SC CV 93 010

CV 01423

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORTHERN COMMUNICATION AND NAVIGATION SYSTEMS LTD.

Plaintiff

- and -

WHITFORD HOLDINGS LTD.

Defendant

Denial of application under Rule 260 for dismissal of action for want of prosecution. Leave granted to plaintiff to take next step in the action, pursuant to Rule 259.

Application Heard: February 1, 1993
Reasons filed: February 5, 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Counsel for Plaintiff: K. Allison
Counsel for Defendant: J. Williams

CV 01423

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORTHERN COMMUNICATION AND NAVIGATION SYSTEMS LTD.

Plaintiff

- and -

WHITFORD HOLDINGS LTD.

Defendant

REASONS FOR JUDGMENT

1 The plaintiff and the defendant were engaged in business transactions with each other in the years 1985 through 1988. In November 1988 the plaintiff commenced this lawsuit against the defendant, claiming damages arising out of the business relationship. There has been considerable delay in the prosecution of the lawsuit. The litigants now come to the court with two motions related to this delay, namely:

(a) a motion by the plaintiff under Rule 259 for leave to take the next step in this dormant action; and

(b) a motion by the defendant under Rule 260 for an order dismissing the lawsuit for want of prosecution.

The relevant Rules of Court state:

> **259. Except with leave or by direction of the court, no new step in an action prior to judgment shall be taken after the expiration of one year from the time when the party desiring to take the step first became entitled to do so and the court may impose terms.**
>
> **260. Where there has been delay the court may on application dismiss an action for want of prosecution or give directions for the speedy determination of the action and may impose terms.**

2 As stated above, this lawsuit commenced with the filing of a statement of claim by the plaintiff in November 1988. The defendant responded by filing a statement of defence in December 1988, in which pleading the defendant denied any liability to the plaintiff. Examinations for discovery were held in December 1990. No explanation is provided by either party for this two year delay in arranging discoveries.

3 Although it is not explicitly so stated in the affidavit material filed in support of these motions, undertakings were apparently made by each party, at the time of the examinations for discovery, to provide further discovery on specific items. These undertakings have not been fulfilled in the time period since December 1990. No explanation is provided by either party for the failure to fulfill its undertakings.

4 As to the plaintiff's delay in taking any further steps in this action since December 1990, the affidavit of its solicitor James D. Brydon filed in support of its motion offers two explanations:

a) lack of a transcript of the examination for discovery; and

b) lack of a response to the plaintiff's settlement offer.

His affidavit reads, in part,

"3. That, on 5 December, 1990, by the agreement of counsel for both parties, examinations for discovery were held in Yellowknife.

4. That, at the conclusion of those examinations, an oral request was made by me for the production of transcripts. Unfortunately, it was either not heard or recorded because no transcripts were forthcoming at that time.

5. That, nevertheless, I am informed by Mr. Ken Pook, one of the officers of the Plaintiff, and do verily believe that he sought to negotiate a settlement of this matter with the Defendant. I am further so informed and do verily believe that he was unsuccessful in this endeavour.

6. That, in addition, I made an offer of settlement in a letter to counsel for the Defendant, dated 13 June, 1991. This offer was not accepted or rejected until 7 July, 1992, when, by letter dated that day, Mr. Bayly, on behalf of his client, indicated to me that his continued to take the position that no money was owed by it to my client in respect of the transaction forming the subject of this action.

7. That, on 6 September, 1991, having not received a copy of the transcripts for discovery, I wrote to the Court Reporter's Office requesting these once again, since they were necessary to take the next step in this action.

8. That the transcript of Mr. Whitford was filed with the court on 11 August, 1992 and delivered to our office sometime thereafter.

9. That, in my opinion, it was not possible to take the next step in this action until the transcripts had been delivered."

This affidavit does not adequately explain why the request for transcripts was not pursued on a more timely basis, nor relate any reasons given by the Court Reporter's office for delay, if any, attributable to that office. In any event, I respectfully disagree with the view that it is impossible to take the next step in proceedings, following examinations for discovery, without having at hand the transcripts of those examinations. Any undertakings made on behalf of a litigant at an examination for discovery should be

fulfilled on a timely basis and in normal circumstances such action need not await the reading of a typed transcript of the making of the undertaking. The fulfilment of undertakings is a "step" in an action within the context of Rule 259. Canadian Cooperative Agricultural Financial Services v. Haze (1989) 100 A.R. 91 (Alta.Q.B.).

