Lexcray Pty Limited v Northern Territory of Australia (No 3)
[2015] NTSC 69

PARTIES:	LEXCRAY PTY LIMITED v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	33/93 (9303729); AP 22 of 99 (9303729)
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JUDGMENT OF:	MARTIN J

CATCHWORDS:

Abuse of process – costs order - negotiations as to amount and terms of payment – lengthy delay – breakdown of negotiations – whether taxing of costs after delay would bring the administration of justice into disrepute – principles in *Batistatos v Roads and Traffic Authority of NSW* applied - applications to stay taxation refused.

REPRESENTATION:

Counsel:

Applicant:	J Rowland QC
Respondent:	G Parker SC and T Anderson

Solicitors:

Applicant:	Clayton Utz Lawyers
Respondent:	Solicitor for the Northern Territory

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lexcray Pty Limited v Northern Territory of Australia (No 3)
[2015] NTSC 69
No. 33/93 (9303729); AP 22 of 99 (9303729)

BETWEEN:

LEXCRAY PTY LIMITED
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: MARTIN J

REASONS FOR JUDGMENT

(Delivered 9 October 2015)

Introduction

[1] Proceedings commenced in 1993 and concluded in May 2004 when the High Court refused two applications by the plaintiff for special leave to appeal. In October 1999 and January 2001 the plaintiff was ordered to pay the defendant's costs of the trial and unsuccessful appeal. On 16 May 2002 the defendant filed two summonses for taxation of costs. Those applications were subsequently adjourned sine die pending resolution of the application for special leave to appeal.

[2] After the High Court refused special leave, the parties entered negotiations with respect to the costs to be paid by the plaintiff. For reasons discussed later, there was inordinate delay in the finalising the negotiations and it was not until 29 August 2014 that the defendant sought to relist the summonses for taxation.

[3] On 17 November 2014 the plaintiff filed two summonses seeking orders that there be a "permanent stay, strike out or dismissal" of the summonses for taxation filed by the defendant on 16 May 2002. In substance the plaintiff submitted that the defendant had intentionally delayed in seeking to tax the costs and, regardless of intention, there had been an inordinate and inexcusable delay by the defendant. The plaintiff submitted that on either ground it would amount to an abuse of process to permit the defendant to tax costs under the orders made in October 1999 and January 2001.

[4] On 9 October 2015 I ordered that both applications be dismissed and I now set out my reasons for those orders.

Background

[5] In the 1980s the defendant conducted a program known as the Brucellosis Tuberculosis Eradication Campaign (BTEC) which required Northern Territory cattle owners to test their cattle for Brucellosis Tuberculosis. If either of those diseases were present in tested cattle,

the owner was required to destroy the stock. Compensation was payable by the defendant to owners whose cattle were destroyed.

[6] Stock on property owned by the plaintiff was infected and the plaintiff was required to destroy some of its stock and send the remainder for slaughter. This task was completed by mid-1990.

[7] In February 1993 the plaintiff issued proceedings in the Supreme Court concerning the amount of compensation to be paid by the defendant in respect of the destroyed stock. Following a hearing conducted between August and December 1998, a judge of the Supreme Court delivered judgement on 30 August 1999 in favour of the defendant. On 13 October 1999 the judge ordered that the plaintiff pay the defendant's costs (the first cost order).

[8] The plaintiff filed an appeal on 24 September 1999 and on 18 January 2001 the Court of Appeal dismissed the plaintiff’s appeal and ordered that the plaintiff pay the defendant's costs of the appeal (the second cost order).

[9] On 14 February 2001 the plaintiff filed an application for special leave to appeal to the High Court. On 3 May 2002 the High Court made orders adjourning that application.

[10] On 16 May 2002 the defendant filed a Bill of Costs relating to the costs of the trial, and summonses for taxation of the costs of the trial and the

appeal. Two weeks later on 30 May 2002 the plaintiff filed a summons seeking to reopen the appeal to the Court of Appeal on the basis of new evidence.

[11] The plaintiff filed applications to stay the summonses for taxation on 4 June 2002. Initially the defendant opposed the application but, on 6 June 2002, the summonses for taxation and the application for the stay of those summonses were, by consent, adjourned sine die.

[12] On 16 April 2003 the Court of Appeal dismissed the plaintiff's application to reopen the appeal. An order for costs was made in favour of the defendant (the third cost order).

[13] On 14 May 2003 the plaintiff filed a second application for special leave to appeal to the High Court. Both applications for special leave were refused on 28 May 2004 and the High Court ordered that the plaintiff pay the defendant's costs of the applications (the fourth cost order).

[14] There is no complaint by the plaintiff concerning the conduct of the defendant with respect to costs in the period leading to the High Court decision delivered 28 May 2004. Nor could there be any such complaint. The basis of the plaintiff's applications for a permanent stay of the summonses for taxation lies in the conduct of the defendant in the subsequent period leading to a letter of 29 August 2014 from the

defendant's solicitor to the Registrar of the Supreme Court seeking to relist the summonses for taxation.

Negotiations - Delays

[15] As mentioned, on 28 May 2004 the High Court refused special leave to appeal. On 22 June 2004, with the assistance of Mr Alan Lindsay, the solicitor from the plaintiff's firm of solicitors who had the carriage of the matter, Mr Roderick Dunbar wrote on behalf of the plaintiff to the Minister for Primary Industry and Fisheries requesting that the defendant not enforce the costs orders made against the plaintiff. Mr Dunbar described the plaintiff as a "family company" that owned Nutwood Downs Station and set out his view of the litigation and the difficulties the family had experienced.

[16] In July 2004 the Hon. John Kerin, former Commonwealth Minister for Primary Industry, and Mr Brian Eade, former leader of the Opposition in the Northern Territory, wrote separately to the Chief Minister of the Northern Territory supporting the request by the plaintiff with respect to the question of costs.

[17] The excessive time taken by the defendant started almost immediately. It was not until 20 February 2006 that the Northern Territory Cabinet made a decision to offer to accept $800,000 from the plaintiff in full settlement of the defendant's costs.

[18] In the period between the plaintiff's letter of 22 June 2004 and the decision of Cabinet on 20 February 2006, advice was provided to Cabinet by Mr Philip Timney, a senior lawyer within the SFNT who had the conduct of the litigation from about May 1999 until he left the SFNT in April 2010, and by Mr David Lisson who was a senior solicitor in the SFNT from 1994 and Director of the litigation division from about February 1999. Mr Lisson had a supervisory role in relation to the litigation.

[19] Mr Timney became aware of the letters to which I have referred and, in his affidavit of 27 February 2015, he described in the following terms the events between the letter from the plaintiff dated 22 June 2004 and the Cabinet decision in February 2006:

> "4. Together with David Lisson, then Director of Litigation at SFNT, I was asked to provide Cabinet with an in-person briefing about the case on or about 3 August 2004. Advice was also obtained from the then Solicitor-General, Tom Pauling QC, in January 2005 which was presented to Cabinet for consideration. I recall that I was subsequently required to provide a further Ministerial briefing and responded to a number of queries raised by Department of Attorney – General and Justice Secretariat and the Attorney – General's office until late 2005."

[20] In his affidavit of 27 February 2015, Mr Lisson described the events between May 2004 and February 2006 in the following terms:

> "7. Between the High Court decision on 28 May 2004 and Cabinet's decision on 20 February 2006, the SFNT was asked to advise in relation to Lexcray's request that costs be waived or forgiven. I had provided a memorandum of advice on at least

> one occasion, Mr Timney and I addressed Cabinet in person on the issue in 2004 and an opinion was obtained from the Solicitor-General in relation to the matter in 2005."

[21] The decision of Cabinet was conveyed by email to Mr Timney and Mr Lisson on 22 February 2006. The terms of the decision were as follows:

> "Cabinet by Decision No. 2258 of 20/02/06 approved the recovery of a discounted amount of $800,000 from Lexcray Pty Ltd for the legal costs owed by Lexcray Pty Ltd to the Territory. The terms of the repayment are to be negotiated with the principals of Lexcray Pty Ltd on the basis that appropriate security for the amount owed is put in place".

[22] Mr Lisson wrote on the email that the amount of $800,000 was "obviously the compromise reached in Cabinet, probably after long, bitter debate." He also wrote that he trusted Lexcray would settle "quickly and without fuss, considering themselves very lucky".

[23] The Cabinet decision of 20 February 2006 was conveyed to the plaintiff's solicitors by letter of 3 March 2006. The letter stated that the SFNT "conservatively" estimated the total costs of the defendant to be in the range of $1.8-$2 million and the offer to accept $800,000 was subject to negotiation and agreement as to the terms of payment and the provision of security for the amount of $800,000. The letter requested that the offer be put to the plaintiff and that the solicitors advise Mr Timney in due course of the plaintiff's instructions.

[24] The letter of 3 March 2006 was addressed to Mr Lindsay who had moved to the Adelaide office of the plaintiff's solicitors. Mr Lindsay said in evidence that he had not been actively involved in the matter since assisting Mr Dunbar to write the letter dated 22 June 2004. He had no recollection of receiving the letter of 3 March 2006. Mr Dunbar said in evidence that he did not recall receiving that letter.

[25] On 25 July 2006 Mr Timney wrote again to the Adelaide address of the plaintiff's solicitors. Mr Dunbar recalled being told of the letter, but Mr Lindsay had no recollection of either the letter or of speaking to Mr Dunbar about it.

[26] In the letter of 25 July 2006 Mr Timney referred to his correspondence of 3 March 2006 and to the absence of a response. He advised that he was required to report to Cabinet on a quarterly basis concerning progress in implementing Cabinet decisions, and that if a response was not forthcoming by 3 August 2006 there would be "little option" other than to report to Cabinet that the offer had been rejected and the matter needed to be resolved through a formal taxation process.

[27] Mr Dunbar telephoned Mr Timney on 27 July 2006. He said in evidence it was likely that he was in possession of the letters dated 3 March and 25 July 2006 at the time he made the call. A file note made by Mr Timney records Mr Dunbar saying "we" did not have any alternative other than to pay and that if forced to pay at that time they

would “go broke”. The note refers to Mr Dunbar undertaking to “negotiate in good faith” and to a deferment of payment “until we get on”. Reference was also made in the note to Mr Dunbar speaking of the big debt and a rebuilding phase.

[28] Mr Dunbar said in evidence that he informed Mr Timney that the offer by Cabinet was accepted.

[29] On 22 November 2006 Mr Timney wrote to the plaintiff concerning the lack of communication from the plaintiff with respect to the defendant’s offer to accept $800,000. Mr Timney referred to the conversation of 27 July 2006 and asserted that the plaintiff had not contacted Mr Timney as undertaken in the telephone conversation. After reminding Mr Dunbar that Mr Timney was required to report “periodically” to Cabinet as to the implementation of its decisions, the letter continued:

> “Unless I hear from you with a proposal for payment by 15 December 2006 I will have little option but to refer the matter back to Cabinet with a recommendation that we reinstate the application for taxation of the Territory’s costs for the trial and appeal at first instance. Those costs alone are in the order of $1.5 million.”

[30] By email dated 2 December 2006, Mr Dunbar apologised for not responding sooner and annexed a “letter of acceptance”. Although the annexed letter was dated 27 July 2006, it referred to the letter from Mr Timney of 22 November 2006.

[31] In the annexed letter Mr Dunbar wrote confirming that he had agreed to accept the offer of $800,000. He said he had agreed because “we” had “no real alternative”. The letter stated that Mr Dunbar “understood that the terms of repayment were to be negotiated, together with agreement as to appropriate security” and that the repayment schedule would “not impede upon the viability of the family business”. Mr Dunbar wrote that he would negotiate “in good faith” with respect to those issues.

[32] The letter from Mr Dunbar concluded:

> “I look forward to hearing from you in the near future”.

[33] The email dated 2 December 2006 to which the letter was attached stated that the original letter would be posted to the SFNT. In his affidavit Mr Timney states that the incorrectly dated letter from Mr Dunbar is stamped as received on 14 December 2006, but it is not clear whether it was the letter sent by email or the original letter by post which is stamped with the date 14 December 2006. The difference is of no consequence.

