PARTIES:	Robert Walter Paech v Alice Springs Abattoirs Pty Ltd and Anor
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Interlocutory Application
FILE NO.:	A/S 34 of 1986
DELIVERED:	11 April 1995
REASONS OF:	Master Coulehan

CATCHWORDS:

Practice & procedure - dismissal for want of prosecution - delay inordinate and inexcusable - whether substantial risk that fair trial not possible

Cases followed:

Kostokanellis v Allen (1974) VR 596
White v Northern Territory 9 MVR 306
Birkett v James (1978) AC 297
Patsalides v Magoulias 28 MVR 1
Dempsey v Dorber 10 MVR 69

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
A/S 34 of 1986

BETWEEN:
ROBERT WALTER PAECH
Plaintiff
and
ALICE SPRINGS ABATTOIRS PTY LTD
and ALLAN HASS
Defendants

MASTER COULEHAN: DECISION
(delivered 11 April 1995)

The plaintiff commenced this proceeding on 2 April 1986, claiming damages for personal injuries suffered on 20 August 1980 when he was working at the Alice Springs Abattoirs.

He first instructed solicitors on 19 June 1985, the explanation for the delay being that he had been told by his foreman that he could not claim compensation.

The writ was served by post on the registered office of the first defendant on 23 May 1986.

Mr Whitaker, who was the manager of the first defendant at the time of service, deposes that the writ did not come to his attention. He says that mail was not delivered to the registered office, being placed in a box at the Post Office. Nevertheless, service by post on the registered office was proper service pursuant to s.362 of the **Companies Act**.

There is evidence in a letter dated 25 June 1986 from the plaintiff's solicitor to the plaintiff, that the manager of the first defendant had objected to the solicitor acting. Mr Whitaker denies any knowledge of this.

The plaintiff changed his solicitors. There were subsequent changes of solicitors necessitated by mergers of solicitor's practices in Alice Springs.

There may have been a letter dated 8 August 1986 by which the plaintiff's solicitors gave notice to the first defendant of a change of solicitors and requested a defence. (See annexure "B" to the affidavit of G.P. Whitaker affirmed 9 August 1994). It is not clear that the letter was sent to the first defendant and the parties have not canvassed this aspect.

On 27 July 1987 the writ was extended to enable service to be effected on the second defendant. He appeared on 17 September 1987.

On or about 1 March 1988 the solicitor for the second defendant sent a copy of the writ in this proceeding to the first defendant. The first defendant responded by a letter signed by Ms C. Cheshire, assistant secretary, informing the second defendant's solicitor that the plaintiff and the second defendant had been employed by Mr Lindsay Hart "**.....whose company name was Alice Springs Abattoirs (N.T.) Pty Ltd not to be confused with our Company Alice Springs Abattoirs Pty Ltd.**" It was suggested that the writ be forwarded to Mr Hart.

Notices of intention to proceed were served by the plaintiff's solicitors on the solicitors acting for the second defendant on 7 April 1991 and 30 November 1992. No such notice was served on the first defendant.

There is no evidence to suggest that the plaintiff's claim was effectively pursued until 7 December 1993, when the plaintiff's solicitor wrote to the first defendant advising as to service of the writ.

It appears that this was the first notice Mr Whitaker had of the plaintiff's claim. By this time more than 13 years had passed since the date of the injuries.

The plaintiff deposes that he understood that in October 1987 there had been an attempt to have the proceeding set down for assessment in default of appearance and that promises as to progress were made "in the ensuing years".

In 1990 he made a complaint to the Law Society, however it was not until 3 April 1991 that he received a letter from his solicitor advising as to the conduct of the proceeding.

In June 1991 he wrote to this Court seeking information as to whether his claim was still "registered".

In September 1992 he made a complaint to the Ombudsman.

It was not until October 1993 that his file was sent to Ms Scicluna who has continued to act for him.

The Court has an unfettered power to dismiss a proceeding for want of prosecution. (see **Kostokanellis v Allen (1974) VR 596, 605-6** and **White v Northern Territory 9 MVR 306,310**).

In **Birkett v James (1978) A.C. 297** Lord Diplock said at p.313 that the power should only be exercised where the Court is satisfied either:

> "**(1) that default has been intentional and contumelious e.g. disobedience to a peremptory order of the Court or conduct amounting to an abuse of process of the Court; or**
>
> "**(2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyer; 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.**"

(See also **Patsalides v Magoulias 28 NTR 1**).

The delay in prosecuting this proceeding has been inordinate

and inexcusable. This appears to have been because of the neglect of the plaintiff's claim by his legal advisers although there is no evidence to suggest that the plaintiff took an active interest in the progress of his claim before 1990.

The plaintiff's claim against the first defendant is that it was vicariously liable for the negligence of the second defendant and negligent in the operation of the premises.

The first defendant has admitted that it was the operator of the premises at the time of the accident but denies negligence and denies that it was the employer of the second defendant.

Mr Whitaker says that the first defendant's records are no longer in existence and the whereabouts of key witnesses, including the second defendant, are unknown. Two persons, namely Mr McDougall and Mr Hill, are deceased.

It is not apparent how the evidence of the two deceased may be relevant to the issues. Nor is it clear what efforts, if any, have been made to locate any witnesses.

Mr Whitaker also deposes that Mr Hart's company is no longer "in existence". I am not sure what this means. It may mean that the company has been dissolved or struck off or, possibly, has ceased trading. Nor is it clear what effect this may have on the first defendant's case. It may be that the first defendant cannot claim contribution or indemnity from this company. There is no information as to when the company ceased to exist.

The first defendant also argues that it has suffered prejudice because it is unable to locate its insurer.

There is evidence that Mr Whitaker has made extensive enquiries and has been unable to locate the insurer at the time of the accident. Bearing in mind the delay, it is doubtful that any

insurer would be liable to indemnify the first defendant in any event.

It is not clear why the writ did not come to the attention of the first defendant after service. It is possible that it was forwarded to Mr Hart's company and that it was the manager of that company that discussed the writ with the plaintiff's solicitor. The fact that it did not do so explains the failure to notify its insurer. Had this proceeding been pursued expeditiously it would probably have come to the attention of the first defendant much earlier. However, there is insufficient evidence to reach any conclusions as to whether the first defendant would have been indemnified by an insurer for a claim made so long after it arose.

The first defendant could not reasonably be criticised for not becoming involved in the proceeding following the receipt of a copy of the Writ in March 1988. It was not forwarded by way of service and it was not unreasonable that it was regarded as a matter to be dealt with by Mr Hart's company.

The plaintiff alleges that he has suffered permanent disability as a result of the defendants' negligence. If his claim is dismissed he will suffer hardship in being unable to pursue his claim for damages.

No submissions were put as to whether the plaintiff has a valid claim against any of his former solicitors. (See **White v Northern Territory** p312-313). It is not a matter I am able to decide on the available evidence.

The parties have not provided any information as to the circumstances in which the plaintiff received his injuries.

It is alleged in the statement of claim that the second defendant negligently shot the plaintiff with a rifle. There are no particulars of negligence in relation to the first defendant's operation of the premises, however, the particulars of

negligence alleged against the second defendant raise issues as to the system of work. In defence of these allegations the first defendant would need to investigate the evidence of workmen and persons in charge of the operation.

The passing of time renders the trial of such issues increasingly difficult and unsatisfactory (see **Dempsey v Dorber 10 MVR 69, 71**). The lack of records will make it difficult, if not impossible, for the first defendant to ascertain and locate witnesses.

I am satisfied that there is a substantial risk that a fair trial of the issues is not possible. The plaintiff's claim is dismissed for want of prosecution.