Date: 20020131
Docket: S. H. No. 119302

IN THE SUPREME COURT OF NOVA SCOTIA
[CITE: Clarke v. Sherman., 2002 NSSC 27]

BETWEEN:

STEPHEN CLARKE

PLAINTIFF

- and -

ALEXANDER SHERMAN, RAHEEM ISMAILY, KAREEN ISMAILY, LILLIAN ISMAILY and SAFAR ALI ISMAILY

DEFENDANTS

D E C I S I O N

HEARD: **At Halifax, Nova Scotia, in Chambers, before the Honourable Justice C. Richard Coughlan, on August 29th, 2001**

DECISION: **August 31st, 2001 (Orally)**

WRITTEN RELEASE OF DECISION: **January 31st, 2002**

COUNSEL: **Steven R. Yormak, for the plaintiff**
Michael E. Dunphy, for the defendants, Kareen Ismaily, Lillian Ismaily and Safar Ali Ismaily
Glenn R. Anderson, for the defendant, Raheem Ismaily

COUGHLAN, J.: (Orally)

[1] Applications were made pursuant to Civil Procedure Rules 2.01(2)(a), 14.25(1) and 28.13, for an order dismissing the plaintiff's action. Counsel of the applicants proceeded pursuant to Civil Procedure Rule 28.13 and did not proceed under Rules 2.01 and 14.25(1).

[2] The test for an application to dismiss the plaintiff's action for want of prosecution pursuant to Civil Procedure Rule 28.13 was set out by Flinn, J.A., giving the decision of the Court of Appeal in **Hurley v. Co-operators General Insurance Co.** (1998), 169 N.S.R. (2d) 22 at paras. 28, 29 and 30:

> The principles of law with respect to the dismissal of a plaintiff's action for want of prosecution, pursuant to Civil Procedure Rule 28.13, were recently reviewed by this court in **Savoie v. Fagan et al.** (1998), 165 N.S.R. (2d) 276; 495 A.P.R. 276 (C.A.). Justice Bateman confirmed that the principles which govern the exercise of a judge's discretion, in deciding whether to grant an application to dismiss an action for want of prosecution, are those set out in **Martell v. McAlpine (Robert) Ltd.** (1978), 25 N.S.R. (2d) 540; 36 A.P.R. 540 (C.A.).
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> In **Martell**, Justice Cooper set out a two-fold test:
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> 1. There must, first, have been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and

2. That such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as is likely to cause, or to have caused, serious prejudice to the defendants.

These principles are set out in helpful detail by Lord Justice Salmon, in **Allen v. McAlpine (Sir Alfred) & Sons Ltd. et al.**, [1968] 1 All E.R. 543 (C.A.), at p. 561, and cited with approval by Justice Hallett in **Moir v. Landry** (1991), 104 N.S.R. (2d) 281; 283 A.P.R. 281 (C.A.), at p. 282:

> "A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the **Rules of the Supreme Court** or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show: (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognize inordinate delay when it occurs.
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> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
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> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the time.
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> "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."

[3] In cases of extreme delay, there is an onus on the plaintiff to show that the defendant has not been seriously prejudiced by the delay as MacKeigan, C.J.N.S. stated in **Robert McAlpine Ltd. v. Martell** (1978), 25 N.S.R. (2d) 540 at paras. 2 and 3:

> The law is clear that when a plaintiff has delayed so long, here nearly ten years, he cannot successfully resist an application to have the action dismissed for want of prosecution unless he can satisfy the Court, and the onus is on him to do so, that the defendant has not been seriously prejudiced by witnesses becoming unavailable or their recollections becoming "eroded" (Gale, C.J.O., in **Farrow v. McMullen**, [1971] 1 O.R. 709 (C.A.)) or by documents having been lost.

> Bearing in mind the onus on the plaintiff I can find nothing in the affidavits filed on his behalf to show such lack of prejudice to the defendant. They contain nothing to show, for example, that all key witnesses could probably be produced, that blasting and other records were kept and are still available. No attempt was made to check such matters or to prove that Mr. John M. Davison, Q.C., counsel for the defendant, was wrong in his sworn belief that memories of witnesses had been impaired and that many records would no longer be available.

[4] The following facts exist in this case:

[5] The motor vehicle collision took place on July 9th, 1989. The originating notice (action) and statement of claim were issued on July 9th, 1991. An order to extend time for service of the originating notice and amending the document was issued on July 13th, 1995. The defence of the defendants, Kareen Ismaily, Lillian Ismaily and Safar Ali Ismaily was filed on January

15th, 1996. A list of documents on behalf of the defendants, Kareen Ismaily, Lillian Ismaily and Safar Ali Ismaily was filed on November 13th, 1996. An order for the plaintiff to file a supplementary list of documents on or before November 15th, 1997 was issued. An order disallowing the limitation defence was issued March 12th, 1997. A notice of discontinuance against the defendant, Alexander Sherman, was dated January 7th, 1998. An order adding the defendant, Raheem Ismaily was issued December 18th, 1998. The defence and cross-claim of the defendant, Raheem Ismaily, was filed on June 2nd, 1999.