[34] As mentioned, Mr Dunbar's letter concluded with the statement that he looked forward to hearing from Mr Timney in the near future. In evidence Mr Dunbar said that he thought the ball was in the defendant's court.

[35] Mr Dunbar said he thought the ball was in the defendant's court because of the involvement of his local member of parliament, Mr Elliot McAdam. He said that during the period of negotiations he had lobbied Mr McAdam to negotiate on his behalf. Mr McAdam informed him that the best he could do was $800,000 and suggested that a proposition be put to Cabinet that the amount of $800,000 be secured by a mortgage against the property which would be paid out if and when the property was sold out of the Dunbar name. Mr McAdam told Mr Dunbar he would put the proposition to Cabinet. Subsequently Mr McAdam informed Mr Dunbar the proposition was not rejected by Cabinet and "we'll hear back from them in due course". However, Mr Dunbar did not hear back from Mr McAdam or Cabinet.

[36] Mr Dunbar said he had more than one conversation with Mr McAdam, including the conversation in which the amount of $800,000 was mentioned, but he was unable to recall the dates of the conversations. Mr Dunbar was certain that during one of the conversations Mr McAdam said that he would take back to Cabinet the suggestion concerning securing the debt of $800,000 with the mortgage over the property to be discharged if the property was sold out of the Dunbar family.

[37] In evidence Mr Dunbar said that after his letter emailed to Mr Timney on 2 December 2006 he was waiting for Mr Timney to respond. He was not concerned about the delay in response. Mr Dunbar did not put a

proposal concerning payment of the $800,000 and was quite content with the situation because, as time went by, the plaintiff had more time to get its financial affairs into order.

[38] Notwithstanding the last line in the December 2006 letter that Mr Dunbar looked forward to hearing from Mr Timney "in the near future", Mr Timney subsequently completed internal documentation incorrectly recording that the plaintiff had undertaken to contact the SFNT "soon" as to the proposed method of payment and provision of security.

[39] The date of the next communication is the subject of contention. The SFNT file contains a letter dated 14 September 2007 from Mr Timney to the plaintiff. However, contrary to Mr Timney's practice with respect to file copies of letters sent out by him, the letter on file is unsigned. In his affidavit Mr Timney acknowledges that there is "no firm evidence" that the letter was sent. However, Mr Timney deposed that he believes it was sent and he referred to it in a subsequent letter dated 14 May 2008.

[40] Mr Dunbar denies receiving the letter dated 14 September 2007.

[41] I am doubtful that the letter dated 14 September 2007 was sent to the plaintiff. After referring to the plaintiff's response in December 2006, and to the plaintiff's undertaking to advise the proposed method of payment and provision of security, the letter stated that if a response

was not received within 14 days Mr Timney would have no choice but to report to Cabinet with a recommendation that the application for taxation be reinstated with a view to recovering the full amount owed to the defendant. In substance the terms of the letter were a final demand, but a final demand in September 2007 does not sit well with an internal document based on Mr Timney's report stating that as at December 2007, a final letter of demand was to be sent to the plaintiff in the future:

> "A final letter of demand is to be sent to Mr Dunbar with a request that he commit to repayment of the Territory's legal costs, as discounted. In the event Mr Dunbar does not comply there will be little option other than to reinstate proceedings for costs recovery through the taxation process.
>
> …
>
> A final letter to Mr Dunbar is being sent."

[42] The next communication between the parties was a letter of 14 May 2008 from Mr Timney to the plaintiff. The letter included a proposal for terms of repayment and sought an urgent response. It concluded in the following terms:

> "As advised previously I am required to report periodically to Cabinet in respect of progress in the recovery of costs from Lexcray. To date I have consistently reported that we are waiting on a response from Lexcray as to the proposed terms of repayment. That situation cannot continue indefinitely and we urge you to respond to the above offer as a matter of some urgency.
>
> In the event that …we do not receive a response by 30 June 2008 I intended to report to Cabinet, without further recourse to

> you, that the offer of compromise has been rejected by Lexcray and the matter will need to be referred for taxation."

[43] In its terms, the letter of 14 May 2008 was a final demand.

[44] Although the letter of 14 May 2008 referred to the letter of 14 September 2007 (unsigned in the file), if an unsigned copy was sitting on the file when Mr Timney wrote the letter of 14 May 2008, Mr Timney might have been misled into thinking that he had sent the letter of 14 September 2007. In addition, as I have said, a final demand of 14 September 2007 does not sit well with internal documentation of December 2007 stating that a letter of final demand would subsequently be sent. Similarly, a final demand in September 2007 does not sit well with the letter of 14 May 2008.

[45] In addition, the first mention of the deadline of 30 June 2008 in internal documentation concerning progress of implementing Cabinet's Decision appeared in a report prepared in April 2008. There is no mention of a 30 June deadline in the September letter.

[46] For these reasons, I am not satisfied that the letter of 14 September 2007 was sent to the plaintiff. It is more likely that the letter was drafted, but not sent.

[47] It follows from my findings that after the plaintiff wrote in mid-December 2006, the defendant did not respond until the letter of 14 May 2008, in which Mr Timney stated:

> "To date, despite your advice that you would do so, you have failed to provide us with any indication whatsoever as to how you intend to deal with payment of our costs."

That statement was literally correct in one respect because no proposal had been put, but incorrect in asserting that the plaintiff had previously said it would advise the SFNT how it intended to deal with payment. As mentioned, in his letter of December 2006 Mr Dunbar finished the letter with the statement that he looked forward to hearing from Mr Timney. The delay from December 2006 until May 2008 rested with Mr Timney.

[48] In the letter of 14 May 2008 Mr Timney gave the plaintiff a deadline of 30 June 2008. On 29 June 2008 Mr Dunbar responded with a lengthy letter in which he denied receiving the letter of 14 September 2007. Mr Dunbar wrote that as he had not received any communication since 2006, he had reached the conclusion that the defendant had decided to release his family from having to pay the costs. Mr Dunbar put forward a proposal and a lengthy review of the BTEC scheme and litigation. He suggested that the evidence justified a judicial review of various decisions.

[49] As to the statement by Mr Dunbar that he had reached the conclusion that the defendant had decided not to pursue the costs, during cross examination Mr Dunbar conceded that the statement was an exaggeration and he was "gilding the lily". He agreed that if the

defendant had decided not to pursue the costs, he would have expected to hear of that decision from Mr McAdam and no such communication had taken place.

[50] In the letter of 29 June 2008 the plaintiff put forward a proposal for payment of $800,000:

> "With reference to the Deed the Crown proposes, I suggest that the terms of the agreement should reflect that Lexcray owes a debt to the Territory of $800,000 in the matter of costs; that Lexcray will not be charged interest on the debt; that the debt will be paid when and if the real property of Nutwood Downs is sold out of the Dunbar family at some future date. This course of action was outlined to me as a possible remedy by Elliot McAdam at the time when Cabinet made the original determination to offer the reduction of costs."

[51] Mr Timney responded by email of 30 June 2008. He acknowledged receipt of the communication and stated that he would seek instructions and provide a response "as soon as possible".

[52] The offer by the plaintiff was not conveyed to Cabinet or the Attorney-General. In his affidavit Mr Timney said he discussed the letter with Mr Lisson who advised him that he did not consider that the proposal was reasonable or acceptable. However, the rejection was not conveyed to the plaintiff. Mr Timney stated in his affidavit:

> "I took no further action on this file, other than that described below, after that. I cannot give an adequate explanation for my failure to respond to Mr Dunbar."

[53] Mr Timney worked at the Licensing Commission from August 2008 to February 2009. He returned to the SFNT in February 2009 and remained in that office until April 2010 when he left the SFNT permanently to become the Legal Member of the Licensing Commission. In his affidavit Mr Timney stated he did not do a formal file handover of the Lexcray matter to any other solicitor and remained “formally responsible" for that file until he left in April 2010.
Mr Timney said that when he returned to the SFNT between February 2009 and April 2010, apart from reports designed to inform Cabinet of the current position he did not do any further work on the Lexcray file.

[54] After the acknowledgement to Mr Dunbar of 30 June 2008, which included the statement that Mr Timney would seek instructions and provide a response as soon as possible, the next communication occurred over four years later when the SFNT wrote to the plaintiff by letter of 16 August 2012. The letter referred to correspondence dated 22 November 2006, 14 September 2007 and 14 May 2008, but not to Mr Dunbar’s letter of 29 June 2008. The SFNT letter stated that it appeared “that there has never been any response from you or anyone else on behalf of Lexcray Pty Ltd.” That statement was inaccurate. It omitted the response of the plaintiff dated 29 June 2008 and the email from Mr Timney to the plaintiff of 30 June 2008 indicating that he would seek instructions and provide a response as soon as possible.

June 2008 – August 2012

[55] What happened between 30 June 2008 and 16 August 2012? Although regular reports intended to inform Cabinet of progress were prepared, no action was undertaken to further negotiations or to respond to the plaintiff's proposition in the letter of 29 June 2008.

[56] I have referred to internal documentation and reports. A system was in place designed to inform Cabinet of progress, or lack of it, in implementing Cabinet decisions. The process was known as the Government Executive Reporting System (GERS) which began with reports from each department to the Cabinet Office within the Department of the Chief Minister. The GERS reports were used by the Department of the Chief Minister as the source of information for reports provided to members of Cabinet concerning the status of the implementation of Cabinet decisions. The reports to Cabinet were known as "Implementation Reports." The Implementation Reports did not necessarily contain all the information conveyed to the Cabinet Office in the GERS reports.

[57] Until April 2010 Mr Timney was responsible for the wording of the GERS reports and they were "signed off" by Mr Lisson. Bearing in mind that the plaintiff put a proposal on 29 June 2008, and on 30 June 2008 Mr Timney said he would obtain instructions and respond as soon as possible, the GERS reports that followed during the lengthy period

of inactivity by Mr Timney until the letter of 16 August 2012 were inaccurate.

[58] In addition, it should be noted that in the letters of 14 September 2007 and 14 May 2008 Mr Timney erroneously asserted to Mr Dunbar that in December 2006 Mr Dunbar had undertaken to advise Mr Timney of his proposed method of payment or the provision of security for the debt.

[59] If, contrary to my findings, the letter of 14 September 2007 was sent to the plaintiff, that letter required a response within 14 days. There was no response. Mr Timney said that after the 14 days had expired, he thought about the matter but did not do anything about it. Asked if there was any explanation for the delay between September 2007 and May 2008, Mr Timney responded that there was "no plausible explanation" that he could give.

[60] As to why he did not report the offer in the letter of 29 June 2008 to Cabinet, Mr Timney said he could not explain why he did not make that report "apart from a failing" on his part. He agreed that he should have responded promptly and that a timely fashion would have been within a fortnight, or possibly sooner. In particular, after Mr Lisson had instructed Mr Timney that the offer of 29 June 2008 was not acceptable, there was nothing preventing him from replying to Mr Dunbar.

[61] In December 2006 both Mr Timney and Mr Lisson approved of the following wording in the GERS report:

> "… Mr Dunbar, a principal of Lexcray finally responded in December 2006 advising he had no option other than to agree to pay the costs. He advised that he is no longer legally represented **and will contact the Solicitor for the NT soon to advise on his proposed method of payment or the provision of security for the debt."** (my emphasis).

[62] Mr Dunbar had finished his letter with the statement that he looked forward to hearing from Mr Timney in the near future. Nowhere in the letter did he state or imply that he would contact the solicitor soon to advise on his proposed method of payment or the provision of security. In his evidence Mr Lisson accepted that Mr Dunbar had closed his letter indicating, from his perspective, that he wanted to hear from Mr Timney.

[63] Later in evidence when it was suggested that the GERS report for December 2006 was not, therefore, accurate, initially Mr Lisson responded:

> "Yes, it doesn't fit perfectly squarely".

