S.C.A. No. 02272

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Matthews and Chipman, JJ.A.

BETWEEN:	
THE ATTORNEY GENERAL OF CANADA, on behalf of Her Majesty the Queen in Right of Canada Appellant	A. D. Tupper J. W. S. Saunders for the Appellant
- and -	
THE FOUNDATION COMPANY OF CANADA LIMITED, a body corporate, C. A. FOWLER, BAULD & MITCHELL LIMITED, a body corporate, TOWER MASONRY CONTRACTORS LIMITED, a body corporate, THOMPSON & SUTHERLAND LIMITED, doing business under the firm name and style of Tasco Sheet Metal and Roofing Company, FORD GLASS LIMITED, a body corporate, REID J. SHANKS LIMITED, a body corporate, NEW ROTTERDAM INSURANCE COMPANY, a body corporate, and NORTHUMBERLAND GENERAL INSURANCE COMPANY, a body corporate Respondents	J. P. Merrick, Q.C. D. A. Jamieson-Fraser for the Respondent, The Foundation Company of Canada Limited G. W. MacDonald, Q.C. S. C. Norton for the Respondent, C. A. Fowler, Bauld & Mitchell Limited G. R. Anderson for the Respondent, Tower Masonry Contractors Limited M. J. Wood for the Respondent, Ford Glass Limited E.A.N. Blackburn,Q.C. for the Respondent, Reid J. Shanks Limited M. S. Ryan, Q.C. for the Respondent, New Rotterdam Insurance Company

) Appeal Heard:
) October 18, 1990
)
) Judgment Delivered:
) November 6, 1990

THE COURT: The appeal is allowed with costs and the decision and order of Mr. Justice Nunn are set aside, awarding the costs of the application before him to the appellant as per reasons for judgment of Chipman, J.A.; Hallett and Matthews, JJ.A., concurring.

CHIPMAN, J.A.:

The appellant appeals from the decision of Mr. Justice Nunn in Chambers dismissing for want of prosecution the appellant's action for damages for breach of contract and negligence in the design and construction of a building.

On May 17, 1967, Her Majesty the Queen in Right of Canada (the appellant) entered into a contract with the respondent, C. A. Fowler, Bauld & Mitchell Limited (Fowler) whereby the latter would design and supervise construction of a headquarters building for the R.C.M.P. in Halifax (the project). On April 16, 1973, the appellant entered into a contract with the respondent, The Foundation Company of Canada Limited (Foundation) for construction of the project. Construction commenced in the summer of 1973, was substantially completed in 1975 and finally completed in the summer of 1977.

According to the appellant's statement of claim, on completion of the project it was apparent that it had not been designed or constructed in accordance with the terms of the contract with Fowler and Foundation. The appellant therefore refused to issue final certificates and retained holdback monies under its contract with Foundation. The appellant's affidavit indicates that the appellant advised Foundation and Fowler of the construction deficiencies as they appeared, starting in 1976, and requested that they examine these defects. As time went on, the problems, which included leaking, flooding and failure of brick and mortar, increased. Repairs made from time to time were

insufficient and in 1980 the appellant began a major investigation into the design and construction deficiencies which was concluded in late 1982.

The affidavit on behalf of Fowler indicates that it received the first notice of a potential claim by way of a letter dated July 11, 1980. On September 15, 1981, the appellant wrote Fowler and Foundation advising that it considered them responsible for the deficiencies which included six specific items. The letter advised that a detailed study of the building completed in 1980 indicated that deficiencies would cost an estimated $1.2 million to correct. The letter continued that the appellant had been advised by legal counsel that Fowler and Foundation were obligated to take positive action towards correcting the major deficiencies/design errors. It concluded by requesting that within the next 30 days they institute extensive dialogue regarding the claim. No dialogue appears to have ensued.

On February 1, 1982, the appellant commenced action against Fowler and Foundation and the originating notice and statement of claim were served on June 22, 1982.

