I am wrong in my conclusion and the 2009 **Rules** should be applied, I find that the Court has the inherent jurisdiction to set aside the dismissal order.

[24] Our Court of Appeal has considered the ancient concept of inherent jurisdiction on a number of occasions. In **Goodwin v. Rodgerson**, 2002 NSCA 137, the Court acknowledged that while the precise scope of the jurisdiction is difficult to pin down, "there is no question it is a power which a superior court enjoys to be used where it is just and equitable to do so": para. 17. In **Central Halifax Community Association v. Halifax (Regional Municipality)**, 2007 NSCA 39, Chief Justice MacDonald for the Court described the concept as follows:

> 34 Every superior court in this country has a residual discretion to control its process in order to prevent abuse. Procedural rules, however well intentioned, cannot be seen to stand in the way of basic fairness. This overriding judicial discretion is commonly referred to as the court's inherent jurisdiction. It is a jurisdiction sourced independently from any rule of court or statute. ...

[25] In **Lord v. Smith**, 2013 NSCA 34, Justice Farrar for the Court adopted the following definition of inherent jurisdiction:

> 25 In his seminal article, IH Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23 Jacob defined the inherent jurisdiction of the court as:
>
> > ... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. (Emphasis by Justice Farrar)

[26] Although the concept is a flexible one, "[i]nherent jurisdiction does not bestow an unfettered right to do what, in the judge's opinion, is fair as between the parties": **Ocean v. Economical Mutual Insurance Co.**, 2009 NSCA 81 at para. 77. As

Justice Farrar noted in **Lord**, "[inherent jurisdiction] must be exercised judicially and with caution. It is typically limited to procedural matters. It cannot effect changes in the substantive law, and it cannot be exercised so as to contravene a law": para. 29.

[27] Fortuitously, the Court of Appeal in **Goodwin** considered the precise issue of whether inherent jurisdiction could be invoked to set aside a prothonotary's dismissal order. At that time, there was no provision in the **Rules** for appealing such an order. On application to set the order aside, the Chambers judge held that the Court's inherent jurisdiction could not be invoked in this manner. The Court of Appeal disagreed. Following an extensive review of the authorities outlining the nature and parameters of the doctrine, the Court held that the dismissal order should be set aside pursuant to the exercise of the Court's inherent jurisdiction to control its own process and to prevent an injustice.

[28] In view of the foregoing, I have no difficulty concluding that even if I have erred in my decision to apply the 1972 **Rules**, I have the inherent jurisdiction to set aside the prothonotary's order if justice so requires.

EXTENSION OF APPEAL PERIOD

[29] The law governing a motion to extend the time to commence an appeal is well established. The applicable test was succinctly summarized by Justice Bateman in **Bellefontaine v. Schneiderman**, 2006 NSCA 96:

> 3 A three-part test is generally applied by this Court on an application to extend the time for filing a notice of appeal, requiring that the applicant demonstrate *(Jollymore Estate Re* (2001), 196 N.S.R. (2d) 177 (C.A. in Chambers) at para. 22):
>
> > (1) the applicant had a *bona fide* intention to appeal when the right to appeal existed;
> >
> > (2) the applicant had a reasonable excuse for the delay in not having launched the appeal within the prescribed time; and
> >
> > (3) there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference.

> 4 Where justice requires that the application be granted, the judge may allow an extension even if the three part test is not strictly met (*Tibbetts v. Tibbetts* (1992), 112 N.S.R. (2d) 173 (C.A. in Chambers)).

[30] More recently, in **Farrell v. Cavasant**, 2010 NSCA 71, Justice Beveridge preferred to consider the three-part test as a set of relevant factors to be considered in determining the ultimate issue of whether or not justice requires that the application be granted:

> 17 Given the myriad of circumstances that can surround the failure by a prospective appellant to meet the prescribed time limits to perfect an appeal, it is appropriate that the so called three-part test has since clearly morphed into being more properly considered as guidelines or factors which a Chambers judge should consider in determining the ultimate question as to whether or not justice requires that an extension of time be granted. (See *Mitchell v. Massey Estate* (1997), 163 N.S.R. (2d) 278; *Robert Hatch Retail Inc. v. Canadian Auto Workers Union Local 4624*, 1999 NSCA 107.) From these, and other cases, common factors considered to be relevant are the length of delay, the reason for the delay, the presence or absence of prejudice, the apparent strength or merit in the proposed appeal and the good faith intention of the applicant to exercise his right of appeal within the prescribed time period. The relative weight to be given to these or other factors may vary. As Hallett J.A. stressed, the test is a flexible one, uninhibited by rigid guidelines. (**Emphasis added**)

[31] The factors listed by Justice Beveridge are not dissimilar from those that I must consider when deciding whether to set aside the prothonotary's order. For this reason, the analysis as to whether to extend the time limit for an appeal will be subsumed within that for the test to set aside the order.