6 As to the settlement offer contained in Mr. Brydon's letter of June 13, 1991, his affidavit implies that no response was received until July 7, 1992, more than a year later. Mr. Bayly, in his affidavit filed on behalf of the defendant, does not deny this specific allegation. Presumably, within the knowledge of the plaintiff, its settlement offer was under active consideration by the defendant until July 1992.

7 It would thus appear that both the plaintiff and the defendant are guilty of delay. Neither party has fulfilled its own undertakings, neither party has sought to enforce the other's undertakings.

8 On its motion for dismissal of the action for want of prosecution, the defendant can hardly be heard to complain of the plaintiff's failure to force the defendant to comply with the defendant's own undertakings. Scott v. Leddy, Alta Q.B. #111279, April 4, 1984, unreported; Urbanetics Inc. v. Aerotech International Inc. (1990) 40 C.P.C. (2d) 110 (Man.C.A.).

9 The determining criteria on applications under Rule 259 (leave to take the next step) were fully discussed by this Court in Riopel v. Sebastien et al (1984) 57 A.R. 364

and **Poole Construction et al** v. **Wood Gardiner Architects et al** [1989] N.W.T.R. 354. In effect, three conditions must be present before leave will be denied:

1. there has been inordinate delay by the plaintiff in the prosecution of the action.
2. such delay is inexcusable.
3. the defendant is likely to have been seriously prejudiced by the delay.

However, even when these three criteria are established, the court may still allow the action to continue if the ends of justice are best served by allowing the matter to proceed to trial. **Riopel** v. **Sebastien et al** N.W.T.C.A. #554, June 18, 1985, unreported.

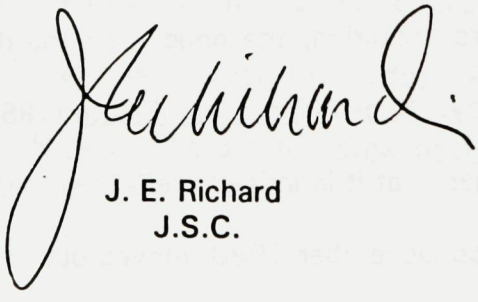
As to the three-fold test, in my view the first two conditions have been met in the circumstances of the present case, for the reasons stated above.

As to the third condition, the onus is on the defendant to demonstrate serious prejudice by the delay. **Knol** v **Thompson Estate** (1980) 27 A.R. 158 (Alta.C.A.). The defendant here alleges that it is indeed prejudiced inasmuch as two of the defendants' witnesses have, since December 1990, moved out of the jurisdiction, and will have to return to Yellowknife for the trial, at additional expense to the defendant. No other prejudice is alleged by the defendant.

12 In my view the defendant has not demonstrated serious prejudice. Prejudice in the context of the third criterion under Rule 259 means prejudice that is not compensable in money. Witnesses' travel expenses can be compensated by an award of costs following success at trial.

13 For this reason (lack of any serious prejudice to the defendant) the plaintiff should not be denied leave to take the next step in its lawsuit. Such leave is hereby granted, on the condition that the plaintiff take its next step within 21 days of the filing of these reasons. The plaintiff's application is therefore granted, but without costs.

14 It follows that the defendant's application under Rule 260 must fail. An application under Rule 260 (invariably made by a defendant when opposing a plaintiff's application under Rule 259) is subject to the same three-fold test stated earlier. **K.M.W.** v. **J.G.C.** (1990) 112 A.R. 81 (Alta.C.A.). A litigant is entitled to have his case decided on its merits unless he is responsible for undue delay which has prejudiced the other party. The defendant's application for dismissal of the action is denied, without costs.



J. E. Richard
J.S.C.

CV 01423

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

NORTHERN COMMUNICATIONS AND
NAVIGATION SYSTEMS LTD.

Plaintiff

- and -

WHITFORD HOLDINGS LTD.

Defendant

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE J.E. RICHARD