On June 23, 1982, Robert Anderson, counsel at the Department of Justice, received written requests from counsel for Fowler and Foundation for extension of time to file defences which he granted. Between that time and the end of 1982 demands for particulars were delivered by Foundation, and Fowler filed a defence and a third party notice against Foundation.

The affidavit filed on behalf of Shanks shows that on July 12, 1982 Foundation's counsel notified Shanks of the appellant's demand against it and its potential claim over. The letter said:

> "Gentlemen:
>
> We represent The Foundation Company of Canada Limited and they have been sued as Defendants in a legal proceeding commenced by the Attorney General of Canada. The legal action claims that Foundation and its sub-trades failed to carry out their contractual responsibilities in a proper manner. In particular, the allegation is made that Foundation and its sub-trades have failed to properly waterproof and backfill around the foundation which failure resulted in flooding. For your information I am enclosing herewith a photocopy of the Originating Notice (Action) and Statement of Claim.
>
> This is to notify you that we are presently investigating this matter and in due course will be responding to the allegations made. On the completion of our investigation we may be instructed to commence third party indemnity proceedings against your company on behalf of our client. In anticipation of those instructions, I would suggest that you notify your solicitor and your insurance company as to the details of the claim and provide us with the name and address of your solicitor so that we may effect service without incurring needless expense."

As far as the record before Mr. Justice Nunn reveals, nothing happened between the end of 1982 and December 19, 1986 when counsel for the firm now representing the appellant delivered a notice of intention to proceed.

The affidavit of appellant's counsel on the application stated that Anderson's understanding was that all parties agreed that the litigation could not proceed until restoration was complete and the affidavit further stated that the defendants and other interested parties would have access to the restoration site as is necessary during the course of the restoration. It was not disputed that these respondents did not, in fact, take up this invitation.

By 1985, the extensive restoration of the project was completed and by the end of March 1986 investigation by engineering consultants retained by the appellant was concluded. In all, it was alleged in the statement of claim that the appellant spent approximately $1.7 million on restorations and $500,000.00 to $700,000.00 on engineering fees.

In December 1986, a notice of change of solicitors for the appellant was delivered. Following the notice of intention to proceed (December 19, 1986) no objection or application was advanced by either Fowler or Foundation.

Throughout 1987 pleadings were exchanged, particulars supplied and Foundation commenced third party proceedings against the respondents, Tower Masonry Contractors Limited (Tower), Thompson & Sutherland Limited (T & S), Ford Glass Limited (Ford), Reid J. Shanks Limited (Shanks) and New Rotterdam Insurance Company (New Rotterdam). The first four were subcontractors of Foundation and the last was a liability insurer of Foundation.

In 1988, further pleadings were filed and interrogatories delivered by the appellant in March of 1988 were answered by the other parties between April 12, 1988 and November 4, 1988. The last was the response of Foundation, over seven months after receipt of the interrogatories.

Nothing appears on the record during 1989 until November 1, 1989 when the appellant delivered its document list. The appellant's affidavit indicates that preparation of this list commenced in early 1987. Counsel received 124 files containing approximately 11,000 pages of material. A computer program was employed in the preparation of this list and it was said that counsel for all parties were subsequently offered the use of the computerized data to assist in processing the file.

On November 21, 1989, the appellant's counsel wrote counsel for all parties requesting that they provide their lists of documents and indicate availability for discovery examinations. Follow up correspondence of December 6, 1989 produced limited response. No discovery examinations have been held.

On January 5, 1990, Foundation delivered notice of its application to dismiss for want of prosecution. Applications by other respondents followed and the matter came on for hearing before Mr. Justice Nunn on March 29, 1990.

On the application before him, Mr. Justice Nunn had the appellant's affidavit and the record setting out the foregoing narrative. Affidavits on behalf of the respondents were chiefly

to the effect that prejudice was likely to be suffered by them as a result of the long delay. Indication was given of a number of persons on whom they would have relied for testimony, some of whom were deceased, some of whom were no longer employed by the party or were otherwise not available. Concern was expressed that, as to those people who were available, prejudice would result from the difficulty they would have in recalling events now so distant in the past. Two of the third parties have gone into bankruptcy or are insolvent.