[64] Asked what he meant by the answer of that the report did not fit perfectly squarely, reluctantly Mr Lisson accepted that the emphasised part of the GERS report was plainly wrong.

[65] Mr Timney agreed that he could not have been under any illusion that Mr Dunbar was expecting the next communication to come from

Mr Timney. He would have made a file note if he had engaged in a conversation with Mr Dunbar and he could only recall one telephone conversation with Mr Dunbar which occurred on 27 July 2006.

[66] Mr Timney's attention was brought to this statement in the December 2006 GERS report that Mr Dunbar was to contact the SFNT soon to advise on his proposed method of payment for the provision of security. He agreed that the report was inaccurate in that respect.

[67] The same inaccurate wording appears in the GERS report of April 2007. In September 2007 the report inaccurately stated that no response had been received from Mr Dunbar and that:

> "Mr Dunbar has not followed through on his agreement to contact the Solicitor for the NT with a proposed method of paying or securing the debt."

[68] As to the statement in the September report that no response had been received from Mr Dunbar, notwithstanding his earlier acceptance that since December 2006 Mr Dunbar was expecting to hear from Mr Timney, when asked later in evidence whether the September 2007 report was unfair to Mr Dunbar, Mr Timney attempted to backtrack from his earlier position:

> "I accept what you say about the end of Mr Dunbar's letter, I was still waiting for him to come back to me with the terms that would be agreeable to him for the security of the amount of $800,000. If I can clarify? I didn't see that it was for me to set the terms that would be agreeable to Lexcray, because I didn't – I had no idea of Lexcray's financial position."

[69] The same inaccurate impression was conveyed in the GERS reports until the May 2008 report which referred to the final letter of demand having been sent requesting a response by 30 June 2008. The reference to the final letter of demand was reference to the letter of 14 May 2008 which provided the deadline of 30 June 2008.

[70] In December 2008 the GERS report stated to Cabinet that attempts to negotiate the terms of settlement had been unsuccessful and that “one further attempt at reaching a settlement with Mr Dunbar will be made." The report continued that if the attempt was unsuccessful there would be “little option available to the Territory other than to seek recovery through the Courts.”

[71] The next GERS report was dated April 2009. For the first time it was reported that Mr Dunbar had “requested a judicial review of the decision against Lexcray”. Comment was made that such a review was not feasible or practical as the proceedings had been concluded in the High Court. The report continued:

> “A final attempt to secure a settlement with Mr Dunbar through a charge over Nutwood Downs (payable on the sale of the property) will be made”.

[72] The report repeated the previous statement that if attempts were unsuccessful, there would be little option other than to seek recovery through the courts.

[73] The wording of the April 2009 report was provided by Mr Timney in an email dated 6 May 2009. In his affidavit Mr Timney states that he completed the reports, or provided information for others to complete the reports, from March 2006 to April 2010.

[74] An email of 24 August 2009 from Ms Tracy Kapitula, Mr Lisson's assistant, to Mr Timney sought an update for the purpose of the August 2009 report and asked the following question of Mr Timney:

> "Has anything else happened on this since I was away? The latest letter on file is dated 14 September 2007 – but I'm sure you've dealt with it since then??"

[75] The statement in the email by Ms Kapitula that the latest letter on file was dated 14 September 2007 did not accurately reflect the state of correspondence. However, there is nothing in the documentary material or other evidence to suggest that Mr Timney corrected the error.

[76] On 2 September 2009 Ms Kapitula sent an email to Mr Timney which commenced with the observation:

> "This matter is never going away."

[77] In response to the request from Ms Kapitula, Mr Timney provided the wording for the August 2009 report which repeated the previous wording concerning the request for a judicial review and provided a progress summary in the following terms:

> "The Department of Justice is still awaiting a response from Mr Dunbar requesting that he commit to repayment of the Territory's legal costs, as discounted, and advise his preferred means of securing payment."

[78] That wording was repeated in seven GERS reports from December 2009 to May 2012.

[79] In responding to the request for an update for the purposes of the August 2009 GERS report, on 2 September 2009 Mr Timney sent an email to Ms Kapitula which led to a further exchange of emails on that day. In summary the exchanges were as follows:

- Timney – "There has been no change since the last report. I have not done anything and I cannot think of anything further I can add."
- Kapitula – "Thanks Phil … how do I put that into words …"
- Timney – "No change."
- Kapitula – "Why didn't I think of that."
- Timney – "Comes from the years of legal training – and a healthy disrespect for bureaucracy!! I have no idea what to do with Lexcray!!!!!"

[80] During his evidence the attention of Mr Timney was drawn to those email exchanges of 2 September 2009. Mr Timney agreed that the exchanges were not the first time the matter had been bought back to his attention since he had been absent from the SFNT office and returned. He agreed that at the time of the exchange he knew that Mr Dunbar had written on 29 June 2008 and that he had responded saying he would get instructions and reply as soon as possible. The

email exchange in 2009 was over 12 months after he had said he would reply to Mr Dunbar as soon as possible. Mr Timney acknowledged that regardless of where he was working and other tasks, in respect of the Lexcray matter he knew it was getting ancient and he had a problem. In spite of the matter being brought into his mind again, he did absolutely nothing apart from preparing the GERS reports.

[81] After agreeing this was not a matter of simply overlooking the file, Mr Timney gave the following evidence:

> Q. So why didn't you do anything?
>
> A. I really didn't know what to do, your Honour. It was – I really didn't know how to resolve it one way or the other.
>
> Q. It just got too hard, did it?
>
> A. Yes, sir and after – if I could say, Lexcray being the basis of my work practice for five or six years, I was heartily fed up with it. It's not a good excuse, your Honour, but it's the best I can come up with.
>
> Q. Why didn't you simply go to Mr Lisson and say 'What do you want me to do?'
>
> A. I should have.
>
> Q. Do you know why …?
>
> A. And I'm sure he would have given me some guidance, had I done that.
>
> Q. He may have actually given you direction?
>
> A. He could have done.
>
> Q. But do you know why you didn't go back to him?
>
> A. Because I thought I had moved on, your Honour. I'm, embarrassed by it now. I regret it, but I didn't do what I should have done.

Q. In your fed up you state of mind did you think it didn't matter?

A. No, I never thought it didn't matter. If I was brutally honest with myself, I was hoping it would go away one day.

Q. Somehow of its own volition it would go away?

A. Yes.

Q. Did you have in mind at any stage that …?

A. Or, your Honour, I should say or that someone else will pick up the file and the taxation would be reinstated. It was never in my mind that I would conduct a taxation or I would be involved with the taxation. I should have instigated it, but it was never in my mind that I would leave the Licensing Commission to come and do the taxation.

Q. Did you have in mind that you might be forced into a taxation, which would be a huge task?

A. Yes.

Q. And something you didn't want to do wrong?

A. I most certainly didn't, your Honour. I don't shy away from that. That's a fact. I did not want to be involved in the taxation.

Q. There were a combination of things that were active on your mind?

A. Yes.

Q. Did it cross your mind that perhaps it would be of assistance to Lexcray if nothing happened for the time being?

A. No, that wasn't in my mind at all. Lexcray's interests were of no interest to me personally.

[82] Mr Timney agreed it was always in the back of his mind that taxation was the ultimate sanction. However, he denied that he did nothing simply to avoid the taxation. He did nothing for a variety of reasons, none of which were valid or justifiable. Mr Timney acknowledged that

he was keen to avoid being personally involved in the taxation, a process which he did not see as a good outcome for anybody.

[83] Mr Timney agreed that the "ball was in his court". As to any explanation for his inaction other than wanting to avoid the possibility of taxation, Mr Timney said he was in a different position doing a different job and he "was getting on with that". Asked for the logical connection between knowing there was a letter due to Mr Dunbar and taking no action, while simply telling the Cabinet office that there was no change, Mr Timney replied:

> "As I tried to explain to his Honour, I was just heartily fed up with it by then. It's not an acceptable excuse, but it's the excuse I have."

[84] Mr Timney agreed that if the matter went to taxation it would have been "huge" and he preferred to settle the issue of costs. Mr Timney asked if he could add something and his evidence continued:

> Q. Yes?
>
> A. In the context of the offer that we made, our costs were in excess of $2 million. Part of my frustration was I couldn't understand why anyone would argue about paying $800,000 when at a taxation of the costs awarded to the Territory would have been far higher, I assumed.
>
> Q. You may have been frustrated and you might have thought that Mr Dunbar was being very foolish, but that couldn't stop you, could it, from saying, 'Alright, Mr Dunbar, we're off to taxation'?
>
> A. No and certainly, your Honour …
>
> Q. 'This can't be done. Put another proposal'?

A. No. And if I could add, your Honour, the most frustrating was when I received that 13-page letter that agitated to basically re-run the case with judicial review. I will concede that I thought at that stage that I'm wasting my time trying to settle this. Mr Dunbar was seeking to re-agitate the case, not negotiate the costs.

Q. No, because he'd asked to re-agitate those issues, did that mean that you would have to deal with what he said, if the matter was to go, for example, to Cabinet or anywhere else, did that mean you would have had a workload?

A. Sorry, I had a …

Q. Did it mean that you would have to undertake a response to that request?

A. No, I wouldn't, your Honour, because I was already moved on to another position, so at that stage, I would have – the only thing that would have been left for me to do, I would have thought, was do a formal handover of the file. The reason I retained the file – normally, if I hadn't just moved to the Licensing Commission, I got – I transferred all my other files except for Lexcray and I didn't transfer Lexcray because it had run so long, it just didn't seem fair or practical that I give that file to someone else who would then have to get across it all and then negotiate this final leg of the case.

Q. And in that situation, when you saw his letter, I take it you were somewhat dismayed by his request for a judicial review?

A. Yeah, dismayed and frustrated, your Honour.

Q. Did it occur to you that because you were the one with the intimate knowledge of the file, you were the one that would have to be undertaking an examination of what he was asking and respond to it or at least give advice to someone?

A. I accept that, your Honour, that was my responsibility.

Q. And was that also a reason why you decided to put it in the bottom drawer, so to speak?

A. That was part of the reason, yes And I think that's – that's a nice way of putting it, I put it in the bottom drawer and hoped – forgot about it and hoped it would go away.

> Q. I am not sure it's intended to be a nice way of putting it, but that is a common expression, isn't it, when somebody finds 'I just can't get on with this' or they have some sort of …. hope that it'll go away, it's a common expression, isn't it, you just put it in the bottom drawer and leave it there?
>
> A. Mr Lisson used to refer to it as the 'dog files'.
>
> Q. A dog file?
>
> A. One that goes in the bottom drawer.
>
> Q. And you hope it'll go away?
>
> A. You hope it'll go away.

[85] As to the inaccurate GERS reports, while conceding the inaccuracies Mr Timney denied intentionally misleading Cabinet. He gave the following evidence:

> Q. Well, Mr Timney, I want you to think very carefully about this. It's one thing to put a file in the bottom drawer for a variety of reasons, unacceptable as that might be, it's another step, isn't it, to actually provide reports that you know might or are likely to go to Cabinet which are misleading?
>
> A. Your Honour, I'm not sure how I respond to that other than to say I would never deliberately mislead Cabinet.
>
> Q. Well, when you say you would never deliberately mislead Cabinet, you approved, in fact you drafted, put forward, wording in documents repeatedly that were misleading, that you were waiting on an offer from Mr Dunbar. Now, for a solicitor of your experience, I'm asking you how you could possibly do that or what motivated you to do that?
>
> A. Your Honour, nothing motivated me to mislead Cabinet, because I didn't deliberately mislead – I didn't ty to deliberately mislead Cabinet, so there's no motivation for me to do that because I didn't try to do that. I may have done it with sloppy drafting or inattention to the work at hand, but there was no motivation to mislead Cabinet, because I didn't try to mislead Cabinet. I may have done so inadvertently, but I most certainly didn't – wasn't motivated to do so.

> Q. You accept that in fact those reports, the repeated reports were misleading?
>
> A. In the context of correspondence between – for there and especially the long letter from Mr Dunbar, yes.

