UNREPORTED PRACTICE CASES

LEAVE TO TAKE NEXT STEP—PRINCIPLES APPLICABLE—PREJUDICE*

An action was commenced against two defendants in 1966. One defendant, employer, defended; the co-defendant, an individual resident outside the jurisdiction, did not. The last step, the completion of an examination for discovery and filing of a notice to produce, was taken in 1967. In 1971 a notice of motion for leave to take the next step was pled. The only explanation for the delay was the inability of plaintiff's counsel to arrange to examine the individual defendant. In the interim, the principal shareholder in the defendant company sold his interest. None of the present personnel of the defendant company had knowledge of the deals of 1963-64 which gave rise to the action. It was pointed out the former principal shareholder would be liable in an indemnity and a critical witness, the co-defendant, was without the jurisdiction.

The Master referred to the case of *Tiesmaki* v. *Wilson et al.* (as yet unreported—Action A.D.). In that case the court approved the view of Kane J.A. in *Marshall* v. *Fire Insurance Co.* (1970) 71 W.W.R. 647, applying *Allen* v. *Sir Alfred McAlpine* [1968] 2 Q.B. 229. In an application to dismiss for want of prosecution, the defendant must show there has been inordinate delay, it is inexcusable, and the defendant is likely to be prejudiced.

Applied to an application for leave to take the next step the plaintiff must show there has not been inordinate delay, if there has it is excusable, and the defendant is not likely to be prejudiced. To this must be added the principle approved by Kane J.A. and Johnson J.A. laid down by Friedman J.A. (now C.J.M.) in *Ross* v. *Crown Fuel* (1962) 41 W.W.R. 65, if it appears manifest that injustice would result from a dismissal without trial.

The court pointed out that if the plaintiff is personally responsible for the delay there can be no injustice in "his bearing the consequences of his own fault", as is stated in the *Allen* v. *McAlpine* case at 269. The court also referred to *Paxton* v. *Allsopp* [1971] 3 All E.R. 370. The court did not characterize the delay as inordinate, although close to inexcusable.

The court decided that the main consideration was whether or not the defendant is likely to be seriously prejudiced by the delay. The changes in ownership and control of the defendant does not establish sufficiently the kind of prejudice required: the defendant cannot avoid the consequences of his misdeeds by rearranging its ownership and control.

(*Delcon Management Ltd.* v. *Dawson Disposal Co. Ltd. & Haines*, S.C.A., J.D.E., No. 49804, March 1, 1972; L. D. Hyndman, Q.C., Master)

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PRACTICE—MASTER'S JURISDICTION—SUMMARY JUDGMENT—AVAILABILITY OF RULE 162 TO A DEFENDANT*

A plaintiff, defendant by counterclaim, applied for judgment under Rule 162 dismissing a counterclaim.

The defendant, as respondent to the application, took preliminary objection on two grounds: (1) that a Master is without jurisdiction to make an order under the rule, and (2) that the Rule is not available to a defendant, in the circumstances.

On the first point, the Master held he had jurisdiction. He was referred to *Robinson* v. *Kompfe* (1930) 37 O.W.N. 475; *Toronto General* v. *Hogg* (1930) 39 O.W.N. 240; and *Glore et al.* v. *Foreign Utilities* [1938] O.W.N. 131. The court pointed out that in Ontario there is a delimitation of powers which judges, masters and local judges may exercise in Chambers, leaving a residuum which can only be exercised by a judge in court, and that those Ontario cases decide that in Ontario such an application must be made in court. In Alberta, Rule 385 provides that such a matter (anything other than a trial) may be disposed of in Chambers. Reading together Rules 385, 397, 402, the Master is clothed with the power given by the Rules of Court to a Supreme Court Judge in Chambers. The matter in issue did not fall within the exceptions in Rule 387.

Turning to the constitutional aspect, the Master cited *Polson Iron Works* v. *Munn* (1915) 24 D.L.R. 18, which involved an application under the Rule 275 (the forerunner of the present Rule 159). He also cited *Advanced Rumley Thresher Co.* v. *LaClair* (1916) 10 Alta. L.R. 446, and held that the function under the Rule in question was within the Master's jurisdiction, as an officer of the court and not a judge.

On the second point, the Master held that the heading "summary judgment" preceding Rules 159-164 could not be used to interpret the rules, and there was no implication that the rules were not available to defendants as well as plaintiffs. He referred to sections 2(1)(a)(c), and 10 of The Interpretation Act, providing that the Act applied to the Rules and the Act provides that marginal notes or headings form no part of the legislation. In any event, the Rules of Court are lacking in that unity of scope which commonly distinguishes statutes. The meaning of Rule 162, as extended by Rule 164, is clear. Moreover, it should be given a remedial interpretation under section 11 of The Interpretation Act.

The applicant might have applied under Rule 129, but could not use evidence on that application. Even if Rules 129 and 162 cover some of the same cases, it would be contrary to ordinary justice and remedial construction to restrict Rule 162 by Rule 129.

The objection was also made that Rule 162, which refers to admissions in "pleadings or otherwise", precludes admissions obtained on discovery. The Master held that to be answered by *Legare* v. *Glass & Large* (1904) 7 Terr. L.R. 221. The Master also held that admissions made by a selected corporate officer were admissions within the Rule.

(*Sturgeon Petroleums Ltd. et al.* v. *Yukon Geothermal Co. Ltd.*, S.C.A., J.D.C., No. 100459, March 21, 1972; A. D. Bessemer, Q.C., Master)

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PRACTICE—ACTION NOT CONCLUDED UNTIL JUDGMENT PAID*

When the plaintiff originally sued the defendant, the defendant company had been struck off the Companies' Register. An Order was obtained by the plaintiff restoring the company to the Register "until the trial or final disposition of the matter". The plaintiff subsequently obtained Default Judgment against the defendant company. Earlier to this, the defendant company had obtained a default judgment against B & A Specialty Supplies Co. Ltd. for an amount considerably in excess of the judgment that it now owed to McConnell Leaseholds Limited. After obtaining judgment, the plaintiff garnisheed B & A Specialty for the amount of its judgment against the defendant. B & A Specialty did not make any payments into court, nor did it file a reply. The plaintiff moved for judgment against the garnishee.

The garnishee argued that when the defendant company was struck from the Register, it was divested of its assets, including its judgment credits, and that when it was subsequently restored to the Register its assets did not revest in the company. Accordingly the garnishee was not indebted to the defendant. Regarding the Master's Order the garnishee contended that "final disposition" meant judgment and that when judgment was obtained the defendant was again off the Register and thus could not enforce any claim against the garnishee. As the defendant could not enforce any claim against the garnishee, the plaintiff could not be put in a better position and was thus not entitled to judgment against the garnishee.

The Court held that the action had not been finally disposed of within the terms of the Master's Order by reason of the fact that the plaintiff had recovered a judgment against the defendant; "final disposition" was interpreted to include enforcement of the judgment. It was further held that removal of the defendant from the Companies' Register did not extinguish any debt which may have been owing by the garnishee to the defendant, in which the plaintiff sought to attach. Because the garnishee failed to file an answer to the garnishee summons the plaintiff obtained judgment against the garnishee.

(*McConnell Leaseholds Limited* v. *Plastiglow Industries Ltd. and B. & A. Specialty Supplies Co. Ltd.*, D.C.D.N.A., J.D.E., No. 142622, December 23, 1971; Haddad J.D.C.)

* Edited by Robert White of the firm of Bishop & McKenzie, Edmonton.