On the morning of the hearing of the application, counsel for Foundation delivered and filed an affidavit. Reference was made to the plaintiff's submission that there was an agreement or understanding that litigation was to be suspended pending restoration of the building. The affidavit said in part:

> "2. THAT in relation to myself and my client, there was no such understanding. Subsequent to the filing of the Demand for Particulars by The Foundation Company of Canada Limited in 1982, I anticipated that if the Plaintiff were to proceed, I would shortly receive a Reply to that Demand or some other response from the Plaintiff's solicitor. I received nothing.
>
> 3. THAT as a result of the lack of any response from the Plaintiff in the four years subsequent to the Demand for Particulars, I came to the opinion during that time that the Plaintiff may have decided to abandon its claim. Indeed, on occasion during those years when communicating with The Foundation Company of Canada Limited on other matters, the topic of the R.C.M.P. Building would incidentally be raised and on several occasions I recall advising my client that it appeared that the claim would not be pursued.

> 4. THAT it was with some surprise that I received notification from the Plaintiff's solicitors that they in fact had instructions to proceed.
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> 5. THAT I considered that The Foundation Company of Canada Limited should take no formal further proceedings in 1982 pending receipt of the Demand for Particulars. The requested information in the Demand was essential to a determination of the specifics of the Plaintiff's claim, as well as an assessment of what liability, if any, there might be on the part of any sub-trades and which sub-trades might have been involved."

The demands for particulars made on July 12, 1982 and October 19, 1982 respectively were in fact replied to on February 11, 1987.

Following argument of counsel on March 29, 1990, Mr. Justice Nunn delivered a short oral decision which fills two and one-half pages. He observed that on such an application it must appear that there was an inordinate and inexcusable delay on the plaintiff's part and that such would likely preclude a fair trial or that serious prejudice was caused to the defendants.

On the subject of inordinate and inexcusable delay, Mr. Justice Nunn said:

> "In this case, I am satisfied that there has been inordinate and inexcusable delay. The delay from the time the work was completed to the present time is a period of 13 years and though the action was brought within the time fixed by limitation of actions, there has been a further substantial delay from the time of the bringing of the action."

Mr. Justice Nunn dealt with the question of prejudice by referring to the respondents' affidavit material regarding

potential witnesses and concluded that the appellant had not met the onus of showing that there was no prejudice to the defendants. The action and the third party proceedings were dismissed with costs against the appellants.

A notice of appeal dated April 6, 1990 was given to all participating respondents and the formal order for judgment was entered on April 18, 1990.

At the commencement of the hearing of this appeal on October 18, 1990, an application by the appellant to admit additional evidence was heard. This evidence consisted of the affidavit of Robert Anderson, touching upon his understanding that counsel for Fowler and Foundation agreed in 1982 that litigation could not and would not proceed until after the repair work was complete. Appended to the affidavit were copies of correspondence between Anderson and counsel for Fowler and Foundation in 1983 and 1984. It will be recalled that the only affidavit before Mr. Justice Nunn relating to Anderson's understanding was that of present counsel stating his understanding of Anderson's conclusions.

After hearing argument from all counsel, this Court held that Anderson's affidavit would not be received, but that certain correspondence would be admitted.

This Court said in part:

> "In view of the last minute filing of the ... affidavit before Mr. Justice Nunn on March 29, 1990, and the contents of that affidavit, we are of the opinion that the seven letters attached to the Anderson

> affidavit and Mr. Merrick's response in June of '83 and similar exchanges of correspondence between Mr. Anderson and Mr. Stewart McInnes, solicitor of record at that time for Fowler, Bauld & Mitchell, are authorized to be given in evidence at the hearing of the appeal from Mr. Justice Nunn's decision dismissing the appellant's action for want of prosecution. This evidence is being admitted pursuant to the provisions of Rule 62.22(1). The affidavits of Mr. Anderson and Mr. Stewart McInnes shall not be given in evidence on the hearing of the appeal."

