

CHAMBERS

BEFORE MASTER LEE, Q.C.

BRISBANE, 5 MARCH 1984

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BETWEEN:

LILLIAN DAISY LEACH

Plaintiff

- and -

INTERNATIONAL PORTION FOODS PTY. LTD.

Defendant

JUDGMENT

MASTER: This is an application by the defendant for an  
I order that this action be dismissed for want of  
prosecution, and costs. Counsel submitted that the  
application was based upon O.22 r.32 which permits the  
striking out or amendment of any matter in any pleading  
which is unnecessary or scandalous or which tends to  
embarrass or delay a fair trial of the action.

The application seems to be more appropriately founded  
upon O.39 r.15 which permits a defendant either to give  
notice of trial himself or to apply to the Court or a Judge  
to dismiss the action for want of prosecution when the  
plaintiff does not give notice of trial within six weeks  
after he is first entitled to do so: see O.39 r.14. In any  
event such an order can be sought pursuant to the inherent  
power. Allen v. McAlpine & Sons Ltd. (1968) 2 Q.B.D. 229 at  
p.245 per Lord Denning M.R. Cf. Tate v. McLeod (1969) Qd.R.

217 (F.C.) per Lucas J. at p.225; Borg v. Muscat (1972) Qd.R. 253; Birkett v. James (1978) A.C. 297; Josefski v. Minister for Education & Ors (Appeals 73/74 of 1983, Full Court 9 December 1983 - unreported).

The question arose as to whether this application, brought more than three years since the last proceeding or step occurred in the action, was itself a "fresh proceeding" in the action within the meaning of O.90 r. 9 such that the defendant should first obtain the leave of the Court or a Judge under the second limb of O.90 r.9 to proceed before the application is dealt with.

Counsel for the defendant conceded that this application was a "proceeding" as such in the pending action, as clearly it must be, but he referred to the Full Court decision of Borg v. Muscat (supra) and in particular to the chronology of events set out by Hart J. at p.257 which shows that after an affidavit of documents had been filed by the plaintiff on 15 August 1967, no further step in the action was taken before a summons was taken out on 6 August 1971 for an order that the action be dismissed for want of prosecution. The plaintiff then also issued a summons for leave to proceed and both summonses were heard together. Counsel submitted that this decision supported his submission even though the Court in that case did not deal with the point now raised.

Whilst it is clear that a notice of intention to proceed issued under the first limb of O.90 r.9 is not itself a "proceeding" or a "step" in the action within the meaning of O.90 r.9: Kaats v. Caelers (1966) Qd.R. 482; Burns v. Korff (O.S.397 of 1980, 22 March 1982 unreported), which may give rise to the question of whether an application for leave to proceed and any order therein under the second limb of O.90 r.9 constitutes a "proceeding" in the action), and whilst leave to proceed can be sought by either party, it seems clear from the detailed chronology of "proceedings" and other activities which were not "proceedings" including the service by the

plaintiff of a notice of intention to proceed on 8 December 1965, that had any application under the second limb of O.90 r.9 for leave to proceed been made by the defendant and any order made therein, such would have appeared in the chronology. This supports counsel's submissions.

The first limb of O.90 r.9 refers to the taking of "any step in the cause". Counsel for the defendant also submitted that the "fresh proceeding" contemplated by the second limb of O.90 r.9 takes its meaning from the words "any step in the cause" in the first limb. This appears to be so. See Burns v. Korff (supra). He contended that this application was neither a step in the action nor a proceeding to advance the action but rather a proceeding to end the action.

The cases show that a "proceeding" within the rule is a proceeding taken with a view to continuing the litigation between the person against whom the proceeding is taken: Spencer v. Watts (1889) 23 Q.B.D. 350 per Lindley L.J. at p.353; and also is a step towards judgment; Webster v. Myer (1884) 54 L.J.Q.B. 101 at p.102 per Brett M.R.; (1884-5) 14 Q.B.D. 231 at p.233. See also Kaats v. Caelers (supra) per Stable J. at p.499 where His Honour said that the word "is one that suggests something in the nature of a formal step, at least a step taken by the litigant in the prosecution of the action, being a step required by the Rules"; Burns v. Korff (supra); Josefski v. Minister for Education (W.30 of 1978, Demack J., Rockhampton 3 August 1983 unreported); Saunders v. Pitts & Ors (W.2001 of 1978, Garter J. 25 October 1983 unreported).

The English rule, O.3 r.6, requires notice of intention to proceed where a year or more has elapsed since the last proceeding in a cause or matter. This rule does not appear to have the second limb contained in Queensland O.90 r.9. In the Supreme Court Practice (U.K.) 1979, the following appears in paragraph 3/6/1 under the annotation to O.3 r.6, (page 18):-

"Nor does the Rule apply to a summons to dismiss for want of prosecution, for such a summons is a proper method of terminating such delays (Lumley v. Hempson (1838), 6 Dowl 558); Warnock v. Mann (1896) 2 Ir.R. 630; see Krakauer v. Katz (1954) 1 W.L.R. 278).

As counsel for the defendant submitted, this is not a proceeding designed to further prosecute the action or in any way to continue the action towards judgment as would have been the alternative course open to a defendant under O.39 r.15 had it chosen to give notice of trial instead of applying to have the action dismissed for want of prosecution. Accordingly counsel is correct in his submission that the defendant has no need to obtain leave to proceed under O.90 r.9 in order to apply for an order that the action be dismissed for want of prosecution.

Dealing with the merits of the application, the chronology of events is set out in the affidavit of Paul Grant Taylor filed 21 February 1984 in para. 4 thereof as follows:-

"6th April 1971 - date of plaintiff's alleged injury

3rd April 1974 - date of issue of writ

23rd May 1974 - date of entry of appearance

28th January 1977 - date on which plaintiff gave notice of intention to proceed

24th May 1977 - date of service of writ on S.G.I.O.

24th May 1977 - date of service of statement of claim

15th June 1977 - date of delivery of defence of defendant

25th May 1978 - date of delivery of interrogatories on behalf of the defendant for examination of the plaintiff."

It was common ground that nothing at all has occurred since the delivery of the interrogatories on behalf of the defendant for examination of the plaintiff on 25 May 1978

until this summons was filed on 21 February 1984, a delay now approaching six years. It also appears from the chronology of events above that the action has not proceeded diligently. There is no explanation for the lengthy delays, nor is there any application by the plaintiff for leave to proceed under O.90 r.9, even though the action, if struck out, will be barred by the limitation of Actions Act 1974.

In the affidavit of Patrick John Spranklin, solicitor for the plaintiff, sworn 28 February 1984 and filed by leave on 28 February 1984, it appears that the solicitors for the plaintiff have made numerous attempts to contact the plaintiff without success. It also appears that as recently as 28 February 1984 the deponent had a conversation with the plaintiff and in such telephone conversation he was advised by the plaintiff that she was not in a position to proceed with the matter. Her solicitors have had no instructions to proceed with this matter for some time.

Having regard to the above chronology, the relevant principles referred to by the Full Court in Borg v. Muscat (supra) and other cases on this subject including those set out early in these reasons, and to the submissions for each party, it appears that the applicant/defendant has clearly made out a case for the dismissal of this action for want of prosecution notwithstanding that such an order will bar the plaintiff's claim.

I accordingly order in terms of paras. 1 and 2 of the summons, viz. that the action be dismissed for want of prosecution and that the defendant's costs of the action and of this application be taxed and paid by the plaintiff.

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