TEST TO SET ASIDE DISMISSAL ORDER

[32] The leading authority on the setting aside of a prothonotary's dismissal order is **Hiscock v. Pasher**, 2008 NSCA 101. In that case, the plaintiff, Florence Hiscock, was injured in an automobile accident on April 28, 1998. A proceeding was filed against the defendant, Mary Pasher, in 2000 but was not served until 2002. A defence was promptly filed. Discoveries were held in 2003, but nothing was done thereafter to advance the file. On April 24, 2006, a Notice of Intention to Proceed was sent by the prothonotary to Ms. Hiscock's lawyer. Her lawyer failed to respond, and on May 25, 2006, the prothonotary issued an order dismissing the action.

[33] The plaintiff's lawyer took no action to have the order set aside and did not advise his client of the status of her claim. Frustrated by the lack of progress on her file, Ms. Hiscock contacted the Nova Scotia Barristers Society in August of 2006. In November 2006, the lawyer apologized to Ms. Hiscock for his inaction and asked her to allow him to finish the case. Ms. Hiscock agreed to this request and did not move forward with her complaint.

[34] In January 2007, having heard nothing from her lawyer, Ms. Hiscock retained a new lawyer. The new lawyer learned of the dismissal order in March of 2007. Ms. Hiscock then filed a written complaint with the Nova Scotia Barristers Society and brought an application to set aside the order.

[35] In Chambers, Justice Edwards applied a line of Ontario authority requiring that the plaintiff satisfy four criteria: that there was an explanation for the delay; that the deadline was missed due to inadvertence; that the motion was brought promptly; and that there was no prejudice to the defendant.

[36] Justice Edwards found that the only explanation for the delay was the wilful neglect of plaintiff's counsel; that the dismissal was not the result of mere inadvertence but was again due to the wilful neglect of the lawyer; that the motion to set aside the order was not brought promptly; and that there was no prejudice to the defendant. He concluded as follows [**Hiscock v. Pasher**, 2008 NSSC 36, paras. 46 - 51]:

> 46 ***Conclusion***: What does the interest of justice require in this case? Obviously, allowing the Dismissal Order to stand would be an extreme remedy. But are the circumstances here so egregious that an extreme remedy is appropriate? I believe they are.
>
> 47 I take comfort from the fact that Hiscock will not be left without a remedy. [The lawyer's] conduct exposes him to liability to Hiscock. I am confident she will have no difficulty making a case against him.
>
> 48 Second (to paraphrase *Marché*), [the lawyer's] conduct amounts to more than that kind of lapse or inadvertent mistake that the legal system can countenance. This type of conduct must be emphatically denounced and discouraged.
>
> 49 Third (again as in *Marché*), excusing this delay and this conduct risks undermining public confidence in the administration of justice. "... Excusing a delay

> of this kind would throw into question the willingness of the courts to live up to the stated goal of timely justice." (*Marché* paragraph 32)
>
> 50 There is no justification for putting this back on the Defendant. Ms. Pasher had this matter hanging over her for eight years prior to the Dismissal Order. Although she was ably represented by Counsel retained by her insurer, she still had to be available to testify at the trial, to meet with Counsel, and, if necessary, undergo further discovery examination. Since the Dismissal Order, she has no doubt experienced a sense of closure and has gotten on with her life without this cloud hanging over her. Litigants are entitled to finality after the passage of a reasonable amount of time. For Ms. Pasher, that time has long since passed. Neither she nor her Counsel are in any way responsible for the present state of affairs.
>
> 51 There is only one person who is responsible for this situation. I see no reason in logic or in law why he alone should not bear the consequences. Defendant's counsel went out of his way to encourage [plaintiff's counsel] to pursue Hiscock's claim. There is no reason to deflect any of the blame from [plaintiff's counsel].