Rule 62.22(1) reads:

> "62.22 (1) The Court or a Judge on application of a party may on special grounds authorize evidence to be given to the Court on the hearing of an appeal on any question of fact as it or he directs."

The material admitted may be briefly summarized:

July 12, 1982:

Foundation's counsel wrote to Tower and Ford a letter similar to that sent to Shanks, the text of which is set out above.

June 1, 1983:

Anderson advised counsel for Fowler and Foundation that tenders for the restoration were being called and extended an invitation for their clients to send representatives to the site. The letter said in part:

> "As it is anticipated that this work will reveal the factors causing the problems encountered with the building, provision has been made for your client and the co-defendant Foundation to have their own representatives on site as the work commences and progresses. You are formally invited and encouraged to do so."

June 8, 1983:

Counsel for Foundation indicated that "Until such time as the particulars are provided to us, it is not of much use to consider having a representative on site to inspect the restoration and upgrading work." It was stated that to properly inspect and monitor the work, it would be necessary for Foundation representatives to know what it was that Foundation was alleged to have done wrong.

October 13, 1983:

Anderson advised Foundation that the contract for restoration had been awarded and work was commencing. It was thought that sufficient brick removal would have been accomplished in two weeks to indicate what was causing that particular problem. A set of drawings would be delivered and the invitation to attend the site was repeated.

October 18, 1983:

Anderson forwarded a set of drawings and specifications to Foundation's counsel.

October 19, 1983:

Foundation's counsel acknowledged receipt of the drawings and indicated that they would be seeking instructions and would be back shortly.

October 28, 1983:

Anderson advised Foundation that removal of the walls would commence on October 31st.

May 11, 1984:

Anderson advised Foundation's counsel that the uncovering of the foundation's drainage system around the rifle range area the building was commencing.

May 25, 1984:

Anderson advised Foundation's counsel of further removal of brickwork and referred to awaiting his advice on some matters that had been apparently discussed between them.

Such was the additional evidence not before Mr. Justice Nunn which this Court has decided to take into account.

On an application for dismissal for want of prosecution, a discretion is conferred upon the Chambers judge by Rule 28.13:

> "28.13 Where a plaintiff does not set a proceeding down for trial, the defendant may set it down for trial, or apply to the court to dismiss the proceeding for want of prosecution and the court may order the proceeding to be dismissed or make such order as is just."

On an appeal to this Court from a discretionary order, the general rule was stated in Exco Corporation Limited v. Nova Scotia Savings and Loan et al (1983), 59 N.S.R. (2d) 331 by MacKeigan, C.J.N.S. at p. 333:

> "This Court is an appeal court which will not interfere with a discretionary order, especially an interlocutory one such as this that is now before us, unless wrong principles of law have been applied or patent injustice would result."

In Nova Scotia (Attorney General) v. Morgentaler (1990), 96 N.S.R. (2d) 54 at p. 57 Matthews, J.A. said:

> "We should only interfere if serious or substantial injustice, material injury or very great prejudice would result if we did not. The burden on an appellant seeking to set aside an interlocutory order such as this is indeed heavy."

Mr. Justice Nunn correctly stated the test to be applied in determining whether or not to dismiss an application for want of prosecution. The subject was covered by this Court in Martell v. Robert McAlpine Ltd. (1978), 25 N.S.R. (2d) 540. Cooper, J.A. said at p. 545:

> "I now direct my attention to the principles which should govern the exercise of a judge's discretion in deciding whether or not an application for dismissal of an action for want of prosecution should be granted. There must first have been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and, secondly, as put by Russell, L.J., in **William C. Parker Ltd. v. Ham & Son Ltd.**, [1972] 3 All E.R. 1051, at p. 1052:
>
> > '...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...'"

