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| <u>PARTIES</u> | DARYL WILLIAM MANZIE, ATTORNEY-GENERAL FOR THE NORTHERN TERRITORY v PHILLIP WEIGHTMAN |
| <u>TITLE OF COURT</u> | In the Supreme Court of the Northern Territory of Australia |
| <u>JURISDICTION</u> | Interlocutory Application |
| <u>FILE NUMBER</u> | A/S 32/89 (8908659) |
| <u>DELIVERED</u> | 19 September 1996 |
| <u>REASONS OF</u> | Master Coulehan |

Catchwords

PRACTICE - Northern Territory - O.5.12(2) Supreme Court Rules -
renewal of stale writ - delay - prejudice

Cases followed

Finlay v Littler (1992) 2 VR 181
The Commonwealth v DKB Investments Pty Ltd -
unreported decision of Mildren J dated 12 September 1991

Representation

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|------------------------|--------------------------------------|
| Counsel Plaintiff | Mr Macdonald |
| Solicitor Plaintiff | Solicitor for the Northern Territory |

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

AT DARWIN

32 of 1989 (8908659)

BETWEEN:

DARYL WILLIAM MANZIE
ATTORNEY-GENERAL FOR THE
NORTHERN TERRITORY

Plaintiff

and

PHILLIP WEIGHTMAN

Defendant

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 19 September 1996)

The plaintiff claims the sum of \$12,098-90 under the provisions of the **Crimes Compensation Act**. It is pleaded that the plaintiff made payment to the applicant for compensation on 30 April 1987. The writ was issued on 24 April 1989.

It is possible that the writ was served on the defendant in mid 1989, however there is insufficient evidence as to service to enable this to be concluded with any certainty. It is necessary to proceed on the basis that the writ has not been served and is stale by reason of O.5.12(1).

The plaintiff applies, inter alia, for an order that the writ be renewed pursuant to O.5.12(2)). Apart from attempted service in mid 1989 there appears to have been little activity on the part of the plaintiff until a self-executing order was made on 6 June 1994, after which a summons seeking directions was issued. This was not pursued and it appears that it was not until May this year that further attempts were made to locate the defendant. It is believed that the defendant may now be located in Queensland.

The principles relevant to the exercise of the Court's discretion under O.5.12(2) have been summarised by Mildren J in **The Commonwealth v DKB Investments Pty Ltd**, an unreported decision dated 12 September 1991. In particular, there should be good reason for the extension and, where there has been inordinate and inexcusable delay, there should be a substantial risk that a fair trial is impossible or a substantial risk of serious prejudice to the defendant.

There is no doubt that the delay has been inordinate and inexcusable, however, the plaintiff argues that there is no prejudice. There is no apparent defence and the defendant has tacitly admitted liability by making payment of a small sum in reduction of the claim prior to the issue of the writ.

As to delay, Crockett J, with whom Southwell J substantially agreed, said the following in **Finlay v Littler** (1992) 2 VR 181 at page 187:

“The delay, to be relevant, must not merely be delay in the abstract, as it were. There must, I think, be some connecting link between the delay and the determination as to the manner in which the discretion vested in the court should be exercised. I think the delay of which I have spoken is relevant in that connection in the present case in three possible ways.

“In the first place, when the appellant sought renewal of the writ he was doing so as a party seeking the court's indulgence. In seeking an indulgence, the party doing so is traditionally expected to act expeditiously in the prosecution of the proceedings for relief from the consequences of his default. Accordingly, the strength of the claim for the indulgence will be proportionately diminished as so there has been unacceptable delay on the part of the party who seeks relief.

“Secondly, the fact and extent of the delay cannot, I think, be disassociated from a consideration of the efforts which have been taken to locate and serve the defendant. Very little would appear to have been done in an endeavour to locate and serve the defendant despite the considerable period of time which was available for that endeavour.

“Then, thirdly, delay itself may be used to found the inference that, as a result of that delay, prejudice (apart from any that might be specifically alleged) will be suffered by a defendant.”

The lengthy and inexplicable delay in pursuing the proceeding has considerably diminished the strength of the claim for indulgence. The defendant may reasonably have concluded that the claim would not be pursued and he may be aggrieved by the renewal of the writ several years after the limitation period has expired (see S.12(1)(d) of the **Limitation Act**). I consider that the length of the delay has been such that it would be unjust to allow the plaintiff to proceed.

The application is dismissed.