[37] The appeal represented the Court of Appeal's first opportunity to articulate a specific test for setting aside a prothonotary's order issued under **Rule** 28.11. Justice Roscoe for the Court commented on the nature and purpose of the order:

> 19 It is clear that the issuance of the prothonotary's order is entirely administrative. It is not a decision on the merits of the case or based on any evidence concerning the intentions of the plaintiff. The purpose of the Rule is to clear cases which have settled or have been abandoned from the docket. (See: *Goodwin v. Rogerson, supra*, para. 19) The purpose of an appeal from the Rule 28.11 order must be to allow the court to reassess the situation in a case where some error has resulted in a striking-off where the plaintiff did not intend to abandon the case.

She proceeded to adopt the test applicable to a motion for dismissal for want of prosecution:

> 20 In my view it makes sense for the test on an appeal of a Rule 28.11 order to be similar to the test the court applies when the defendant applies to dismiss a proceeding for want of prosecution pursuant to Rule 28.13. That Rule allows a defendant to seek the dismissal of a case the plaintiff has unreasonably delayed, which also assists the court in clearing the docket of cases that are not likely to proceed. There is no obvious rationale for having a stricter test for reinstatement after the prothonotary's administrative dismissal than the applicable standard on an application made by the defendant to dismiss for delay.

[38] Before setting out the appropriate test, Justice Roscoe emphasized that it is the plaintiff's behaviour and personal blameworthiness and not that of the plaintiff's lawyer that is of particular importance on a motion to set aside a dismissal order:

> 22 As the cases dealing with Rule 28.13 indicate, dismissal for want of prosecution is an extreme remedy and the plaintiff should not lightly be deprived of her day in court. (See: *Goodwin v. Rodgerson*, para. 19 and *Moir v. Landry*, p. 284). It is important to distinguish between the neglect and delay caused by the plaintiff's solicitor and the plaintiff's own failure to pursue her rights. Even in cases where the solicitor's conduct is exceptionally careless, if the plaintiff is entirely blameless, the defendant's motion to dismiss may be unsuccessful if there is an absence of prejudice to the defendant. For example, in *Clarke v.Sherman* there had been a 13 year delay due in part to the plaintiff's solicitor being suspended from the practice of law. Since the plaintiff was not personally responsible for any of the delay, and the defendants had not been prejudiced, the appeal court found that the application should have been dismissed. [**Emphasis added**]

[39] Justice Roscoe proceeded to summarize the test as follows:

> 23 Under Rule 28.13, the defendant bears the burden as the applicant. On appeal from a prothonotary's Rule 28.11 order, the plaintiff, as the appellant, ought to bear the burden of proving:
>
> 1. That there is no inordinate or inexcusable delay, or, if there is, that it is not the plaintiff personally who is to blame for the delay;
>
> 2. That the plaintiff has always intended to proceed with the action and was either unaware of the Rule 28.11 notice or her solicitor's failure to respond to it;
>
> 3. That the defendant has not likely been prejudiced by the delay; and,
>
> 4. After balancing all the relevant factors, it is shown to be in the interests of justice, to set aside the prothonotary's order.

[40] In reaching her decision, Justice Roscoe found that Justice Edwards had erred by overemphasizing the lawyer’s neglect. The plaintiff's blamelessness and the absence of prejudice to the defendant led her to conclude that it was in the interest of justice that the order be set aside and the action reinstated.

APPLICATION OF THE TEST

[41] I must first consider whether there has been an inordinate or inexcusable delay, and if so, whether Mrs. Palmer is to blame for that delay.

[42] The accident that killed Mr. Palmer occurred on February 28, 2003. This motion was filed in August of 2013. As in Hiscock, the delay amounts to a period of ten years and could easily be labelled as inordinate or inexcusable. I am satisfied, however, that blame for the delay lies with her lawyer and not with Mrs. Palmer.

[43] I accept that Mrs. Palmer has always intended to proceed with a claim against the defendants. As to her awareness of the notice or her counsel's failure to respond, the affidavit evidence of Mrs. Palmer and her former counsel that she was unaware of the dismissal order is uncontradicted.