This Court should not in general interfere with the discretion exercised by a judge of first instance, especially in interlocutory matters. Such judges are daily involved in, and fully familiar with, the trial process and the concerns of front line judges in making the system work. Further, appeals in

interlocutory matters necessarily involve additional expense and delay. Nevertheless, when a patent injustice results from the exercise of a discretion, this Court will intervene to set the matter right.

Without limitation, a patent injustice may appear when the judge exercising the discretion was not aware of all of the material circumstances. Another consideration is the effect of the discretionary order made. A refusal to grant an order dismissing for want of prosecution, serious as it might be, still leaves open to the defendant not only the opportunity to make a subsequent application to dismiss, but to gain the day at trial, perhaps because the plaintiff's case has weakened with the passage of time. If such an order is granted, however, the plaintiff's action is terminated and the result is that what is generally termed an interlocutory application has concluded with a final order of dismissal of the proceedings. It is appropriate to take into account among other things the gravity of the consequences of the order in determining whether, overall, a patent injustice has resulted. In this case, the consequences to the appellant of Mr. Justice Nunn's order are so obvious that they need not be restated.

The appellant need only succeed on either of the two main issues raised on this appeal. The first is whether patent injustice resulted from the conclusion of Mr. Justice Nunn that the delay was inordinate and inexcusable. It is necessary to analyze events as they unfolded following the commencement of the

proceeding and particularly the action or lack of it on the part of counsel for the appellant and the respondents. In so doing, reference will be made to acts or omissions of counsel for the parties, but it is the conduct of the client on whose behalf they acted, no doubt on instructions, that is at issue here - not that of counsel personally.

It was not contested that the delay was very substantial and inordinate in the sense that it was out of the ordinary. The focus of counsel's argument was on whether or not it was inexcusable. It was recognized that the answer to this question was largely determinative of the question whether the delay was inordinate or out of the ordinary in relation to this particular case which was complex and not ordinary. The argument went to the excusability of the way in which the appellant's case was handled during the eight years from the commencement of the action to the application to dismiss, not disregarding the delay period from the time the cause of action arose until the commencement of proceedings.

The overall delay of some eight years in litigation which was started very late is most unusual. There were long periods of apparent inactivity on the part of appellant's counsel. For example, it was over four months before the originating notice, once issued, was served. On the face of it, all of this delay, if not inexcusable, is anything but commendable. In evaluating the delay regard may be had to the time allowed to pass before the commencement of the action; Anil

Canada Limited v. Industrial Estates Limited et al. (1986), 75 N.S.R. (2d) 181.

A plaintiff's conduct of the proceeding can and should also be judged to some degree in the context of that of the defendants. Acquiescence or waiver on the part of the defence are proper matters to be taken into account in determining the excusability of plaintiff's conduct; Albrecht et al. v. Meridian Building Group Ltd. et al.; Corporation of the City of Kitchener et al. (third parties); Realty Explorations Ltd. et al. (fourth parties) (1988), 27 C.P.C. (2d) 213 at p. 215; Allen v. Sir Alfred McAlpine & Sons, Ltd.; Bostic v. Bermondsey and Southwark Group Hospital Management Committee; Sternberg and Another v. Hammond and Another (1968), 1 All E.R. 543 at p. 550, 558, 564. There is no duty on a defendant to actually take positive steps to move the matter forward or to send out warnings and exhortations to the plaintiff to proceed. However, the presence or absence of these actions may be relevant in determining whether the defence acquiesced in the slow tempo of litigation.

I will first examine the conduct of the parties during the period from June 1982 until December 1986 as this appears to be the most critical period of delay. Mr. Justice Nunn had before him the affidavit of the appellant's counsel that it was his "understanding" from discussions with Anderson that litigation would not actually be pursued during the restoration period. Mr. Justice Nunn gave no elaborate reasons for his conclusion that the delay was inexcusable, but in all probability

he concluded that there was no such understanding. This is easy to appreciate in view of the fact that this hearsay assertion was contradicted by the unequivocal statement in the March 29, 1990 affidavit of Foundation's counsel that there was no such understanding. This affidavit continued that he anticipated that if the appellant were to proceed, he would shortly receive a reply to the demand for particulars or some other response. The affidavit states that he received nothing. Counsel deposed that in view of this lack of any response in the four years subsequent to his demand he thought the appellant may have abandoned its claim, and he so advised his client.

