IN THE SUPREME COURT OF QUEENSLAND No. 1848 of 1980

Before Mr Justice Thomas

BETWEEN:

SUSAN MARY BISHOP Plaintiff

AND:

NORTH BRISBANE HOSPITALS BOARD Defendant

JUDGMENT: THOMAS J.

Delivered the Twentieth day of March, 1986.

CATCHWORDS:

Practice - non-compliance with terms of guillotine order - order providing that in such event statement of claim be struck out and defendant at liberty to enter judgment - discretion existing under either O. 90 r. 6, O. 31 r. 1 or O. 45 r. 1 to extend time for performance - relevant factors in exercise of discretion - dilatory conduct by plaintiff - substantial departures foreshadowed to her original allegations - Court not satisfied that trial fair to both parties could be held - refusal to exercise discretion to countermand effect of guillotine order.

Counsel:	Jensen for Applicant/Defendant
	Douglas Q.C. & Martin for Respondent/Plaintiff
Solicitors:	Chambers McNab Tully & Wilson for Applicant/Defendant
	Quinlan Miller & Treston for Respondent/Plaintiff
Hearing dates:	20th March, 1986

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CIVIL JURISDICTION

BEFORE MR. JUSTICE THOMAS

BRISBANE, 20 MARCH 1986

BETWEEN:

SUSAN MARY BISHOP Plaintiff

-and-

NORTH BRISBANE HOSPITALS BOARD Defendant

JUDGMENT

HIS HONOUR: I have before me a motion by the defendant for an order that the statement of claim be struck out and for judgment for the defendant in the action. I have also a cross summons on behalf of the plaintiff that the time limited in the order by Master Lee Q.C. on 27 May 1935 be extended until 20 March 1986 and alternatively for the plaintiff to have leave to deliver a statement of claim within 14 days from today.

The accident the subject of the claim happened in 1974. The writ was issued 6 February 1980. The action proceeded in a very dilatory fashion. On 27 May 1985 Master Lee made an order which is the foundation of the present proceedings. The Master ordered that within 14 days of that date the plaintiff should (a) give further and better answers to defendant's interrogatories numbers 8 and 27, and, (b) give further particulars of the name and status of the employee of the defendant who allegedly assisted the plaintiff on the occasion referred to in the plaintiff's answers to interrogatory number 3.

The occasion in question was the occasion of the accident itself, the plaintiff apparently having claimed that another person was present with her when the accident happened. The accident was said to have been the suffering of a back strain whilst she was lifting a heavy patient.

The Master further ordered that in default of compliance by the plaintiff with the terms I have mentioned the statement of claim of the plaintiff be struck out and the defendant be at liberty to enter judgment against the plaintiff in this action. The particular rule of the Court under which the order was made has not been identified by either counsel. However the order was made by consent and its validity is not challenged.

Neither part of the order was complied with within the time specified. The answers to interrogatories numbers 8 and 27 were delivered on 27 June 1985 which shows the passage of approximately two weeks after the expiry date. There was a much more subtantial breach in relation to the second part of the order requiring particulars of the name and status of the accompanying employee. These details were not supplied until 17 March 1986. Counsel for the Hospitals Board submitted that even now the response to the “status of the employee” has not been sufficiently responsive. Answers actually supplied by the plaintiff are to the effect that she does not know the name of that person and the only status designated by her of that person was “student nurse”. Even so I regard the supplying of these particulars as sufficiently responsive to the relatively simple request as formulated in the order and I would not hold the plaintiff in default so far as the text of the answers that were eventually supplied are concerned. However, the delay in providing them shows a failure to comply with the terms of the order over a period of something like nine months. The plaintiff's material provides a sufficiently acceptable explanation of the fortnight's delay in relation to the first part of the order but fails to provide any adequate explanation in relation to the latter failure.