[44] I must now consider whether the defendants are likely to suffer prejudice. Not just any degree of prejudice, however, will be sufficient to deny the plaintiff a remedy. The defendants must establish that they are likely to suffer serious prejudice: **Lord**, at para. 43; **Young v. Merrill Lynch**, 2013 NSSC 225 at para. 81.

[45] The defendants say the circumstances of this case are such that I should presume serious prejudice. The law as to the presumption of serious prejudice in the face of inordinate delay was recently reviewed by Justice Farrar in **Lord**. In that case, the plaintiff, Michael Lord, was involved in a rear-end collision with the defendant, Leanne Smith, on December 11, 1998. An action was filed on December 12, 2000 by Mr. Lord's first solicitor, Kyle Langille.

[46] At some point before July 2, 2002, Mr. Lord retained John McKiggan to take carriage of his file. On July 2, 2002, Mr. McKiggan forwarded medical reports to Ms. Smith's insurer. The insurer and Mr. McKiggan continued to communicate throughout 2002 and 2003. No defence was filed.

[47] On December 18, 2002, a Notice to Appear was issued. The prothonotary, unaware that Mr. Lord had retained Mr. McKiggan, attempted to contact Mr. Langille. At that time, however, the Nova Scotia Barristers' Society had assumed control of Mr. Langille's practice. The Barristers' Society indicated that Mr. Lord was now representing himself. The prothonotary attempted to find Mr. Lord but was

unsuccessful. Since no defence had been filed, the prothonotary was similarly unable to notify Ms. Smith or her counsel. The action was therefore dismissed by Associate Chief Justice MacDonald (as he then was) on April 7, 2003.

[48] The dismissal order was not discovered until March 17, 2004 when in-house counsel for Ms. Smith's insurer attempted to file a defence on her behalf. She then contacted Mr. McKiggan to advise that the action had been dismissed. Mr. McKiggan contacted the prothonotary who informed him of the circumstances of the dismissal and his option to apply to set aside the order.

[49] Strangely, no steps were taken until October 22, 2010 when Mr. Lord's lawyer at that time, David Green, contacted the prothonotary. She advised Mr. Green of the circumstances of the dismissal and of her contact with Mr. McKiggan six years earlier.

[50] Again no steps were taken until March 28, 2012, when the motion to set aside the order was filed. In Chambers, Justice Rosinski allowed the motion and set aside the order. Ms. Smith appealed. On appeal, Ms. Smith alleged that Justice Rosinski erred in law by not applying a mandatory presumption of serious prejudice. Justice Farrar commented on this ground of appeal as follows:

> 44 I now turn to the appellant's argument on this point which is, that there is a mandatory presumption that the defendant has suffered prejudice and that failing to apply this mandatory presumption resulted in reversible error by the trial judge. With respect to the appellant's position, the presumption is not mandatory, but rather its application will depend on the circumstances of each individual case. In *A.J.M. v.Children's Aid Society of Cape Breton*, 2006 NSCA 13, Hamilton, J.A. summarized the law as follows:
>
> > 19 The case law indicates prejudice may be presumed in some circumstances. The judge referred to this case law and found that in the circumstances of this case he should presume serious prejudice rather than require the respondents to prove it:
> >
> > > [23] Mr. Justice Chipman of our Court of Appeal in *Saulnier v. Dartmouth Fuels Ltd.* (1991), 106 N.S.R. (2d) 425, ... confirmed the *Cooper* test in *Martell*, [1978] N.S.J. No. 512 on the question of onus at page 430. ... I quote:

> All that can be said generally about onus is that while the onus is initially upon the defendant as applicant to show prejudice, there may be cases where the delay is so inordinate as to give rise in the circumstances to an inference of prejudice that falls upon the plaintiff to displace. The strength of the inference to be derived from any given period of delay will depend upon all the circumstances in the case.