[86] Mr Lisson acknowledged that the delays were unacceptable and that he should have taken action. He recalled that Mr Timney was frustrated and he thought that Mr Timney was having discussions with Mr Dunbar. Once the decision had been made that the offer of 29 June 2008 was unacceptable, Mr Lisson would have expected Mr Timney to respond. There was no need for Mr Timney to obtain instructions as suggested in Mr Timney's email to Mr Dunbar of 30 June 2008.

SFNT delay

[87] Both Mr Timney and Mr Lisson believed that Mr Timney had authority to negotiate and agree upon terms for repayment and provision of security. Mr Timney had the primary carriage of the matter, but overall supervision fell to Mr Lisson to whom Mr Timney would refer if there were difficulties in respect of which Mr Timney needed assistance. Mr Timney had in mind permitting the plaintiff to defer payment of any amount, provided appropriate security was registered over the title to the station property. He was prepared to accept the offer made in Mr Dunbar's December 2006 letter, but he was overruled by Mr Lisson who considered that allowing repayment of the debt to be deferred indefinitely in the manner suggested by Mr Dunbar was unacceptable. Throughout the very lengthy period following the first letter of 3 March 2006

from Mr Timney to the plaintiff's solicitors, and more particularly after the December 2006 letter from Mr Dunbar to Mr Timney, it was always open to Mr Timney and/or Mr Lisson to put offers to Mr Dunbar or to bring negotiations to a halt and obtain instructions from Cabinet to proceed with taxation of costs. There was no impediment facing the SFNT which might explain the delays.

[88] Significantly, at no time did Mr Timney overlook the December 2006 offer which concluded with the statement by Mr Dunbar that he looked forward to hearing from Mr Timney "in the near future". At best from the point of view of the SFNT, the next attempt to communicate with Mr Dunbar was not until nine months later by way of the letter of 14 September 2007 (which I have found was not sent to Mr Dunbar). On the basis of my finding that the letter of 14 September 2007 was not sent, the next communication after December 2006 was Mr Timney's letter of 14 May 2008, nearly 18 months after the offer made by Mr Dunbar.

[89] As mentioned, Mr Timney left the SFNT permanently in April 2010. In response to a request by Mr Lisson to find out the arrangements made by Mr Timney to transfer the Lexcray matter, Ms Kapitula sent an email to Mr Timney on 22 April 2010 asking who was taking over the Lexcray file from him. Mr Timney's response on the same day was as follows:

> "I don't mind who takes over the Lexcray file – preferably someone who is an expert in costs!!

> I don't expect anyone to volunteer so I guess it will stay with me.
>
> Nothing has happened since the last report."

[90] After Mr Timney left the SFNT, Mr Lisson undertook preparation of the GERS reports until he took extended leave from June 2012.

[91] In his affidavit of 27 February 2015 Mr Lisson states that although the reports to Cabinet from April 2009 onwards referred to SFNT making a "final attempt" to secure a settlement, he was not "consciously aware" at that time that this "final attempt" had not been made. Mr Lisson has no recollection or explanation for why the attempt was not made. From Mr Lisson's perspective, the instructions provided by the Cabinet decision of 20 February 2006 remained unchanged and he must "accept responsibility" for the failure to progress the implementation of the Cabinet decision. Mr Timney also said Cabinet's instructions remained the same.

Lost File

[92] According to Mr Lisson, in about April 2010 the current part of the Lexcray file was lost. That part contained correspondence between Lexcray and Mr Timney. Alarmed about the loss of the file, Mr Lisson requested urgent searches be made, but the file was not found before he left his position as Director of the Litigation Division. For the period he undertook preparation of the GERS reports, Mr Lisson did not have

access to the correspondence and was not aware of the exact state of affairs on the file.

[93] The documentation provided to me demonstrates that significant efforts were undertaken to locate the missing file. The history in this regard was canvassed by Barr J in his reasons for judgement delivered 11 May 2015 in respect of an application by the plaintiff for discovery of specific documents. In particular his Honour dealt with the search for the lost files in paragraphs [28] – [33] and it is unnecessary for me to canvass the details of the search.

[94] The missing part of the file, which included correspondence, was found by a graduate clerk on 23 June 2014 among documents which had been retrieved from archives. The search, therefore, had taken place over approximately four years.

2012 – 2014

[95] Notwithstanding that the missing part of the file had not been located, on 16 August 2012 the SFNT wrote to the plaintiff and referred to Mr Timney's letters of 22 November 2006, 14 September 2007 and 14 May 2008. The letter did not refer to Mr Dunbar's letter of offer dated 29 June 2008 or the email response of Mr Timney on 30 June 2008.

[96] Prior to the letter of 16 August 2012, internally there were discussions in the SFNT about the state of the matter and what should be done. An

internal email of 2 August 2012 referred to Mr Timney's letters of 3 March 2006, 22 November 2006, 14 September 2007 and 14 May 2008, and stated that no response had been received to the final letter of demand. The email continued:

> "I mistakenly thought we had received a letter from Mr Dunbar after Phil's letter of 14/05/2008, however Tracey [Kapitula] said we hadn't (as pointed out in the extracts of previous GERS reports below). So I'm not actually sure what was on the missing part of the file.
>
> As I've pretty much given up on locating part 30 of this file (LIT2000 – 1039), do we write a letter and therefore are we able to update the GERS report? I will leave it to you all."

[97] Later that day Mr Rob Jobson, a senior solicitor within the SFNT, circulated an email advising that he had requested Ms Alison Smart (now deceased) to assume carriage of the matter. Mr Jobson noted that Ms Smart would consider whether the SFNT could still pursue recovery action and, subject to confirmation that the matter could still proceed, a final demand would be made that the plaintiff make arrangements to accept and pay the outstanding amount.

[98] On 16 August 2012 Ms Smart circulated an email advising that there was no time barrier to a pursuit of costs and that if Mr Dunbar did not agree to terms in the letter to be sent that day, they would proceed to taxation of costs. Ms Smart wrote to the plaintiff that day and referred to previous correspondence which did not include the letter of 29 June 2008 or Mr Timney's response of 30 June 2008. The letter proposed

that the plaintiff pay the sum of $800,000 by annual instalments of $100,000, together with interest.

[99] The plaintiff responded by letter of 11 September 2012 and attached copies of the correspondence with Mr Timney in June 2008. The response asserted that as no contact had been made since 30 June 2008 until the letter of 16 August 2012, “we” had reached the conclusion that the defendant had decided to release the family from having to pay costs.

[100] In evidence Mr Dunbar denied he was “gilding the lily” and maintained he had formed the belief that the defendant had decided not to pursue “the costs.” However, nothing had been said to Mr Dunbar to promote such a belief and he was aware that only Cabinet could make that decision. No doubt Mr Dunbar hoped the delay meant that the defendant had decided not to pursue the plaintiff for its costs, but I am satisfied that, “deep down”, he thought it was just the government “taking its time” and believed that, eventually, he would have to pay the debt.

[101] The SFNT responded by letter of 25 September 2012 stating that instructions would be sought and the process of obtaining those instructions might take some weeks.

[102] It is apparent that when Ms Smart wrote the letter of 16 August 2012, she was not in possession of Mr Dunbar's letter of offer dated 29 June 2008. Nor was she

in possession of Mr Timney's email response dated 30 June 2008. Following receipt of Mr Dunbar's response of 11 September 2012 to which copies of that correspondence were attached, Ms Smart was obviously in a difficulty because the SFNT had been proceeding on the incorrect basis that Mr Dunbar had not responded to the final demand dated 14 May 2008 and had never put forward a proposal for repayment. Hence Ms Smart responded to Mr Dunbar advising that instructions would be sought.

[103] Contrary to the indication in the letter of 25 September 2012 that the process of obtaining instructions might take "some weeks", it took a little over 17 months before the SFNT made further contact with the plaintiff by letter of 3 March 2014.

[104] As to what occurred after the SFNT wrote to the plaintiff on 25 September 2012, there is no direct evidence as to steps taken by the SFNT, but it is apparent from documentation that the matter was referred to the Attorney-General. A draft Cabinet submission was prepared, presumably by the SFNT, and signed by the Attorney-General on 23 November 2013. It appears that a draft had been circulated in September 2013 to the departments of Chief Minister, Treasury and Finance and Primary Industry and Fisheries, and approval had been given to present a submission to Cabinet. However, the submission signed by the Attorney-General on 23 November 2013 was not circulated to members of Cabinet.

[105] In February 2014 a memorandum was prepared and signed by the Attorney-General addressed to "Cabinet colleagues" for out of session consideration. That memorandum summarised the history and asked Cabinet members to note that the Attorney-General intended to provide the SFNT with instructions to confirm the proposal approved by Cabinet in 2006 and, in the absence of agreement with the plaintiff, "to seek to have the taxation of costs proceedings revived on the basis that the Northern Territory will seek its full entitlement to costs." Stamps on various copies suggest that the memorandum was circulated out of session to members of Cabinet.

[106] The Attorney-General signed the memo on 21 February 2014. I infer that subsequently he gave instructions to the SFNT in accordance with the memo and that such instructions led to the letter of 3 March 2014 from the SFNT to the plaintiff.

[107] In the letter of 3 March 2014 the SFNT stated that Bills of Costs in taxable form had been filed for a total in excess of $1.5 million and Bills of Costs had not yet been prepared in respect of the High Court proceedings and the second proceeding before the Court of Appeal. Against that background the letter stated that the defendant remained willing to settle the liability for costs in the amount of $800,000 on either of two bases set out in the letter. The concluding paragraphs of the letter were in the following terms:

> "If neither option 1 nor option 2 are exercised by Lexcray within one month of this letter, I will apply to the Supreme

> Court to have the taxation of costs proceedings revived and have Bills of Costs prepared in the High Court and further Court of Appeal proceedings. The Northern Territory will seek its full entitlement to costs.
>
> This letter is to be taken as one month's notice under Supreme Court rules 3.05 of the Northern Territory's intention to revive the taxation of costs proceedings already commenced in that Court.
>
> I look forward to hearing from you."

[108] The plaintiff did not respond to the letter of 3 March 2014. On 29 August 2014 the SFNT wrote to the registrar of the Supreme Court seeking to relist the summons for taxation. The application to stay, strike out or dismiss that summons was filed on 17 November 2014.

Summary

[109] In summary, the key dates with respect to the lapses of time are as follow:

- 16 May 2002 – summonses for taxation filed.
- 4 June 2002 – summons for stay for summonses for taxation filed.
- 6 June 2002 – by consent summonses for taxation adjourned sine die.
- 28 May 2004 – application for special leave refused by the High Court.
- 22 June 2004 – letter from plaintiff to Minister for Primary Industry requesting that the defendant not enforce the costs orders.

- 20 February 2006 – Cabinet decision to accept $800,000 in full settlement of the defendant's costs.

- 3 March 2006 – letter from SFNT to plaintiff's solicitors advising of the Cabinet decision and seeking a response to the offer in due course.

- 25 July 2006 – follow up letter from SFNT to the plaintiff's solicitors.

- 27 July 2006 – telephone conversation between Mr Dunbar and Mr Timney in which Mr Dunbar advised that the offer by Cabinet was accepted and he would negotiate in good faith.

- 22 November 2006 – SFNT letter to the plaintiff concerning lack of communication from the plaintiff.

- 2 December 2006 – "letter of acceptance" emailed to SFNT advising that the offer was accepted and the plaintiff would negotiate in good faith with respect to a payment schedule and security. The letter concluded with the sentence "I look forward to hearing from you in the near future".

- 14 September 2007 – unsigned letter on SFNT file. Unlikely it was sent.

- 14 May 2008 – letter from SFNT to the plaintiff incorrectly stating that, to date, the plaintiff had failed to comply with his previous advice that he would provide the SFNT with an indication as to how he intended to deal with the payment of costs.

- 29 June 2008 – letter of offer from the plaintiff to SFNT which included a request for a judicial review.

- 30 June 2008 – SFNT response by email in which Mr Timney stated he would seek instructions and provide a response "as soon as possible".

