SULLIVANS (SI) LTD -v- S.I. TOBACCO COMPANY LTD

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 155 of 1992
Hearing: 7 October 1992
Ruling: 12 October 1992

J. C. Corrin for the Plaintiff
T. T. Kama for both Defendants

PALMER J: These are two applications heard together. One is an application by way of a Notice of Motion filed on the 22nd of July 1992 by the First and Second Defendants, and the second, a Summons for Directions filed on the 25th of September 1992. The Notice of Motion was filed on the 22nd July 1992 and sought to have the action dismissed for want of prosecution.

The basis of that application stemmed from what was alleged by the First Defendant as a failure of the Plaintiff to serve a Statement of Claim within 14 days after appearance had been entered on the 6th of July 1992.

The Plaintiff, on the other hand, alleges that service was effected on the First Defendant on the 22nd July 1992 under cover of a letter dated the same. A copy of this letter is marked JC3 in Ms Corrin's affidavit filed on the 7th July 1992 and I quote paragraph 1:

> *"At the conclusion of the last hearing in the above action you agreed to inform me whether or not you are instructed to accept service on behalf of the Second Defendant, and I have delayed issue and service of the Statement of Claim pending receipt of this information."*

In the hearing of the 6th July 1992, Ms Corrin clearly asked for the joinder of W.D. and H.O. Wills (Australia) Ltd as a Second Defendant to save costs and time because the facts were exactly the same and relate to the same action.

She stated in her affidavit that she did ask in Court if Mr Kama would accept service on behalf of the Second Defendant and if not that service be effected by registered airmail. Such an order was made by the Court accordingly.

It is clear that the Statement of Claim to be served on the First and Second Defendants was the same. The only matter in question was whether Mr Kama would accept service as well on behalf of the Second Defendant. And it was clearly the intention of Ms Corrin to effect service on Mr Kama if possible as the solicitor for both Defendants. In the second paragraph of Ms Corrin's letter dated 22nd July 1992 she stated and I quote:

> *"However, I cannot delay any longer, and accordingly I have issued the documents, and enclose herewith amended Writ of Summons and Statement of Claims. If you are not instructed to accept service, please let me know by return, so that I can forward them by registered airmail, as ordered in the alternative."*

Mr Kama has submitted that the letter of the 22nd July referred only to the Second Defendant and not to the First Defendant and that because he had not been authorised to accept service on behalf of the Second Defendant, he had sent the documents back.

The letter of the 22nd however in my view could not be so narrowly interpreted as such. Mr Kama already knew that the reason why the Statement of Claim was not filed earlier was because Ms Corrin was waiting to hear from him whether he would accept service as well for the Second Defendant. There is no dispute and no question raised about the fact that he acted for the First Defendant. And it is quite clear in my view that Mr Kama knew that the Amended Writ of Summons and Statement of Claim for both Defendants would **exactly be the same**. It is also clear in my view that the intention of Ms Corrin was to have the Amended Writ of Summons and Statement of Claim served on Mr Kama as the solicitor for both Defendants, if possible to save time and costs.

Even if the import of the letter was that the Writ of Summons and Statement of Claim was intended for the Second Defendant only he (Mr Kama) would have been put on notice to enquire or request that a separate Statement of Claim be served on him as the solicitor for the First Defendant. To close one's eye to this fact and then later apply to have this action dismissed for want of prosecution would not in my view be in the interests of justice to the Plaintiff, especially where part of the delay is as a result of not letting the Plaintiff know in good time whether Mr Kama would accept service on behalf of the Second Defendant as well or not. Had Mr Kama made it known earlier that he would not accept service, then I am sure he would have been served separately

as the solicitor for the First Defendant. The service of the documents on him on the 22nd July 1992 were in his capacity as solicitor for the First Defendant and as solicitor for the Second Defendant.

The only doubts in Ms Corrin's mind was whether he would accept service for the Second Defendant as well or not. And if not, then he should let her know so that she could send the documents by registered airmail. There is no uncertainty or doubts about the instructions in her letter. Instead, Mr Kama sent all the documents back without even a covering note.

To turn around now and say that he was never served as the solicitor for the First Defendant when he knew all along that the only reason why service of the documents had not been effected earlier was because it was never confirmed to Ms Corrin that he was or was not acting for the Second Defendant as well smacks of ***"the austerity of tabulated legalism"*** referred to in the case of ***The Speaker -v- Danny Philip*** *Court of Appeal of Solomons Islands, Civil Case 5 of 1990 at page 5.* But assuming that no service was effected on the 22nd July 1992, there is clear evidence to show that an "**attempt**" to effect service was made on that date. It is very difficult to argue on this point because the documents were returned by Mr Kama himself without any explanation. It was not a question of delivery to the wrong person or wrong office or wrong address.

All the same, if we are to pursue the argument further, there is again clear evidence that on the afternoon of the same day alternative service was made on the Second Defendant by registered airmail. I would find it quite hard to accept that there has been inordinate and inexcusable delay on the part of the Plaintiff in that respect.

On the 6th of August, the documents were received by the Second Defendant. By 3 August however, a Memorandum of Appearance had been entered by Mr Kama on behalf of the Second Defendant. On that date service could have been effected on the Second Defendant had he communicated this fact to the Plaintiff, or he could have requested a copy from the Plaintiff.