> [24] And finally in *Moir v. Landry* (1991), 104 N.S.R. (2nd) 281 (N.S.C.A.), this was a case involving a three year delay. Mr. Justice Hallett, of the Court of Appeal, writing for the Court, noted that the onus to establish prejudice falls on the defendant except in cases of unusual long delay, such as the ten years in Martell. Justice Hallett said at page 284 in *Moir v. Landry, supra*, ...:
>
> > A plaintiff has a right to a day in Court and should not lightly be deprived of that right. Therefore, it is only in extreme cases of inordinate and inexcusable delay that a Court should presume serious prejudice to the defendant in the absence of evidence to support such a finding.
>
> [25] This is one of those cases. I am satisfied that as a result of the inordinate, inexcusable, extreme delay in excess of ten years in relation to this matter, that I can presume serious prejudice to the defendants. I do not find that the plaintiff has satisfied the onus to establish that no such prejudice exists. (**Emphasis by Justice Farrar**)

45 In cases where there has been an inordinate delay prejudice is sometimes presumed without further proof. However, it is not mandatory as suggested by the appellant. The strength of the inference, if any, is to be derived from all of the circumstances of the case.

[51] Justice Farrar reviewed the factors that led the motions judge to find that any prejudice suffered by Ms. Smith was minimal and concluded that no error had been made:

> 46 In this case, although the motions judge did not reference a presumption, he makes reference to the circumstances that are present in this case which led him to conclude that the prejudice was not so substantial to preclude him granting the relief sought. Those circumstances include: the accident was a rear-end collision; the insurer being aware of the accident early on and had an opportunity to investigate that accident; the insurer had received some medical information relating to Mr. Lord's condition; the motions judge felt that any deficiencies in the medical records would likely be to the prejudice of the plaintiff; and he was satisfied, despite the passage of time, there could be a fair trial between the parties.

[52] In my view, this is not an appropriate case to apply a presumption of serious prejudice. There are no circumstances to suggest that the delay is so extreme and the defendants' ability to receive a fair trial so severely compromised that the burden should shift to the plaintiff to disprove prejudice. Accordingly, the defendants must satisfy me that they will suffer serious prejudice if the action is reinstated. For the reasons that follow, I find that any prejudice to the defendants does not rise to the level required to deny relief to the plaintiff.

[53] The first allegation of serious prejudice relates to the recent death of Mr. MacInnis, the driver of the bus that struck and killed Mr. Palmer. The defendants say that Mr. MacInnis' inability to participate in a discovery in July of 2007 does not lead inexorably to the conclusion that he remained unable to give evidence in the years leading up to his death. The defendants claim that as a result of the delay in bringing this motion, they may have lost the opportunity to obtain critical evidence from Mr. MacInnis about the accident.

[54] The evidence with respect to Mr. MacInnis' health is limited to the medical reports provided by his treating physician in July of 2007 and the affidavit of James Green, an articled clerk, assisting counsel for the defendants. According to the medical reports, Mr. MacInnis' stroke left him with issues related to word finding and cognition. He was severely depressed, highly irritable, and hard to deal with. Despite therapy and medical intervention, Mr. MacInnis had not improved significantly in the year following his stroke. His physician advised that at that time, Mr. MacInnis would be unable to present himself as a clear and competent witness. She was unable

to anticipate when he might be sufficiently improved to attend a discovery and participate in any useful way.

[55] In Mr. Green's affidavit, he indicates that he spoke with Mr. MacInnis' wife on August 7, 2013. Mrs. MacInnis informed Mr. Green that her husband was in ill health and not able to speak on the phone at that time. She further indicated that her husband's ability to recall and communicate events was limited but he was able to speak with her on a day-to-day basis. She was uncertain as to his ability to recall the accident.

[56] Mr. Green requested that Mrs. MacInnis enquire as to her husband's ability to recall and recount the facts surrounding the accident. She confirmed that she would try and they agreed to speak again the next day. The following day, Mrs. MacInnis told Mr. Green that when she asked her husband about the accident, he would not respond to her.

[57] Mr. Green spoke with Mrs. MacInnis one final time on October 23, 2013. He attempted to ask about her husband's condition prior to his death but Mrs. MacInnis was no longer willing to answer his questions.

[58] Accordingly, our knowledge of Mr. MacInnis' ability to give evidence in this matter is limited to the following:

1) In July of 2007, Mr. MacInnis was incapable of giving evidence about the accident and it was unclear at that time when or if this situation would change; and,

2) In August of 2013, Mr. MacInnis remained incapable of giving evidence about the accident.

[59] Any suggestion that Mr. MacInnis may have been able to answer questions about the accident in the intervening years is mere speculation and I am not prepared to presume any prejudice to the Defendants on this basis.

[60] The other allegations of prejudice to the defendants pertain to the increased costs associated with bringing witnesses to Halifax who have moved to other

provinces since the accident and the loss of evidence resulting from the fading of witnesses' memories over the years.

