McKechnie v Gameson [2000] NTSC 4

PARTIES:	MCKECHNIE, Robert Lachlan
	v
	GAMESON, Anthony McDougal
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	16/91 (9100843)
DELIVERED:	14 February 2000
HEARING DATES:	10 February 2000
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

INTERLOCUTORY PROCEDURE

Whether to vacate trial dates. Whether to transfer to Local Court

REPRESENTATION:

Solicitors:

Applicant:	Self represented
Defendants:	Hunt & Hunt

Judgment category classification:	C
Judgment ID Number:	mar00001
Number of pages:	3

Mar00001

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

McKechnie v Gameson [2000] NTSC 4
No. 16/91 (9100843)

BETWEEN:

ROBERT LACHLAN MCKECHNIE
Plaintiff

AND:

ANTHONY MCDOUGAL GAMESON and ANOR
Defendants

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 14 February 2000)

[1] This is an application by the first defendant to vacate dates set for the hearing of this action of 8, 9 and 10 March next. He supports it with an affidavit sworn 2 February 2000. The second defendant has taken no active part in the proceedings.

[2] The history of the litigation to March 1999 is set out in the reasons of the Master attached to these reasons. Justice Thomas rejected an appeal against the Master's decision refusing to dismiss the proceedings from want of prosecution on 8 June 1999.

[3] On 20 September 1999, the Master certified the proceedings were ready for trial. The solicitor for the applicant wrote to him on 24 September at his

postal address advising him of that step. The solicitor gave advice regarding the matter generally, including as to evidence, and rendered an account for costs to date and sought $5,000 on account of future costs. He warned the applicant that failure to pay might lead to him having no option than to cease to act on his behalf. The correspondence also records that prior to 4 November 1999 the applicant spoke to the solicitor and was advised the matter that had been listed for hearing and of those dates. Copies of earlier correspondence which the applicant claimed not to have received were forwarded to him at his postal address.

[4] By letter of 9 December the solicitor again advised that failure to pay the account and estimated future costs would lead to the solicitor's ceasing to act. He did so by notice filed in Court on 4 February 2000.

[5] The applicant seeks to have the trial dates, which he says he first learned about on 24 January, vacated so that he can raise the required funds. He says that until he is able to pay the account, his solicitor will retain his papers which, he says, he requires for the trial. He also says that he needs to contact his former wife to find out what she can say and secure her attendance. She is said to be in Italy.

[6] As to costs, there is nothing but the vaguest information available as to whether, and if so, when, the applicant will be in a position to pay the account rendered and the amount which is sought on account. As to the second defendant, the applicant has known for a long time that she may be

required. All he could say is that she is in Italy. There is nothing to suggest that if the trial is delayed on that account, he will be able to locate her, and if so, whether she will be able to give any evidence.

[7] The applicant says that if the trial is not adjourned he will act on his own behalf.

[8] Notwithstanding the delays which are attributable to the plaintiff, it is clear that he made his intention to proceed known to the applicant at a time when the applicant had sufficient opportunity to prepare for the hearing including obtaining funds for that purpose. In my opinion the plaintiff should not be delayed in prosecuting his claim because of the applicant's financial difficulties, nor because the applicant has not been able to locate his former wife. There has been ample time to do that.

[9] The application to vacate the trial is refused.

[10] When the proceedings were instituted the amount claimed did not fall within the jurisdictional limit of the Local Court. The proceedings have continued in this Court. The plaintiff opposes the transfer to the Local Court and no good reason has been given as to why the transfer should be ordered at this late stage. The plaintiff may be at risk on the question of costs, but that is a matter for him and to be considered in due course. The application to transfer the proceedings to the Local Court is refused.

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

16/91(9100843) Between:

ROBERT LACHLAN MCKECHNIE

Plaintiff

and

ANTHONY MCDOUGAL GAMESON
and ANOR

Defendants

MASTER COULEHAN: REASONS FOR DECISION
(Delivered 18 March 1999)

The writ in this proceeding was issued on 16 January 1991 claiming $50,500-00 being monies loaned by the plaintiff to the defendants between 3 November 1986 and 12 January 1987, plus interest. The writ was endorsed with a claim for an extension of time pursuant to section 44 of the Limitation Act, although no particulars were provided.

The defendants, in their amended defences, deny that any sum is owed by them to the plaintiff and allege that the sum of $42,000-00 paid by the plaintiff, was paid to Graceful Pty. Ltd., which was the owner of the Maranga Hotel, and was consideration for shares in that company. They also rely on defences under the Limitation Act and the Statute of Frauds.