The question that the Court is entitled to ask is, if the Defendants were concerned about expediting matters why did they not take the initiative in these instances. Their actions, on the contrary, seem to show otherwise.

Although the Amended Writ of Summons and Statement of Claim could have been obtained on the 3rd August 1992, and although they were actually received on the 6 August 1992, no Defence was filed until 23 September 1992. Surely, if urgency was required, why then was the Defence filed late.

In the case of ***Allen -v- Sir Alfred McAlpine & Sons Ltd*** *[1968] 2 Q.B. 229* referred to in "**Odgers Principles of Pleading and Practice in Civil Actions in the High Court of Justice**", 22nd Edition, the learned authors D.B. Casson and I.H. Dennis said at page 250 and I quote:

> *"The Court of Appeal held that the power to dismiss should be exercised only where the court is satisfied either -*
>
> *(i) that the default has been intentional and contumelious, ...;*
>
> *(ii) (b) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and*
>
> *(b) 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 either as between themselves and the plaintiff or between each other or between them and a third party."*

The circumstances do not in anyway show that the failure by the Plaintiff if at all was intentional and contumelious. To the contrary, they were actions taken to expedite matters. Had Mr Kama been able to confirm to Ms Corrin that he was or was not accepting service for the Second Defendant then service of the documents it seems could have been done immediately either on him separately as the solicitor for the First Defendant or on him as the solicitor for both Defendants.

On the question of delay, I do not find anything close to what can be described as inordinate and inexcusable delay.

I do not find any justifiable grounds to dismiss the Plaintiff's action for want of prosecution and accordingly the Notice of Motion is dismissed with costs to the Plaintiff.

I will now turn to the question of the Summons for Directions.

Summons for Directions are covered in Order 32. The corresponding Order in the Rules of the Supreme Court Practice (1954) is Order 30, rule 1. The words for Order 30 rule 1(a) of Supreme Court Practice are exactly the same except for the difference in the number of days for the return day, which is, not less than 7 days.

The application of Order 30, rule 1 was considered in ***Nagy -v- Co-operative Press, Ltd*** *[1949] Vol. 1 page 1019.*

At page 1022 paragraph C - D, Somervell LJ said:

> *"The rule does not say that, if, by the default of the defendant, the pleadings are not closed, the plaintiff cannot apply for a summons for such directions as are appropriate to the position as it has arisen as the result of the defendant's inaction."*

The above is authority for the proposition in my view that the Defendant is not restricted to the requirements of Order 32 1(a), that the pleadings must be closed before a Summons for Directions can be applied for. In the above case, there was a reason why the Summons for Directions had been applied for. It was because of a failure to file a defence on the part of the Defendant.

The general tenor of His Lordship's ruling in the above case is that Summons for Directions may be applied for before close of pleadings. This would appear to be the construction adopted too by the learned authors in Odger's Principles of Pleadings (Ibid) at page 253 footnote:

> *"If a party has to make any interlocutory application at an earlier stage, he may include therein all matters upon which he then desires the master's directions; but it is not ordinarily convenient to give extensive directions before the issues have been defined, and a summons under Order 25 (Order 32 in our case) would still be necessary at the appropriate time."*

The application for Summons for Directions therefore is not invalid per se. The question of whether it is justifiable at this stage of the proceedings however is another matter.

The purposes of a Summons for Directions to be made after pleadings have closed is to enable the parties to take stock of the issues in the action and the manner in which he or she is to proceed in the case, and to come up with the Summons for Directions in such a way that will enable the Court to dispose of the action in as little time and less expense as possible.

The pleadings in this case should effectively close on the 21st of October 1992. I am far from satisfied that a Summons for Directions to expedite matters at this stage will achieve any further progress and at a faster pace than the way things are already progressing.

I am aware that the Defendants are concerned about the effects of the restraining orders and that they wish to have matters expedited. This however, should

not be to the disadvantage of the Plaintiff and especially where there is nothing that I have found to warrant an order being made at this stage.

I can understand the basis for the Summons, which has come about through the application made under the Notice of Motion, that the Plaintiff is dragging its feet.

However, having ruled against that Notice of Motion, the better approach now really for the Defendants is to get a consent from the Plaintiff for directions to be agreed to prior to the close of the pleadings. And if that is not agreed to then the normal course should be allowed to run.

The significance of the interlocutory injunction in my view is taken care of by the undertaking of the Plaintiff as to damages for any loss that may be incurred until trial and so it should not be over-emphasised.

I am not satisfied that the Plaintiff is not as concerned as the Defendants to have this matter disposed of, because in the event that it loses the case then any unnecessary or long delays would obviously impinge upon the quantum of the damages that it will have to pay. The longer the matter is dragged on the bigger the possible damages get.

The Summons for Directions therefore is also dismissed with costs to the Plaintiff.

The question of the request for further and better particulars raised by Ms Corrin is a matter that should first be dealt with by letters.

The Defendant has submitted a request to the Plaintiff but no formal response has been made it seems. Ms Corrin has made submissions concerning the relevancy and appropriateness of the request. However, no proper summons has been filed inrespect of this and so I do not consider it appropriate to deal with this request at this point.

However, I will direct that a response must be made formally by letter within 7 days to that request of the Defendants.

(A. R. Palmer)
JUDGE