



T-918-88

Between:

JOE PAL,

Plaintiff,

- and -

HER MAJESTY THE QUEEN,

Defendant.

REASONS FOR ORDER

RICHARD, J.

This is an appeal from the order of the Prothonotary, dated May 12, 1997, dismissing the Appellant's (Plaintiff) appeal for want of prosecution. The order reads as follows:

The Defendant having established both inordinate delay and the likelihood of serious prejudice and the Plaintiff having failed to show that the delay was excusable, the action is dismissed for want of prosecution. The Defendant not having sought costs, none are awarded.

The events leading up to this order are as follows:

- 1) The Notice of Assessment from which the Plaintiff originally appealed was with respect to the Plaintiff's 1981 taxation year and dated March 23, 1984.
- 2) The issue under appeal was whether an amount claimed as an interest expense was incurred for the purpose of gaining or producing income from a business or property. The relevant events involve a land transaction, the purchase and sale of which took place in 1976 and 1979, respectively.
- 3) The Tax Court of Canada dismissed the Plaintiff's appeal by Judgment dated February 2, 1988.

- 4) The Plaintiff filed a Statement of Claim in the Registry of the Federal Court of Canada on May 17, 1988.
- 5) The Statement of Defence was filed on June 23, 1988.
- 6) Pleadings closed on July 8, 1988.
- 7) By letter ^{to} of the Plaintiff dated February 2, 1995, the Defendant gave the Plaintiff notice pursuant to Rules 331A and 440(2) that the Defendant intended to file a Notice of Motion to have the appeal dismissed for want of prosecution on April 4, 1995.
- 8) By letter to the Plaintiff dated April 21, 1995, the Defendant agreed to the Plaintiff's request for more time. It also advised that if it had not received the Plaintiff's response by the close of business on May 1, 1995, the Defendant would proceed with the motion to have the matter dismissed for want of prosecution.
- 9) By letter to the Plaintiff dated February 19, 1997, the Defendant gave the Plaintiff notice pursuant to Rules 331A and 440(2) that the Defendant intended to file a Notice of Motion on March 24, 1997 to have the appeal dismissed for want of prosecution.
- 10) No discoveries have been held.
- 11) The Defendant has not received a notice of trial, nor an application for an order fixing the date of trial.

The appeal is by way of a trial *de novo*.

The Plaintiff states:

... the delay in this action is due to job and financial demands on my time and my ignorance regarding the non responses of the counsel for the Defendant and the procedures and processes to properly prosecute this appeal.

The Defendant's Written Submission dated the 25th day of March, 1997,

reads:

- 25) In the instant action, the Plaintiff is appealing with respect to his 1981 taxation year, and the issue under appeal arises from events which occurred between 1976 and 1979. The Defendant submits that the ability of the Defendant to defend the Minister's assessments will be more difficult due to the passage of time, being approximately 16 years from the taxation year in question and 20 years from the beginning of the relevant events.
- 26) The Defendant submits that the Defendant's ability to defend this action has been seriously prejudiced by the delay of the Plaintiff.

As stated in Aqua-Gem¹:

... discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

- (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
- (b) they raise questions vital to the final issue of the case.

Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

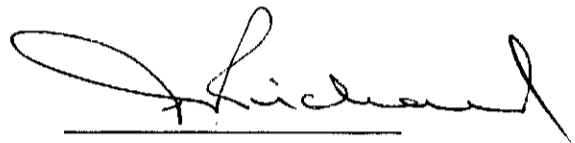
The order of the prothonotary is not clearly wrong. He properly considered the factors which were to be applied. In the exercise of my overriding discretion by reason that the question involved is vital to the final issue of the case, I also conclude that the appeal should be dismissed for want of prosecution. The defendant has proved inordinate delay, that such delay is not excusable and that the delay is likely to cause serious prejudice to the defendant.

In this appeal, the appellant also questioned the constitutional validity, applicability or effect of the common law principles of inordinate and inexcusable delay and the likelihood of serious prejudice as adequate grounds to deprive him of his right to a fair trial. At the hearing he invoked sections 7, 11 and 15 of the *Charter*. The appellant's freedoms or rights guaranteed under the *Charter* have not been infringed or denied. Rule 440 allows a defendant to move to have the action dismissed for want of prosecution where the plaintiff is not prosecuting the action with due dispatch. It is the plaintiff's own inaction which gives rise to the application. Also, a defendant must give the plaintiff notice of its intention to apply for dismissal. Further, the Court applies a three-fold test for dismissal as described above.

¹ *The Queen v. Aqua-Gem Investments Limited*, [1993] 2 F.C. 425 at 463

In addition, the appellant's interest are monetary. The appellant has not established that there is a deprivation of his right to life, liberty and security. Nor has the appellant established that he was deprived of equality rights. The proceeding in issue is not a criminal or penal matter.

Accordingly, the appeal is dismissed.

A handwritten signature in black ink, appearing to read "Richard", written over a horizontal line.

Judge

September 19, 1997
Vancouver, British Columbia

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE: JOE PAL

- and -

HER MAJESTY THE QUEEN

COURT NO.: T-918-88

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: September 15, 1997

**REASONS FOR ORDER OF RICHARD, J.
dated September 19, 1997**

APPEARANCES:

Mr. Joe Pal for Plaintiff

Ms. Victoria Bryan for Defendant

SOLICITORS OF RECORD:

**George Thomson for Defendant
Deputy Attorney General
of Canada**