It appears that the proceeding initially advanced at a reasonable pace, and it was set down for hearing in October 1993, but the trial date was subsequently vacated. Interlocutory activity continued during the balance of 1993 and into

1994. The last positive step appears to be the filing of the first defendant's answers to interrogatories in August 1994.

There followed a long period during which little appears to have been achieved, despite numerous directions hearings and letters from the Registrar enquiring as to progress. Part of the delay appears to have been caused by the plaintiff's seeking counsel's advice. At a directions hearing held on 22 May 1996, the defendants' solicitor indicated that an action to strike out for want of prosecution was being considered.

The defendants were represented by the firm Mildrens until some time after 7 July 1997. That is the date of the last letter from that firm, under the hand of Mr Walker, and there is no reference to any appearance by a member of that firm after that date.

At a directions hearing held on 1 September 1997, Mr. Walker who was then apparently employed by the firm Morgan Buckley, appeared for the defendants, and indicated that a notice of change of solicitors would be filed. The plaintiff's solicitor informed the Registrar that a certificate of readiness would be filed.

No change of solicitor was filed but by letter dated 27 January 1998 Morgan Buckley informed the Registrar that it was not acting in the matter.

There were further directions hearings at which the plaintiff was represented but not the defendants. It was not until 10 December 1998 that the first defendant's solicitors filed a notice of acting on his behalf. The plaintiff has subsequently served a certificate of readiness and informed the Court that he is ready to proceed.

In his affidavit in support of his application to have the proceeding dismissed for want of prosecution, the first defendant deposes that, in the belief that the plaintiff had lost interest in the proceeding, he had decided, after consultation with his solicitor, to take no further action in this proceeding, that is, "to let sleeping dogs lie". It is not clear when this decision was made, however, it was made some time after 31 August 1994. This decision does not appear to have been communicated to the Registrar who continued to seek information as to the progress of the proceeding and to hold directions hearings from time to time.

He also deposes that in 1996 he was divorced from the second defendant and he has not had any contact or communication from her since about September 1998, when, he believes, she went to live permanently in Italy. She has refused to disclose her whereabouts or how she can be contacted.

This has prejudiced his defence because the second defendant "should" have been able to corroborate his evidence and he refers to particulars provided by the plaintiff which allege discussions with the "defendants". As a result, he asserts, there is a risk that a fair trial is not possible. Further, any judgment in favour of the plaintiff will have to be satisfied from his assets alone.

The dismissal of a proceeding for want of prosecution is in the Court's discretion (see ***Ullowski v Miller (1968) S.A.S.R.277*** and ***White v Northern Territory (1989) 97 FLR 122***). In ***Ullowski***, Bray C.J. suggested, at page280, that there are five paramount matters to be considered, ".... the length of the delay, the explanation for the delay, the hardship to the plaintiff if the action is dismissed and the cause of action is left statute barred, the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay, and the conduct of the defendant in the litigation.".

The length of the delay has been inordinate and there has been no explanation offered. However, the plaintiff's claim will be statute barred if the proceeding is dismissed and it is not clear that he would have any remedy against his solicitors, if this be relevant (see ***White*** at pages 129 – 130).

As to the alleged prejudice, there is a lack of particularity as to the evidence which may be given by the second defendant, if available. It is conceded that she did not play any active role, but the manner and extent to which she may have been able to corroborate the evidence of the first defendant has not been explained.

The fact that in the event of an unfavourable result the first defendant may have to pay out of his assets alone is not persuasive. There is no evidence to suggest that this may not have been the case had the proceeding been resolved earlier.

As to the first defendant's conduct, while authority suggests that a defendant is under no obligation to stimulate a plaintiff into action (see ***Duncan v Lowenthal (1969) VR 180, 186***), the Court's case management system provides a different approach (see O.48.).

Under O.48, directions hearings are contemplated at which orders and directions shall be made " … in order to have the proceedings effectively, completely, promptly and economically determined" (O.48.12). Failure to attend a directions hearing may result in dismissal of the plaintiff's claim or the striking out of a defendant's defence (O.48.07).

The intention is that proceedings be determined promptly, and it follows that a defendant may not assume that a proceeding will lapse because of a plaintiff's inaction. Parties are required to participate in directions hearings, at which there are opportunities to express concern about delays and to seek orders for expedition. The failure to do so is a relevant consideration.

I am not satisfied that a fair trial is no longer possible, nor do the circumstances otherwise justify the plaintiff being deprived of the right to have his claim determined according to law.