- 2 September 2009 – email exchange between Mr Timney and Ms Kapitula during which Mr Timney wrote that he had “no idea what to do with Lexcray”.

- 30 June 2008 to 16 August 2012 – no further communication between the parties. Regular inaccurate GERS reports.

- 16 August 2012 – letter from SFNT stating incorrectly that there had not been a response from the plaintiff to the letter of 14 May 2008 and repeating the offer of 14 May 2008.

- 11 September 2012 – letter from the plaintiff to SFNT advising of both the response of 29 June 2008 and Mr Timney’s confirmation of receipt dated 30 June 2008.

- 25 September 2012 – letter from SFNT to the plaintiff advising that the SFNT would need to obtain instructions and the process might take “some weeks”.

- September 2012 to March 2014 – no communication between SFNT and the plaintiff.

- 3 March 2014 – letter from SFNT to the plaintiff advising of a different offer to be accepted within one month or an application would be made to revive the taxation of costs proceedings.

- 29 August 2014 – letter from SFNT to the registrar of the Supreme Court seeking to relist the summonses for taxation.

Plaintiff’s Attitude

[110] As I have said, following his letter of December 2006 Mr Dunbar was content to let time pass because it was to the advantage of the plaintiff. That attitude did not change. With respect to the lack of response to his offer of 29 June 2008, Mr Dunbar agreed that he thought “they could

take as long as they liked because the longer it went on, the better position [the plaintiff] would be in to meet the $800,000."

Impact of Lapse of Time

[111] Against the background of the extensive and "contumelious" delays by the SFNT, and through the SFNT by the defendant, the plaintiff advanced a case that seeking to tax the costs now amounts to an abuse of the process of the court. The plaintiff relied on the inherent power of the court to order a permanent stay as an abuse of process "in order to safeguard the administration of justice". In substance the plaintiff submitted that contumelious delay by the SFNT, in itself, was sufficient to result in an abuse of process and, further, that the delay has given rise to such prejudice to the plaintiff in attempting to deal with a taxation process that to allow the matter to proceed would be unfair and would bring the administration of justice into disrepute.

[112] The case for the plaintiff requires, therefore, consideration of the impact of the lapse of time. While Mr Dunbar acknowledged in evidence that the delay in finalising negotiations has worked to the financial advantage of the plaintiff, because the plaintiff has not had to meet its debt to the defendant and has had the opportunity to get on with its business without meeting the debt, the critical question is centred on the impact of the lapse of time upon the plaintiff's capacity to properly deal with the taxation process. In summary the plaintiff advanced the following propositions:

- "The ten-year delay between 2004 and 2014 has resulted in serious and redeemable prejudice to Lexcray in defending the Taxation Summonses. The delay is of such magnitude that this is a case where, absent any specific evidence of prejudice, it should be inferred in any event."

- The delay will "impact severely on the capacity of both Mr Lindsay and his then assistant Mr Gideon Super to recall the events which are relevant to assessing the Bills of Cost and hence on Lexcray's ability to raise objections.

- Mr Lindsay's capacity to recall relevant events in relation to over 4000 items claimed in the Bills of Costs and give advice on them will be adversely affected.

- Mr Lindsay's capacity to recall relevant events in relation to at least 15 costs orders in the plaintiff's favour, which would operate as a set off against the plaintiff's liability to the Territory, will be adversely affected.

- There will be difficulty locating relevant documents in 135 archived boxes of documents held by the plaintiff's former solicitor.

- The inordinate delay will increase the costs of defending the taxation summonses.

- Non-compensable inconvenience and stress will be caused to Mr Dunbar and his family.

[113] In support of the application, Mr Dunbar outlined the history from his perspective in his affidavit dated 17 November 2014. Part of that history included the impact of the trial and appeals upon Mr Dunbar and other members of his family which is not directly relevant, but provides background to Mr Dunbar's concern about the likely impact of proceedings related to taxation:

> "[48] In the light of this background, I am extremely concerned about the impact which proceeding after all these years with the taxation of costs as proposed by the Northern Territory will

> have on me and my family. Having regard to the complexity of the costs issues and the matter generally, I expect that I will need to be closely involved in the matter so I can try to instruct Lexcray's lawyers. Any prospect of me becoming sufficiently familiar with the issues related to costs has been made exponentially more expensive, difficult and stressful because of the Northern Territory's delay. I am extremely concerned about the impact this will have on our family's business at Nutwood Downs and on our health and well-being generally. It is impossible to predict exactly what will result from permitting the Northern Territory to proceed with the taxation of costs after all these years. However, I do believe that, if the Northern Territory is permitted now to proceed with these taxations, the Northern Territory's delay will cause very significant and irreversible personal detriment to me and my family."

[114] In a subsequent affidavit dated 10 April 2015, Mr Dunbar pointed out that Nutwood Downs is their family home and business. It is a very remote cattle station located approximately 100 km from the nearest town and about 400 km from Katherine. Mr Dunbar and his wife have three children, including a 13-year-old child who is schooled through the Alice Springs distance education program with the assistance of Mr Dunbar's wife. The eldest child is studying law and working in a solicitor's office. Mr Dunbar, his wife and their second eldest child work on the station on a full-time basis. They generally work from 6:00 am to 6:00 pm, seven days a week, depending upon the season, and their only break in the year is for a brief period during the wet season.

[115] As to the personal impact of dealing with the matter of the litigation and costs, Mr Dunbar deposed as follows:

> "[19] Being now required to deal with this matter 11 years after the High Court refused special leave and 6 years after I thought the litigation had finished entirely is causing me and my family a lot of stress. We are having to go over the hurt and pain of

> that episode of our lives again. In a family as close as ours and which lives (apart from [eldest child]) in such an isolated place, it is not possible to shield my wife and my children from the consequences that will arise from the revival of this litigation. In addition, working on affidavits, travelling 400 km to Katherine to have my affidavits witnessed, travelling to Darwin to meet with our lawyers, attending mediation and the hearing are all taking up a large amount of the time we would ordinarily spend working the station. I anticipate this would continue if the taxation process is allowed to proceed. It is causing and will continue to cause us great stress and anxiety."

[116] The outgoing battle between the parties is undoubtedly a matter of great concern to Mr Dunbar and his family. However, as I have said, I do not accept Mr Dunbar's evidence that he thought the "litigation had finished entirely." Mr Dunbar was aware throughout the years of silence that the costs negotiations remained alive and, eventually, the issues of payment and security would have to be resolved.

[117] As to the taxation process, there is nothing in the evidence to explain why Mr Dunbar would have other than a minimal involvement. To the contrary, the process of checking and objecting would not require any input or instruction by Mr Dunbar.

[118] The case for the plaintiff concerning prejudice caused by the delay relies heavily upon the evidence of Mr Lindsay who, as I mentioned, was the partner at the plaintiff's solicitors with the conduct of the litigation and appeals. He has sworn affidavits dated 10 December 2014 and 10 April 2015 from which I extract the following summary of the key points arising from his evidence:

- "[T]he process of obtaining discovery from the Northern Territory was protracted and various interlocutory orders were made against the Northern Territory."

- There were "numerous delays" brought about by the defendant, including complying with interlocutory orders and management directions.

- The defendant changed its entire legal team close to the trial.

- The plaintiff made attempts to agree documents and witnesses for the purposes of limiting costs, but many attempts were unsuccessful.

- A number of costs orders were made in favour of the plaintiff as a result of delays or defaults by the defendant in complying with interlocutory orders.

- Not all costs orders were formally taken out.

- Mr Lindsay developed a document management database and an evidence management database. The databases were prepared for BTEC cases and Mr Lindsay became proficient in using the databases. He relied upon them heavily for his preparation work and "sorting and analysing documents." "The document management system was essentially an electronic 'card' for each document that contained formal parts, some summaries of contents and notes about how it was to be used, what points it proved, the source and duplicates et cetera". Mr Lindsay "generally entered comments about documents directly into that database, rather than on paper."

- Mr Lindsay would have "considerable difficulty" in assisting preparation of a response to the bills of costs and in preparing bills of costs for the orders made in favour of the plaintiff.

- In order to respond to the bills of costs, and to prepare bills of costs for the plaintiff, it will be necessary to reassemble the Cridlands files and, if possible, to reactivate the electronic document management system. At the time Cridlands files were sent to archive storage,

the documents filled up “two or three rows of filing cabinets around the walls of two dedicated rooms”, and there were many documents not in cabinets which had been created or worked upon by Mr Lindsay, Mr Super and counsel. It took a number of days for two paralegals to pack the documents for archiving.

- Mr Lindsay estimates that each archive box contains the equivalent of approximately five or six lever arch folders and although there was some “limited sorting” of documents when the files were archived, much was unsorted”. Some of the material was in files, some in lever arch folders and some loose.

- Mr Lindsay has always experienced difficulty interpreting the handwriting of Mr Super who had most of the dealings with the defendant’s solicitors on procedural matters. Mr Lindsay does not believe he would be able to reconstruct or interpret the detail of Mr Super’s work from his file notes.

- Mr Lindsay has conducted a number of large taxations and, in his experience, “it is often necessary to be able to place individual items in the context of the overall litigation and its preparation to be able to assess if the claims are proper or if there are any proper objections.”

- Mr Lindsay has only a “very general recollection of circumstances and events which would be relevant to preparing objections to the Bill of Costs.” While Mr Lindsay's memory will be improved on reviewing the files, Mr Lindsay believes there will be “areas” where his memory is not refreshed at all or with “necessary accuracy” and the context will be lost.

- With respect to “potential repetition of work” by the defendant when the legal team changed, in 2002 Mr Lindsay had an understanding of the extent of work required and would have been in a position to assess the extent to which work was being repeated. He does not now have such a memory.

- The defendant reported that preparation of the Bill of Costs for costs to the conclusion of the trial involved 60 hours of solicitor time and 142 hours of clerk time. To

that must be added six hours of solicitor time and 12.6 hours of clerk time for preparation of the Bill of Costs relating to the appeal. In Mr Lindsay's view, having regard to the number of Cridlands files, his time to try and analyse the material and prepare objections to the bills would now be at least triple the time taken by the defendant in preparing the bills. In this regard:

"(a) there is nobody at CridlandsMB who has any understanding of the archived files. I would need to sort them and try to reconstruct the file myself;

(b) it would then be necessary to review some or all of that material with Mr Super and potentially other persons involved in the proceedings about their notes and their recollections and/or arrange for them to review the relevant material in some way;

(c) items that I would once have been able to deal with from immediate memory will need to be cross–checked from the reconstructed file;

(d) what appears to have been a clerical task by the Northern Territory in preparing some parts of the bills could not be responded to by a clerk on behalf of Lexcray."

- If Mr Lindsay had to perform the task of preparing objections to the Bill of Costs, "guess" is that it would take a minimum of five weeks of his time and an unknown amount of Mr Super's time. A clerk or paralegal would also need to be involved.

- In Mr Lindsay's "very general estimate", the cost of his involvement would be "in the order of $138,500 depending on whether it occurred in the dry season or the wet season and assuming that it only took five weeks."

- In Mr Lindsay's opinion, it is not adequate in this case to prepare objections by reference only to the Bill of Costs or by referring to correspondence only as there are "a number of other discretionary considerations" which apply when determining whether the work was properly charged against the plaintiff. For example, with respect to the claim for approximately $25,000 for drafting an amended defence, in assessing the party/party reasonableness of that cost, "it is necessary to have an

understanding of the issues pleaded, the way in which those pleadings changed, what issues were pleaded by the defence and how they arose, who prepared the amendment and how the activity related, if at all to the interlocutory costs orders". Neither the "description in the Bill or the correspondence assists in that assessment."

- "There are many items in the Bill of Costs that are not self-explanatory and are simply a description of the activities. In this matter there are issues of relevance, reasonableness, solicitor/client considerations, interlocutory costs orders, allowances for care, skill and consideration, duplications etc that would in many cases require an understanding of the work claimed and its context."