Fowler's affidavit simply refers to the commencement of the action in 1982 and the change of solicitor in 1986 with no details of what went on in that period. The affidavit on behalf of Shanks did refer to the letter received from Foundation in 1982 advising of a possible action against Shanks, but giving no further particulars. The next notice was when the third party proceedings were served on Shanks in 1987. Tower's affidavit indicates no developments between September 29, 1982 and June 5, 1987. The Ford Glass affidavit does append a copy of the demand letter of July 12, 1982 from Foundation. No further communication was received by Ford until the third party papers arrived on June 9, 1987.

I would expect that all of this material in support of the application to dismiss for want of prosecution would have weighed heavily on the balance when Mr. Justice Nunn exercised his discretion.

What was the reality? After the originating notice was served in June 1982, Foundation and Fowler both asked for and were given added time to file a defence. Fowler filed its defence in 1982 and Foundation filed its defence in 1987.

On July 12, 1982 and October 19, 1982, Foundation delivered a demand for particulars. The appellant did not file a reply until February 11, 1987 but in the interim it was always open to Foundation to apply under Rule 14.24 for an order that they be answered. The demands for particulars contained a notice that if particulars were not delivered within ten and 14 days respectively, an application would be made for an order. This was never done.

Next followed the chain of correspondence which was admitted as evidence before us. It shows that contrary to Foundation's affidavit much indeed was received by Foundation. Both defendants were informed in June of 1983 of the rehabilitation project and given an opportunity to attend at the site as work progressed. Having thus been sued for over $1.2 million, not to mention the danger of prejudgment interest, Fowler seems to have ignored this correspondence and appears thereafter to have been left out of the communications. Fowler had, according to the particulars it delivered to New Rotterdam, corresponded with the appellant about the matter in the Fall of 1981.

Foundation took the position that since it had outstanding a demand for particulars that was not answered "there

was not much use" to consider having a representative on site. What better particulars could they receive than actually observing the alleged defective work being dismantled, inspected and corrected? To the suggestion made on argument that without particulars the expense of having an investigation was not justified, I suggest that a party, having such a substantial claim could hardly, unless insolvent, afford not to engage expert advice forthwith or have its own personnel attend on site.

Incidentally, the following particulars are in the statement of claim of alleged failure by Foundation to deliver work of workmanlike quality:

> "(a) failed to properly waterproof and backfill around the foundation which failure has resulted in periodic flooding of the below grade areas of the 'project';
>
> (b) failed to properly install the flashing and downspouting resulting in water penetration of the upper levels of the 'project';
>
> (c) failed to properly install the windows resulting in air and water leakage around the said windows, failure of the seals on the hermetically sealed windows and condensation buildup between the glazing surfaces of the said windows and interior surfaces of the window sills and frames;
>
> (d) failed to properly construct the exterior brick siding of the 'project' resulting in extensive failure of the mortar joints and extensive damage to the bricks."

Another course of action open to Foundation would be to apply for an order for particulars, but no particulars delivered

would compare with what would be available to the eye of an expert on site. Indeed, it may be that the appellant would not, at that time have been able to deliver meaningful particulars before the restoration was complete. A perusal of the particulars which were delivered on February 11, 1987 suggests that many alleged deficiencies would not be discernible until after the work was torn out.

Notwithstanding Foundation's stated position, the appellant did keep it informed to some degree as the balance of the correspondence shows.

If Fowler and Foundation were not totally putting their heads in the sand, the only inference that can be drawn from the whole of the material, particularly the fresh evidence, is that they took no objection to the delay and waited until the restoration was complete.