[6] Mr. Anderson wrote Mr. Steven R. Yormak on June 3rd, 1999, in part:

> As noted in my letter of May 7, 1999 and during our telephone conversation of May 14, 1999, Judgment Recovery has been prejudiced by the passage of time prior to Raheem Ismaily being served on February 8, 1999. This passage of nine and a half years has prejudiced Judgment Recovery's ability to defend the claims regarding liability and damages. I anticipate making an Application to Strike the Statement of Claim on the basis of the Limitation Period defence and delay since the Originating Notice was issued on July 9, 1991. I am also concerned that the further passage of time will only add to the prejudice and would ask that you provide the requested documentation now.

[7] A list of documents of the defendant, Raheem Ismaily, was dated June 3rd, 1999. Mr. Anderson wrote to Mr. Yormak on August 30, 1999 stating, in part:

> This motor vehicle collision occurred over 10 years ago and my principals are yet to be provided with any medical documentation. My principals have been prejudiced in their ability to defend the claims regarding liability and damages. The prejudice is obviously increasing with the passage of time since the action was commenced. As stated in my letter of June 3, 1999, I anticipate making an application to strike the Statement of Claim on the basis of the limitation period defence and delay since the Originating Notice was issued on July 9, 1991.

[8] Mr. Yormak and Mr. Anderson corresponded about disclosure of documentation. A management conference with Justice Davison was held on March 1st, 2001. Discoveries were to take place before the end of July, 2001. Responses to inquiries show an inability to obtain records from **inter alia** Dr. Thomas Loane, the Nova Scotia Hospital, the Dartmouth Work Activity Society and Human Resources Development Canada. The plaintiff and the defendants were currently working toward discoveries of the parties and other witnesses.

[9] In this case, the accident took place over twelve years ago. Ms. LeBlanc's affidavit (tabs 18 to 22) are letters which state requested information is not available. The affidavits filed in support of the plaintiff's position do not contain adequate explanation for the delay in the conduct of the action. There is not sufficient evidence to rebut the presumption of prejudice for what I find is an inordinate delay.

[10] The nature of the action can be relevant to the issue of delay. As Bateman, J.A. said in **Savoie v. Fagan** (1998), 165 N.S.R. (2d) 276 at para. 24:

> The impact of delay can vary depending upon the nature of the case. In this regard, the comments of Macdonald, J.A., from **Martell**, supra are instructive. Although in dissent on the result, he said at p. 554:
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> > "In cases such as those arising out of motor vehicle accidents one can readily appreciate how a delay of several years or longer can so affect the memory of witnesses as to what they saw and observed as to make it practically impossible for a defendant to then properly prepare and present his case."

[11] In this case, there is not only the presumption of prejudice, but actual material that is not available.

[12] The plaintiff says the application cannot succeed as Judgment Recovery has taken numerous "fresh steps" and is, therefore, estopped or has waived its rights. In dealing with subsequent conduct, Lord Browne-Wilkinson stated in **Roebuck v. Mungovin**, [1994] 2 A.C. 224 at p. 236:

> ... Where a plaintiff has been guilty of inordinate and inexcusable delay which has prejudiced the defendant, subsequent conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking-out order. Such conduct of the defendant is, of course, a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case. At one extreme, there will be cases like the present where the defendant's actions are minor (as compared with the inordinate delay by the plaintiff) and cannot have lulled the plaintiff into any major additional expenditure: in such a case a judge exercising his discretion will be likely to attach only slight weight to the defendant's actions. At the other extreme one can conceive of a case where, the plaintiff having been guilty of inordinate delay, the defendant has for years thereafter continued with the action thereby leading the plaintiff to incur substantial legal costs: in such a case the judge may

> attach considerable weight to the defendant's activities. But it is for the judge in each case in exercising his discretion to decide what weight to attach in all the circumstances of the case to the defendant's actions ...

[13] Considering the facts of this case, including the actions of the defendants, I find the test to be met in an application pursuant to Civil Procedure Rule 28.13 has been satisfied.

[14] I, therefore, allow the applications to dismiss pursuant to Civil Procedure Rule 28.13.

[15] In dealing with the question of costs and considering the submissions of Mr. Yormak with regard to the financial situation of Mr. Clarke, I am not going to award costs to any party in connection with this application.

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C. Richard Coughlan, J.