[119] Mr Lindsay was cross examined about a number of aspects of his affidavit evidence. As to the process he would follow in deciding what objections to take, first Mr Lindsay would physically check the items in the bill against entries in the Cridlands file. Next he would consider each item and endeavour to work out the context of the items. He would also check interlocutory orders and costs orders which might reflect on claims such as preparing amendments to pleadings. While in 2002 he considered the Bill of Costs for the purposes of an application to stay the taxation process, Mr Lindsay did not consider the Bill for the purpose of determining whether there were any objectionable items in it. Similarly, Mr Lindsay has now looked at the Bill to work out, as best he can, how he would now go about the task of doing objections, but he has not started the exercise of assessing which items are objectionable.

[120] Mr Lindsay agreed that a large percentage of the disbursements would be uncontroversial and he would not need the document management system for that exercise.

[121] As to other claims in the Bill, in answer to the proposition that he would not suggest it was impossible for him to undertake today the exercise of deciding which items would be the subject of the of objection, Mr Lindsay gave the following answer:

> "Well there is a lot wrapped up in the expression 'impossible.' So it would be more difficult and time-consuming and I think the point I made in my affidavit is that I am not satisfied that I would be able to do it properly. So I am sure somebody could take the file without knowing about it and do some kind of exercise. I don't know what quality of response I would produce now."

[122] Mr Lindsay agreed that it is a matter of speculation how many items could not now be checked adequately. He made the obvious point that this question cannot be determined without doing the work.

[123] As to the usefulness of the document management system in the taxation process, Mr Lindsay said that if available it would have been useful in relation to some aspects**.**

> "For the document management system, we used it, for example, to do the index for the court documents, and so with that you could check which documents had been agreed; which ones were objected to; the grounds of the objections; our workings on the documents, that kind of thing. So, it would have gone to topics like, facts and documents that have been agreed, which were the priority documents, which were not, what were the sources of them; that kind of thing."

[124] By mid-2007 Mr Lindsay had not been involved in the matter for approximately three years. It had been a "vivid case" and the loss was a matter of great personal disappointment to Mr Lindsay. Once his involvement was finished he actively

tried not to think about the case and had “worked hard” in attempting to put the case out of his memory. He was not successful in that attempt, and although his memory had faded by 2007, it had not faded to the extent that it has faded today.

[125] As to what difference there might be between the exercise today and trying to undertake it in 2009, Mr Lindsay said he could not really say because there has been a gradual fading of memory. The same sorts of difficulties would have existed in 2009.

[126] Mr Lindsay thought that “probably” the document management system would not have been available in 2009. It appears from efforts made by the plaintiff's former solicitor to access the system on a decommissioned computer were, in substance, unsuccessful. It is unlikely that the management system would be available if the taxation process proceeds.

[127] Mr Super is a legal practitioner now practising in New South Wales and is the principal of an incorporated legal practice. In his affidavit of 10 April 2014 Mr Super deposed that as the sole principal of a family law and litigation practice based in Sydney, it would be very difficult for him now to set aside time to be involved in a taxation process. He is willing to assist, but given the demands on his time in his practice the assistance he would be able to give would be very limited. In addition to expenses, his professional time will be charged at no less than $575 per hour.

[128] At this time Mr Super's recollection of the file is “big picture” and somewhat vague. To assist in the process he would need to review specific details from the

plaintiff's files and he anticipates this would involve the equivalent of at least several full days work.

[129] Mr Super said he had many direct dealings with the defendant and throughout the proceedings he used the electronic document management database. He relied on that database for much of his preparation work and in sorting, categorising and analysing documents. Mr Super recalls that the matter was "a very document intensive case with a large number of documents that needed to be managed and analysed."

[130] In addition to the costs about which Mr Lindsay gave evidence, the plaintiff drew attention to the likely costs of retrieving and sorting the files of the plaintiff's solicitor which have been archived. One hundred and thirty five standard archive boxes (32(d) x 41(w) x 26(h)) were archived and it appears that the files will not be in lever arch files but in envelopes. Each box contains approximately 1,500 pages, but as storage occurred nearly seven years ago the solicitors have no idea how much is in each box. The estimate given by the solicitors for retrieving and sorting is approximately $40,000 plus GST.

[131] The plaintiff also relies on the evidence of a legal cost consultant, Mr Ariel Weingart, who provided a report of 9 April 2015 and was cross examined. Mr Weingart was admitted to practice in 1971 and has practiced as a costs consultant continuously since 1972. Since admission he has practiced as a sole practitioner, primarily in the areas

of commercial law and conveyancing. Mr Weingart is highly experienced in the area of costs.

[132] In his affidavit Mr Weingart deposed to his usual practice and explained that his first step is to consult with the solicitor who conducted the matter to obtain information as to the issues in the case and how the case was conducted. Usually he seeks the comments of the solicitor in relation to the items set out in the Bill of Costs. In Mr Weingart's view, solicitors with the carriage of the matter invariably have a good grasp of detail and nuances which are not necessarily apparent from the file.

[133] Mr Weingart regards access to the plaintiff's file is essential in preparing objections to a Bill of Costs.

[134] Mr Weingart made the obvious observation that as more time passes it becomes harder to retain accurate recollection of details and nuances of a particular matter. Speaking generally, he agreed with the views expressed by Mr Lindsay.

[135] Bearing in mind his view that it is necessary to resort to the file in "considerable detail", and to confer with Mr Lindsay, Mr Weingart estimated that the likely time required to prepare a notice of objection to the bills would be in the order of 220 hours. As his rate is $400 per hour plus GST, he estimated the cost of preparation of notices of objection would be approximately $88,000, plus GST.

[136] In evidence, based on the information provided by Mr Lindsay as to the data base, Mr Weingart maintained that access to the data base would assist in preparing notices of objection because of the probability there were comments about relevance and matters such as duplications. Of course, as the data base is not available, Mr Weingart was not in the position to determine the extent to which the data base might be of assistance.

[137] With respect to the importance of delay and access to the solicitor who had the carriage of the matter, Mr Weingart acknowledged that back in the 70's there were many more cases when a long period elapsed between the commencement of proceedings and the taxation of costs. He has had involvement in cases involving a considerable number of years and also cases where solicitors had moved on and memories had faded. In those circumstances Mr Weingart had no option but to proceed without the input of the solicitor and simply had to do his best. Mr Weingart also agreed that the quality of what he was able to produce by way of objections to bills of costs in those cases depended upon the quality of records kept by solicitors on both sides.

[138] As to the extent to which the taxation process is paper driven. Mr Weingart gave the following evidence:

> Q. And the whole fact that you have a job as a professional costs consultant is testimony to the fact that the taxation process is a paper-driven process and that experts, such as yourself, are able, effectively, to come into a matter which they

> haven't been familiar with before and do the job of the costs taxation. Correct?
>
> A. Yes, but not as well as if it was the lawyer involved himself; that's the preferred position as far as I am concerned, but yes, you're right.
>
> … Q. I'm putting to you that in an ordinary case your general experience and expertise outweighs any lack of personal familiarity you have with the case, and I'm suggesting to you that the reason for that is that essentially it is a paper-driven process. That's a double question I'm sorry, but can you deal with both of those propositions?
>
> A. I reiterate there isn't really a substitute for knowledge of the case, intimate knowledge of the case, especially large matters such as this, and that's fundamental in my view. If that isn't available then you move to the next option. So far as being a paper-driven process it's a process whereby one party presents an itemised bill; the other party needs to understand what the claims are and what the facts were in order to raise objections to the claims for costs.

[139] In response to the plaintiff's case concerning the impact of delay, the defendant relied upon the evidence of Ms Kerrie-Ann Rosati. Having been admitted to practice in New South Wales on 1 July 1988, Ms Rosati worked in a large firm as a solicitor, mainly in commercial litigation, property and general commercial practice groups. After time off for family reasons, Ms Rosati joined DGT Costs Lawyers in February 1998 as a Legal Costs Consultant. In 2000 she took on the roles of Client Services Manager, Costs Consultants Manager and General Manager. She became solicitor director and principal of the firm in October 2007. Ms Rosati has practiced exclusively in the area of legal costs since joining DGT in 1998. Ms Rosati is highly experienced in the area of legal costs.

[140] In her affidavit dated 19 February 2015 Ms Rosati explained the bases for objections and the process she usually follows. In her view, when preparing a notice of objection, “a costs lawyer really only needs a copy of the judgment, the costs order and the itemised bills of costs”. Ms Rosati said it is not usual for the party preparing objections to have access to the file of the solicitor for the successful party.

[141] Mr Weingart disagreed with that opinion. In his report he said that in order to formulate a view as to whether an item was reasonably required to be done and, if so, whether the time spent was reasonable, it is essential to look at each item of work, such as the correspondence, document or attendance note. These are documents to be found on the file of the successful party.

[142] Ms Rosati deposed that she considers it is preferable to have access to the file of her instructing solicitor, but it is not always necessary in preparing a notice of objection. She said that on many occasions she has been instructed to prepare a notice of objection without any access to any file material. While the unavailability of a file makes the task of formulating objections more difficult, “it is by no means impossible”.

[143] In the opinion of Ms Rosati, it is “most likely” that a costs lawyer would not need access to all of the 135 boxes that make up the plaintiff’s file. In her view “it is very likely” that a costs lawyer preparing notices of objection would gain sufficient information by

access only to the correspondence and pleadings folders on the file. Again, Mr Weingart disagreed with that view. In his opinion it is essential to look at court documents, "correspondence, attendance notes, time records, discovered documents, briefs, memoranda, proofs of evidence and the like".

[144] Ms Rosati also expressed the opinion that inability to access the document management system would not preclude the plaintiff from adequately responding to the bills of costs. She pointed out that in the period 1993 to 2002, courts did not have the facility for electronic filing and data management and, therefore, it is likely that paper copies of all documents used in the proceedings would be contained in the files of each of the solicitors with the carriage of the matter.

[145] As to the involvement of the solicitor who had the carriage of the matter, Ms Rosati acknowledged that the elapse of time will no doubt make the task of objecting to these costs more difficult than if the proceedings had been recently resolved and the solicitors with the carriage of the matter had it in the forefront of their minds. However, in her view an experienced costs consultant or costs lawyer does not need to be instructed or supervised by the solicitor who had the carriage of the matter. From her perspective, the bills of costs stand alone and, if further information is required to verify the claims, the necessary information should be found in correspondence and pleadings.

[146] During cross examination Ms Rosati agreed that if the solicitors with the carriage of the matter had the matter in the front of their minds, in a big matter like this the solicitors could provide valuable input. However, although the solicitor would be helpful if objection was taken on the basis that the defendant had caused or spent more money because of their own delays and inefficiencies, in Ms Rosati's view those matters would become evident from the correspondence files. Ms Rosati agreed that the best solution is a good consultant and a good solicitor with the knowledge of the case.

[147] Ms Rosati agreed with the proposition that the work of a consultant in compiling objections and working out what items should be the subject of objection is essentially a paper-driven process. In her opinion the documents stand alone. However, Ms Rosati also agreed that although a notice of objection could be produced on the papers alone, it could be "suboptimal" and the process would be enhanced if a solicitor with the intimate knowledge of the case was available.

[148] As to the likely costs of preparing notices of objection, Ms Rosati estimated that the total time would be 143 hours which would cost between $49,000 and $56,000 plus GST. She added the qualification that in view of the way in which the bills have been drawn and the scarcity of detail narrative in the items of the bills, in her experience, it is likely that the costs would be significantly lower.

[149] The evidence provided by Mr Weingart and Ms Rosati included reference to specific items in the bills of costs which were used as examples relevant to various views expressed by those witnesses. It is unnecessary for me to refer to those specific examples.

[150] Although I am satisfied that the extensive lapse of time between the events of the 1990's to today will create difficulties for both parties should a taxation process be undertaken, the problem for the plaintiff is the absence of evidence from which it can be reasonably inferred that the taxation process would be relevantly unfair or oppressive to the plaintiff by reason of loss of memory and/or lack of documentation.