The respondent third parties were not joined in the litigation until 1987. Their position during this period depends on the inference to be drawn from their apparent failure to pay any attention to Foundation's letter of July 12, 1982 enclosing a copy of the statement of claim. They were certainly informed of the nature and magnitude of the claim and given a warning which would give them the opportunity to peruse and assemble documents and be in readiness. As far as the record goes, they apparently chose to do nothing, from which it can be inferred that they were content to await events, as in the case of Fowler and Foundation. A prudent business person might have assembled records and taken expert advice, faced with such substantial claim and warning.

New Rotterdam filed no affidavit before Mr. Justice Nunn. The claim of Foundation against it relates to a policy of liability insurance allegedly issued on February 9, 1982. Foundation alleges it notified New Rotterdam of the appellant's claim and New Rotterdam refused to defend it. New Rotterdam's defence alleges non-disclosure in the application for insurance. Its position appears to be one of non-involvement.

I conclude therefore that it was a fair inference on the part of the appellant that litigation would not proceed until the restoration was complete. As to the third parties, they were not then parties to the action. They did, however, elect to ignore the warnings given and await events. It is true no agreement was expressly stated, but it can be inferred from the conduct of the parties. The inference is supported by the failure of any party to move to dismiss for more than three years after the notice of intention to proceed was given in December 1986. I find it difficult to accept that this notice to proceed came as a surprise to the defendants.

Considering all the material now before us, I do not consider the delay from February 1982 to December 1986 to be inexcusable.

The delays from January 1987 to November 1989 appear, on a review of the material, to lie not only with the appellant's counsel but also with that of the respondents. For example, Foundation delayed over seven months in answering interrogatories, Ford nearly five months in doing so. New

Rotterdam was added as a third party on June 5, 1987. It demanded particulars from Foundation, Fowler and the appellant on July 17, 1987. Fowler responded on September 4, 1987, the appellant on September 18, 1987 and Foundation on October 21, 1987. New Rotterdam did not file a defence until January 26, 1988. In some instances, correspondence arrived late or it was ignored. I recognize that this was a matter of unusual magnitude and counsel were no doubt busy with a number of other commitments. However, to blame the appellant alone for such delay in this period would not be fair. All were participants in the leisurely pace of this litigation. In the absence of a clear reason given by Mr. Justice Nunn for considering delay in this period of time to be inexcusable, I am not prepared to characterize the delay as such.

Overall then, it appears that Mr. Justice Nunn did not have the benefit of the very material evidence relating to the first long period of delay between 1982 and 1986. As to the second period, he has not singled it out or attempted to assign blame to any of the parties for the delay that occurred. As has been seen, the blame appears to be a shared one. While as I have said, the late commencement of the action and its slow progress thereafter leaves much to be desired, I am satisfied that it is not correct to say that the appellant was guilty of inexcusable delay. A great injustice would result if this action was dismissed at this time.

It is not necessary to address the second principal issue - Mr. Justice Nunn's finding that there was prejudice to the respondents. It is sufficient to say that once the nature of the delay has been fully understood, the degree of prejudice and those who suffer it are usually quite apparent.

The third party respondents raised the question whether, in the absence of a notice of appeal from Fowler and Foundation, this Court can revive the third party proceedings dismissed by Mr. Justice Nunn. A fair reading of the notice of appeal is that the whole of Mr. Justice Nunn's judgment, including dismissal of the third party proceedings was appealed from by the appellant. While the third parties argued that the appellant had no standing to appeal with respect to the third party proceedings, they were served and appeared, taking part in the appeal. I am of the opinion that we have power to set aside the entire judgment in all the circumstances.

The appellant's notice of appeal seeks relief in the following terms:

> "AND that the Appellant will request that the judgment appealed from be reversed, discoveries be ordered forthwith, and the Defendant and Third Parties be at liberty to make this application at a later date."

I see no reason to make any order other than a reversal of the judgment.

I would allow the appeal with costs and set aside the decision and order of Mr. Justice Nunn, awarding the costs of the application before him to the appellant.

J. A.

Concurred in:

Hallett, J.A.

Matthews, J.A.