The condition in the guillotine order has plainly occurred and the order must in my view be declared to take effect. No appeal has been brought against it. I think that this preliminary consequence follows from K.G.K. Constructions Pty. Ltd. v. East Coast Earthmoving Ptv. Ltd. (1984) 2 Qd.R. 40, and on appeal, at (1985) 2 Qd.R. 13.

Notwithstanding this preliminary conclusion, the striking out of a statement of claim does not terminate an action. The action is a live action and I have a discretion to extend time in favour of the plaintiff and to make orders which would have the effect of allowing the action to proceed further. Whether this discretion arises under O.90 r.6, as the leading judgment of Mr. Justice Kneipp in Marshall v. Dunkley (Full Court unreported, 2 November 1984, C.A. 20 of 1983) suggests, or whether it is a discretion within O.31, r.1 to extend time for delivery of a statement of claim, or indeed, whether it is notionally the exercise of a power under O.45 r.1 subsequent to the entry of a judgment upon the defendant's application followed by an immediate application to set it aside, I do not think it necessary to rule. Suffice it to say that the reconciliation of all aspects of the two Full Court decisions I have mentioned is extremely difficult and ouch a reconciliation will be more satisfactorily achieved by a court of greater authority than a judge in chambers.

At all events, I rule that I have a discretion to extend time if the circumstances justify the taking of such a course.

There are many factors which operate in relation to the exercise of such a discretion. I do not overlook the making of the order of 27 May itself, an order which was made by consent and which was made after noteworthy delay on the part of the plaintiff.

The accident is 12 years old. A recent intention has emerged on the part of the plaintiff to depart substantially from the case originally pleaded. It is relevant to notice that the area of the departure directly

concerns the existence and role of the person as to whom the further particulars were ordered as to which the plaintiff was so dilatory in replying and as to whom the particulars eventually supplied were minimal, and I think it is fair to say, unhelpful to the defendant. It is now belatedly suggested that this unknown person caused or contributed to the plaintiff's injury by suddenly letting go of the plaintiff.

A substantial number of submissions on this point were presented by Mr. Jensen for the defendant Hospitals Board. They include the fact that the plaintiff has twice failed to comply with consent orders and that no attempt has been made to extend or vary the order of 27 May, let alone to appeal against it. He submits that to the extent to which non-compliance with the order and to which lack of due diligence in the conduct of the action may be the fault of the plaintiff's solicitors, she would have an adequate remedy, and that in any event the consequences of such a matter should not be visited upon the defendant. He refers to the fact that somehow the plaintiff obtained an ex parte extension of the limitation period in 1980, and that the defendant has thereby been deprived of the right to plead the statute. The defendant has now belatedly, it seems, brought an appeal against that ex parte order and that appeal has not yet been heard.

It is also significant that the plaintiff's more recent answers to interrogatories show substantial variations in allegations of negligence compared with those originally set out in the ex parte application to extend time and in the original statement of claim. The plaintiff's present allegations would convert a hitherto unknown bystander into a tortfeasor for whose actions the defendant would be responsible.

A certain amount of material has been presented in affidavits by the plaintiff and by her solicitor. On the whole, that material shows piecemeal details as to events in certain periods. I cannot help observing that there is

an air of unreality in the details concerning contacts between her and her solicitors in 1985, 11 years after the accident at which time they are suggesting to her that she try to ascertain the identity of the person who presumably would be a principal witness and who is now said to be a tortfeasor as well.

Mr. Douglas has made helpful submissions on all aspects of the case but I consider that he was quite unable to provide any adequate response to the submissions which relate to the history of the action and the difficulties which result to the defendant from the fact that it has been conducted in such a way, and the further difficulty in seeing how a trial could be held which would be fair to both parties. It is not a history which persuades me that 1 should exercise my discretion to countermand the prima facie effect of the order of 27 May 1985. It follows that I should dismiss the plaintiff's summons filed on 18 March 1986 and that I should grant relief in accordance with the defendant's notice of motion of 26 February 1986. Order as per notice of motion with costs against the plaintiff to be taxed.