[151] Mr Lindsay frankly acknowledged that he had not looked at the Bill of Costs at any time with a view to identifying potential objections. No evidence has been led concerning the state of the files and records of either party other than a suggestion that the files of the plaintiff's solicitors were not maintained in a pristine condition in the archiving process. There is no evidence as to how much of the Bill of Costs is likely to be subject to objection and whether there is likely to be any difficulty in locating the appropriate records in respect of the matters that would be subject to objection. While it is reasonable to assume that locating the relevant documentation will incur costs additional to those that would have been incurred prior to archiving the solicitor's file, attempting to draw any conclusions with respect to these issues is an exercise in speculation.

[152] As to the likely costs of the taxation process, it should not be overlooked that even if the process had been undertaken in 2004 immediately after the High Court refused special leave, it would have been a very large exercise. The word Mr Timney used was “huge”. The archiving of the files, coupled with the effect of the passing of time on memories, would result in additional costs being incurred if the process was undertaken today. However, other than the rough estimate of $40,000 to retrieve and sort the files from archives, which was strongly challenged and I regard as excessive, the extent of the additional cost has not been advanced with any degree of certainty and is also a matter of speculation.

[153] In respect of additional costs, regard should be had to the powers of the Taxing Master with respect to costs of a taxation. In written submissions the defendant has acknowledged that the powers are “amply wide enough” to permit the Taxing Master “to deprive the Territory of its costs or to order the Territory to pay Lexcray’s additional costs, or both”, if “persuaded that additional cost had been incurred as a result of delay on the part of the Territory”.

[154] As an aspect of the prejudice asserted by the plaintiff, the issue of additional costs is left in a vague state and, at best for the plaintiff, is a matter of relatively minor significance.

[155] As to the effects of a lengthy lapse of time, in *Batistatos v Roads and Traffic Authority of New South Wales* (*Batistatos)*[1] the Court of Appeal had found that if a hearing took place it would only be a "formal enactment of the process of a hearing" and the process would not be "just".[2] Further, the Court had found that there was "no useful evidence" available concerning the critical issue.[3] These were the objective effects of a lapse of approximately 29 years between the accident upon which the claim was based and the filing of the statement of claim.

[156] The effects in *Batistatos* are far removed from the potential effects upon the taxation process under consideration. While the lapse of time is likely to have some adverse impact upon the plaintiff's ability to conduct the taxation, the extent upon that impact is a matter of speculation. A significant percentage of the Bill of Costs is unlikely to be challenged. The hearing of the live taxation issues would relate only to the controversial items which have not been identified other than in general terms. There is no evidence to support a conclusion that there is a substantial risk that the hearing with respect to controversial items would be relevantly unfair. To the contrary, the evidence suggests that the files of the parties would be available. Further, I was impressed by the evidence of Ms Rosati concerning the capacity of a costs consultant

[1] (2006) 226 CLR 256.
[2] *Batistatos* (2006) 226 CLR 256 at 278 [55].
[3] *Batistatos* (2006) 226 CLR 256 at 278 [55].

to deal with the taxation process adequately in the circumstances under consideration. While the hearing might be “suboptimal”, to use the word used in questioning some of the witnesses, the evidence fails to establish that the plaintiff would not be able to deal with the process adequately. More is needed to establish the substantial risk of relevant unfairness than a general opinion that the hearing might be “suboptimal”.

Principles

[157] In opening written submissions, the plaintiff invited the court to order a permanent stay of the summonses for taxation in the exercise of its inherent power on the basis that to allow the summonses to proceed would result in an abuse of process. In addition, the plaintiff relied upon RSC 23.01 of the Supreme Court Rules which is in the following terms:

> 23.01
>
> (1) Where a proceeding generally or a claim in a proceeding:
>
> (a) does not disclose a cause of action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the Court
>
> the Court may stay the proceeding generally or in relation to a claim or give judgement in the proceeding generally or in relation to a claim.

[158] The defendant's written opening advanced the proposition that RSC 23.01(1) does not apply to taxation of costs. The defendant's submitted that the references to "a claim in a proceeding" on which the court may "give judgment" demonstrates that the rule relates to the "substantive phase of the litigation."

[159] In my opinion RSC 23.01(1) is applicable. The rule addresses "a proceeding generally" or "a claim in a proceeding" in respect of which the court may "stay the proceeding generally or in relation to a claim" if of the view that the proceeding generally or a claim is an abuse of process. The power to give a judgment is an additional power to give judgment in the proceeding generally or in relation to a claim in a proceeding.

[160] The issue as to whether RSC 23.01(1) applies is of no moment. The parties are in agreement that the court possesses an inherent power to stay the summonses for taxation in appropriate circumstances.

[161] The relevant principles were explained in the joint judgment of Gleeson CJ, Gummow, Hayne and Crennan JJ in *Batistatos*.[4] As to the content of the inherent power, the following passage from the judgment provides a concise definition:[5]

> "In *Walton v Gardiner*, the majority, Mason CJ, Deane and Dawson JJ, accepted as correct the passage in *Hunter* which

[4] (2006) 226 CLR 256.
[5] (2006) 226 CLR 256 at 264, par [6].

> Lord Diplock spoke of "the inherent power which any court of justice must possess to prevent misuse of its procedure in way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."
>
> His Lordship went on to describe as "very varied" the circumstances "where abuse of process" can arise." (citations omitted)

[162] In later passages, the judgment made the following points which are relevant in the matter before the court:

- "What amounts to abuse of court process is insusceptible of a formulation comprising closed categories. Development continues."[6]

- The concept of 'abuse of process' is not at large or without meaning … It "extends to proceedings that are quite seriously and unfairly burdensome, prejudicial or damaging".[7]

- The concept extends to the use of the court's procedures which would be "unjustifiably oppressive to one of the parties" or which would "bring the administration of justice into disrepute".[8]

- Any properly instituted procedural step in the course of proceedings is capable of amounting to an abuse of the court's process.

- Failure to take procedural steps, and delay in the conduct of the proceedings, are capable of amounting to an abuse of process.

[6] (2006) 226 CLR 256 at 265, par [9].
[7] (2006) 226 CLR 256 at 267, par [14].
[8] (2006) 226 CLR 267 at 267, par [15].

[163] The joint judgment noted that in the exercise of the power, which is designed to safeguard the administration of justice, that purpose "may transcend the interest of any particular party to the litigation".[9] Further, "oppressive conduct" or "moral delinquency" by a party are not prerequisites for the exercise of the power. It is the "objective effect" of the continuation of the proceedings which is "decisive".[10]

[164] In directing the attention to the "objective effect" of continuation of proceedings, rather than the issues of oppressive conduct and moral delinquency on the part of a party, the judgment observed that the new procedural code in England has been taken "as giving a wider scope for the use of principles of abuse of process in dealing with dilatory plaintiffs".[11] It appears that the focus in England on the conduct of a party has, in Australia, been replaced by focus on the "objective effect" of continuation of the proceedings. For example, if, regardless of prejudice to the opposing party, the conduct of a party was such that allowing proceedings to continue would bring the administration of justice into disrepute, the power to stay would be exercised.

Lapse of time – Court processes - Relevant dates

[165] There is no doubt that the lengthy period which has elapsed since the principal proceedings were concluded in May 2004 will have an adverse impact on the memories of those who were involved in the

[9] (2006) 226 CLR 256 at 266, par [12].
[10] (2006) 226 CLR 256 at 281, par [69] and [70].
[11] (2006) 226 CLR 256 at 281, par [68].

litigation. Even if the taxation process had been undertaken in May 2004, fading memories since the proceedings were issued in February 1993 would have made the process more difficult than a process conducted within a few years of commencement of proceedings. The first question to be addressed is the extent of the lapse of time attributable to conduct on the part of the defendant or its solicitors. In addition, consideration must be given to the date beyond which it might be argued that it was unreasonable for the defendant to proceed with the taxation of costs.

[166] Bearing in mind that the plaintiff applied for the summonses for taxation to be adjourned indefinitely pending the High Court decision, and that the plaintiff later chose to pursue the lobbying route rather than proceeding to taxation, the plaintiff could not reasonably argue that the defendant should have proceeded to taxation at the time of the Cabinet decision in February 2006, or during 2006 while negotiations were in progress. The period of inaction between February and December 2006 was lengthy, but both parties were responsible for periods of inaction. If the plaintiff had been worried about the negative impact of the passing of time on the taxation process, it was always open to the plaintiff to prepare objections to the Bill of Costs while lobbying Cabinet and subsequently negotiating with the SFNT in order to be ready for taxation should lobbying and negotiations fail to achieve a resolution. Mr Dunbar was aware throughout that should

lobbying and negotiations fail, the taxation process would be undertaken.

[167] The plaintiff does not suggest that seeking to tax the costs in December 2006 would have amounted to an abuse of process. Mr Dunbar, on behalf of the plaintiff, was not concerned about the delay in progressing the negotiations and the plaintiff did not choose to take the precaution of preparing a notice of objection to the Bill of Costs or even giving preliminary consideration to possible objections. There are obvious reasons why the plaintiff would not have taken either of those courses, but they remained options throughout the negotiations if the plaintiff had been concerned about the impact of the passing of time on the plaintiff's capacity to deal properly with the summonses for taxation.

[168] The absence of communication from December 2006 to May/June 2008 was caused by Mr Timney's failure to respond to the plaintiff's letter of 2 December 2006. Mr Lisson was also at fault in not ensuring negotiations proceeded in a timely manner. Mr Timney and Mr Lisson were both in breach of their duty to Cabinet to pursue the matter with reasonable diligence. However, Mr Dunbar was not concerned about the absence of communication during that period and did not seek to prompt Mr Timney to respond to his December 2006 letter. From Mr Dunbar's perspective, the passing of time was working to the advantage of the plaintiff.

[169] Following Mr Dunbar's offer of 29 June 2008, Mr Timney was in favour of accepting the offer which would have deferred payment until the property was sold out of the Dunbar family name. However, Mr Lisson advised Mr Timney that the offer was not acceptable. In breach of his duty to Cabinet, Mr Timney failed to respond to the offer of 29 June 2008. As I have said, the failure was not due to an oversight by Mr Timney. He made a deliberate decision not to respond in the forlorn hope that, somehow, the file would go away or be taken over by someone else.

[170] There was no impediment to Mr Timney responding to Mr Dunbar within a relatively short time of 30 June 2008. No evidence was led as to when Mr Timney advised Mr Lisson of the offer and received instructions that it was rejected, but I am satisfied that Mr Timney would have discussed the offer with Mr Lisson within a few weeks of 29 June 2008. It would have been a simple exercise for Mr Timney to write to Mr Dunbar rejecting the offer and either maintaining the previous position or putting forward a counter offer.

[171] The failure of Mr Timney to progress the matter, and his conduct in ignoring the file thereafter until his departure from the SFNT in April 2010, was a gross dereliction of his duty to Cabinet. That dereliction of duty was exacerbated by Mr Timney repeatedly approving misleading GERS reports to the Cabinet office which he knew would form the basis of misleading reports to Cabinet. While Mr Timney strongly

denied that he intended to mislead Cabinet, he was well aware that the reports were misleading and chose not to correct them.

[172] Although both Mr Timney and Mr Lisson were in beach of the duty to Cabinet to progress the matter diligently and to report accurately to Cabinet, they did not owe any duty to the plaintiff. Notwithstanding the failure to respond to the offer of 29 June 2008, negotiations remained open. The plaintiff, through Mr Dunbar, made no effort to prompt the defendant into replying to the offer of 29 June 2008.

[173] After Mr Timney's response of 30 June 2008, the next communication between the parties was the letter of 16 August 2012 from the SFNT to Mr Dunbar. The lapse of over four years worked to the plaintiff's advantage. Mr Dunbar was content to allow the time to pass. In this sense, by failing to raise objection or enquire as to progress, through Mr Dunbar the plaintiff acquiesced in the failure to pursue the negotiations.

[174] As to the prospect of the taxation process being reinstated, as I have said Mr Dunbar was aware throughout that if the negotiations failed the summonses for taxation would proceed. I am satisfied he did not turn his mind to potential difficulties in the taxation process and was always confident that a settlement of the terms of repayment and security would be successfully negotiated.