[61] Counsel for both parties have made efforts to locate the witnesses to the accident. File materials from Mr. Williams and witness statements indicate that there are three "primary" witnesses who saw Mr. Palmer prior to the collision. Two of these witnesses were in the car behind the bus. They are now married and living in Fredericton, New Brunswick. The husband says that he has a relatively good memory of the incident that night, can recall most of the details, and is willing to make himself available. The extent of his wife's recollection is unknown at this point. The third witness lives in Eastern Passage, Nova Scotia. She expressed no reservations about giving evidence.

[62] There are five "secondary" witnesses who were passengers on the bus but did not specifically observe Mr. Palmer prior to the collision. Their statements confirm that they are able to comment on a variety of matters in issue, including Mr. MacInnis' driving, the visibility that evening, and the accident location. To date, three of these witnesses have been located and all are living in Alberta. One witness says he has a decent memory of the events while the other two claim to have little or no memory of the accident. The final two witnesses have yet to be found but Plaintiff's counsel has recently retained a private investigator to locate them.

[63] All three of the primary investigating officers have been located by the private investigator and are living in Halifax Regional Municipality. They are able to testify in this matter.

[64] The most critical witnesses to the accident, the three primary witnesses and the three investigating officers, have all been located. Although some of the secondary witnesses claim to have very little memory of the accident, their statements provided in the immediate aftermath will be of significant assistance to the parties.

[65] As to the costs associated with bringing witnesses to Halifax from Alberta or New Brunswick, I am unable to conclude that this is likely to prejudice the defendants for two reasons. First, there must be a causal connection between any prejudice and the delay: **Atlantic Canada Opportunity Agency v. LaFerme D'Acadie**, 2008 NSSC 334 at para. 20. There is no evidence as to when these individuals moved away from Nova Scotia. Without this evidence it is unclear whether the expenses

involved in bringing them to Halifax would have been incurred in any event. Second, Mrs. Palmer has accepted that she may be required to bear any additional costs of this nature.

[66] Finally, any prejudice caused by the passage of time and the fading of witnesses' memories will not be limited to the defendants. Both parties will undoubtedly be subject to some degree of prejudice in advancing their respective cases.

[67] Having found that the plaintiff has established the first three criteria of the test, I must now engage in a balancing of all of the relevant factors to determine whether it is in the interests of justice to set aside the prothonotary's order. Justice LeBlanc elaborated on the nature of this balancing in **Brogan v. RBC Dominion Securities Inc.**, 2009 NSSC 351:

> 69 In addition to the three-step test outlined above, the court must step back and assess the positions of the parties keeping in mind the draconian nature of the dismissal remedy. In the words of Lord Salmon, in *Allen, supra*:
>
> > If the defendant establishes the three factors to which I have referred, the court, in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. If he is personally to blame for the delay, no difficulty arises. There can be no injustice in his bearing the consequences of his own fault. If, however, the delay is entirely due to the negligence of the plaintiff's solicitor and the plaintiff himself is blameless, it might be unjust to deprive him of the chance of recovering the damages to which he could otherwise be entitled.

[68] The defendants say that the negligence of Mrs. Palmer's former counsel and the potential recourse she may have against him should be given "significant weight" in the overall balancing of factors. I disagree. By giving effect to the defendants' argument, I would be adopting the approach of the Chambers judge in **Hiscock** which was specifically rejected by our Court of Appeal.

[69] In my view, the interests of justice require that the prothonotary's order be set aside. Mrs. Palmer bears no personal responsibility for the delay in this matter. It would be most unjust if the negligence of her solicitor was sufficient to deprive her of the chance to prove her claim that the defendants are at fault for her husband's

death. The potential prejudice to the defendants that would flow from reinstating the action does not rise to the level necessary to deny Mrs. Palmer her day in court.

CONCLUSION

[70] The dismissal order issued by the prothonotary on October 15, 2008 will be set aside and Mrs. Palmer's action reinstated.

[71] The Defendants shall have costs in the amount of $1,000 in any event of the cause.

[72] I ask counsel for the plaintiff to file an amended order setting aside the prothonotary's dismissal order and reinstating the action while awarding costs of $1,000.00 to the defendants in any event of the cause.

McDougall, J.