[175] Similarly, I am satisfied that Mr Timney and Mr Lisson believed that if negotiations were unsuccessful, the summonses for taxation could be relisted for hearing. They were well aware that the taxation process would be a very large exercise and Mr Timney was anxious to avoid that process which he believed would not be to the advantage of either party. However, while Mr Timney and Mr Lisson had in mind that the taxation process was the final fall-back position, I am satisfied that neither of them addressed their mind to the potential difficulties that might be caused to the taxation process by the extensive lapse of time.

[176] This is not a case in which, negotiations having broken down, the defendant chose not to pursue the summonses for taxation. Until the plaintiff's silence following the letter from the SFNT of 3 March 2014, negotiations remained open as to payment of the amount of $800,000 and security for the debt.

[177] The lengthy lapse of time while negotiations remained open, and the consequences, must be considered in the context of the processes of the Court. From the perspective of those processes, the principal proceedings and the rights of the parties in issue in those proceedings, had been determined finally when the High Court refused special leave in May 2004. Outstanding was the assessment of the amount of the successful party's costs. On the application of the plaintiff, and by consent, resolution of that issue had been adjourned indefinitely by the Court. Initially the adjournment was sought pending the decision of the

High Court, but the parties subsequently agreed tacitly that the summonses for taxation would not be enlivened while the plaintiff pursued the lobbying route and, following the Cabinet decision of February 2006, while negotiations as to the terms of payment and security were ongoing.

[178] Once the Summonses for Taxation were adjourned indefinitely, the Court ceased to have a role in subsequent events. No court order existed with which the parties were bound to comply. In the conduct of the negotiations from May 2004 until March 2014, no procedural default by either party was involved. While Mr Timney and Mr Lisson blatantly disregarded their duty to Cabinet, they were not in breach of any duty to the Court or to the plaintiff.

[179] The absence of default in compliance with the court processes or orders is significant. While acknowledging the fundamental principles identified *Batistatos*, the plaintiff relied upon the concept of "intentional and contumelious" conduct as amounting to an abuse of process. The plaintiff sought to apply that concept to the conduct of Mr Timney and Mr Lisson in failing to progress the matter over so many years. The plaintiff contended that, in themselves and regardless of any prejudice to the plaintiff, those failures amounted to such intentional and contumelious conduct that allowing the taxation process to proceed would now bring the administration of justice into disrepute.

[180] In this submission the plaintiff relied upon the following passage in the judgment of Lord Diplock in *Birkett v James*[12]

> "The power [to dismiss an action for want of prosecution] should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) 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."

[181] The difficulty facing the plaintiff is that in speaking of "intentional and contumelious" conduct as, in itself, amounting to an abuse of process, Lord Diplock was speaking of such conduct which amounted to a "default" in the context of the court processes. Although His Lordship included an example in the broad terms of "conduct amounting to an abuse of the process of the court", it was an example of a "default" which was "intentional and contumelious"

[182] In the matter under consideration, as I have said no "default" was involved. The Court and its processes were not treated with disrespect. Leaving aside oppression or unfairness caused by a lapse of time, and in the absence of "default", is the conduct by Mr Timney and Mr Lisson which amounted to intentional and contumelious disregard of their duty to Cabinet of such a character that, assessed objectively,

[12] [1978] AC 297 at 318.

such conduct has the effect that the continuation of the taxation proceedings at this time would bring the administration of justice into disrepute? My answer to that question is in the negative. The taxation proceedings had been adjourned indefinitely and the Court was not concerned with the progress or otherwise of the negotiations. There was no order of the Court requiring the parties to report to the Court or to return to court with a view to resolving the summonses for taxation. In those circumstances I am unable to conclude that the continuation of the taxation proceedings would amount , as the plaintiff contended, to sanctioning disrespectful conduct toward the court or would, in any other way, bring the administration of justice into disrepute.

[183] My view that a negative answer is appropriate is confirmed by my finding that the plaintiff acquiesced in the delay in the manner I have explained. Neither party has, at any time, unfairly sought to disadvantage the other party or to misuse the processes of the Court.

[184] The plaintiff also relied on the alternative basis explained by Lord Diplock, namely, an “inordinate and inexcusable delay” on the part of the defendant and the SFNT which has given rise to a “substantial risk that it is not possible to have a fair trial of the issues” in the taxation process, or “is such as is likely to cause or to have caused serious prejudice” to the plaintiff as between the plaintiff and the defendant. In other words, the “objective effect” of a continuation of the taxation

process would be “unjustifiably oppressive” or “manifestly unfair” to the plaintiff.

[185] This aspect of the plaintiff’s case requires an examination of the prejudice caused to the plaintiff by the conduct of the defendant’s solicitors in causing the extensive lapses of time. It is in this context consideration must be given to the date beyond which it might be argued that the defendant was behaving unreasonably in not relisting the summonses for taxation.

[186] Although the plaintiff’s letter of 2 December 2006 did not advance an offer, it finished with the observation that Mr Dunbar looked forward to hearing from Mr Timney “in the near future”. Ideally Mr Timney should have responded promptly, but there was room for misunderstanding as to who was to make the next move. Mr Dunbar thought that the government was just taking its time and the delay in progress was to the advantage of the plaintiff.

[187] While the delay from December 2006 to May 2008 was excessive, I do not regard that period as the relevant date for the purposes of assessing that the date beyond which it might be argued that it was unreasonable for the defendant to reinstate the taxation process. The relevant period comes after Mr Dunbar’s offer of 29 June 2008.

[188] There is now no way of knowing how Mr Timney would have responded to the offer of 29 June 2008 other than to inform Mr Dunbar

that the offer was rejected. Mr Timney could have repeated the offer which had been made in the letter of 14 May 2008; he could have simply given Mr Dunbar more time to put forward a proposition for progress payments; he could have put a different offer from the offer in the letter 14 May 2008; or he could have advised the plaintiff that the offer was rejected and applied to relist the summonses for taxation.

[189] Although there is no way of knowing with certainty what response Mr Timney would have made, the subsequent history suggests it is likely that the offer of 14 May 2008 would have been repeated or a modified offer made. If the matter had been pursued diligently, it is likely that negotiations would have continued until the end of 2008 or into the early part of 2009. Such negotiations might have been successful, or a stalemate might have been reached causing the defendant to apply to relist the summonses for taxation.

[190] The plaintiff cannot establish the date on which it is likely that negotiations in 2008 - 2009 would have stalled, or even whether they would have stalled. In my view, given the attitude of Mr Dunbar, if Mr Timney had acted diligently and pursued the negotiations, it is likely that Mr Dunbar would have reached agreement with the defendant concerning the terms of repayment and security.

[191] In these circumstances the plaintiff's case as to the date beyond which it was unreasonable to relist the summonses for taxation must be

founded on assumptions made in favour of the plaintiff. The best case for the plaintiff is that it was unreasonable for the defendant to delay seeking to relist the summonses for taxation beyond early to mid-2009. This date assumes that Mr Timney rejected the offer of 29 June 2008 within a few weeks and, contrary to my view as to the likely result, negotiations, conducted without delay, broke down.

[192] By mid-2009 memories had faded. Even if the defendant should have pursued taxation in 2007, so much time had passed that memories would not have been appreciably better than two years later. The same additional costs would have been incurred. Mr Lindsay and Mr Super had moved on.

[193] By August 2014, no doubt memories would have faded further, but I doubt that such additional fading would be of significance to the ability of the plaintiff to respond to taxation. The nuances and memories of relevant details would already have disappeared by 2007 – 2009, particularly with respect to the important pre-trial period of 1993 – 1998. It is in that pre-trial period that most of the potentially objectionable costs items would have been incurred and, in respect of which, the memories of those involved might be significant.

Plaintiff's case

[194] The plaintiff's case with respect to prejudice caused by the lapse of time faces a number of problems. First, the plaintiff was content to

allow delays in the progress of negotiations at different times to occur and took no steps to enliven the negotiations or to bring them to a conclusion. The passing of time assisted the plaintiff. In this way the plaintiff acquiesced in the delays in the negotiations.

[195] Secondly, aware that negotiations might fail and that the taxation process might proceed, the plaintiff failed to take any precautions to avoid or minimise the potential impact of the passing of time. No attempt was made to consider the Bill of Costs with a view to identifying the potential objections or to maintaining the file in a form which would protect the plaintiff's capacity to deal with taxations. No attempt was made to maintain the document management system.

[196] No doubt the plaintiff failed to prepare for a taxation because the need to do so did not occur to Mr Dunbar or the plaintiff's solicitor. Mr Dunbar accepted liability to pay and believed that the terms of payment and security would be agreed. No advice was given to Mr Dunbar that delay might create a difficulty if taxation was required, but the defendant is not responsible for the plaintiff's lack of knowledge.

[197] Thirdly, for the reasons discussed, in my opinion the conduct of Mr Timney and Mr Lisson was not such that, in itself, it has the effect that a continuation of the taxation proceedings at this time would bring the administration of justice into disrepute.

[198] Fourthly, for the reasons discussed, although the plaintiff has established that there was “an inordinate and inexcusable” delay on the part of the defendant’s solicitors, the plaintiff has failed to establish that such delay has given rise to a “substantial risk” that a trial of the issues on taxation will not be fair or that the delay is likely to have caused significant prejudice to the plaintiff in the context of the taxation process. In other words, the plaintiff has failed to establish that allowing the taxation process to continue would be “oppressive” or “manifestly unfair” to the plaintiff.

[199] My conclusion that the plaintiff has failed to establish oppression or manifest unfairness is based upon my view that, whatever date is chosen beyond which it would have been unreasonable for the defendant to enliven the taxation process, the plaintiff has failed to make out its case as to prejudice. I previously dealt with this issue when discussing the evidence of Mr Lindsay and others with respect to the taxation process.

[200] Further, even if it be said that prejudice in the relevant sense has been established, the evidence fails to demonstrate that the prejudice was caused by the inordinate and inexcusable delay on the part of the defendant’s solicitors. The relevant date for the commencement of the inordinate and inexcusable delay was approximately mid 2009 or, at the earliest, sometime in 2007. By those dates, however, the damage had been done in the sense that the plaintiff’s claim is based upon loss

of memory, loss of the data base, possible loss of documentation and additional costs. The lapse of time since 2007 has had minimal impact in this regard.

[201] As I have said, during the lengthy periods in which silence reigned and negotiations were at a standstill, the silence was not one sided. Both parties were silent, albeit for different reasons. Both parties were aware, throughout, that negotiations remained open and that, should negotiations fail, the taxation process would be reactivated. Neither party sought to unfairly disadvantage the other party or to use the processes of the court in the course of the negotiations.

[202] The plaintiff has failed to establish its case that a continuation of the taxation process would amount to an abuse of process. The burden of proving that case rests on the plaintiff and the plaintiff has failed to discharge that burden at each step.

[203] In reaching this conclusion I am far from sanctioning the conduct of Mr Timney and Mr Lisson which was a blatant disregard of their duty to their client. However, as I have said, they were not in any breach of duty to the court or in default of any court order. Their conduct merits condemnation because it was such a serious breach of their duty to their client, but it is not for this Court on an application to stay a proceeding to use its power as a form of disciplinary censure of those solicitors.

[204] Finally, although my finding that the plaintiff has failed to prove its case does not depend on my view of the plaintiff's acquiescence, it is appropriate to comment generally upon the relevance of acquiescence to the claim of unfairness resulting from the lapse of time. I have explained the sense in which Mr Dunbar acquiesced in the long periods of inactivity and, speaking generally, in my opinion a court should be slow to accede to an application to stay proceedings on the basis of effects caused by a lapse of time to which the plaintiff acquiesced. If prejudice was caused to the plaintiff by a course of conduct in which the plaintiff acquiesced, the Court would be reluctant to find that the objective effect of the conduct is such that a continuation of proceedings would bring the administration of justice into disrepute.

[205] For these reasons the applications were dismissed.
