

PARTIES: Katherine Stores Pty Ltd v  
B & D Milk

TITLE OF COURT: In the Supreme Court of the  
Northern Territory of Australia

JURISDICTION: Interlocutory Application

FILE NO.: 148 of 1993

DELIVERED: 3 November 1994

REASONS OF: Master Coulehan

CATCHWORDS:

Practice & procedure - application to extend validity  
of writ - principles - expiry of limitation period  
- balance of hardship

Cases referred to:

The Commonwealth v DKB Investments Pty Ltd - unreported  
decision of Mildren J dated 12 September 1991

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

148 of 1993

BETWEEN:

KATHERINE STORES PTY LTD

(in liquidation)

Plaintiff

and

B & D MILK

Defendant

MASTER COULEHAN: REASONS FOR DECISION

(Delivered 3 November 1994)

The writ in this proceeding was issued on 23 August 1993 naming "B & D Milk" as the defendant and claiming the sum of \$6,000-00 which is alleged to be a preference in favour of the defendant against other creditors of the plaintiff.

On 13 October 1994 the plaintiff filed an amended writ naming "B & D Lane Pty Ltd ACN 009606 777" as the defendant and a summons seeking an extension of the period of validity of the writ.

On the hearing of the application it was agreed that the purported amendment was defective and the plaintiff applied to change the name of the defendant to "B & D Lane Pty Ltd". There was no objection to this amendment, which appears to be appropriate.

The payments the subject of these proceedings were made between 21 August 1990 and 26 September 1990.

On 15 October 1990, following a resolution that the plaintiff be wound up voluntarily, the liquidator was appointed.

On 20 February 1991, the liquidator wrote to "B & D Milk" requesting payment of the moneys claimed and there was an exchange of correspondence. On 27 March 1991 he instructed solicitors to

recover the sum claimed.

No action was taken by these solicitors and on 27 April 1993 the liquidator terminated their instructions and instructed his present solicitor.

Following further correspondence with "B & D Milk", this proceeding was instituted.

There appears to have been some confusion as to the name of the defendant, a search of the Business Names register having revealed that the name "B & D Milk" was not registered.

The plaintiff's solicitor carried out further searches and enquiries and discussed the claim with solicitors acting for the defendant.

On 13 April 1994 the defendant's solicitors advised the plaintiff's solicitor that they had instructions to accept service of the writ. This was confirmed by letter dated 15 April 1994.

Following this letter there were further discussions between the solicitors and the plaintiff's solicitor sought further instructions. Instructions as to service of the writ were received around 25 August 1994, by which time the writ was stale.

No explanation has been given as to the failure by the plaintiff to serve the writ or to seek an extension of time prior to expiry. Nor has there been any explanation for the delay in making this application.

The only prejudice alleged by the defendant is the loss of the benefit of the relevant limitation provisions. It appears to be common ground that the limitation period had expired subsequent to the issue of the writ although this issue was not the subject of detailed argument.

The relevant legal principles have been set out by Mildren J in **The Commonwealth of Australia v DKB Investments Pty Ltd**, an

unreported decision dated 12 September 1991, as follows:-

"1. The court will not grant the extension unless good reason is shown for the extension: Irving v. Carbines [1982] V.R. 861; Soper v. Matsukawa [1982] V.R. 948; Kleinwort Benson Ltd v Barbrak Ltd [1987] 1 A.C. 597; [1987] 2 W.L.R. 1053.

"2. Whether there is good reason depends on all the circumstances of the case. The question whether an extension should be allowed was one for the discretion of the judge who is entitled to have regard to the balance of hardship between the parties and the possible prejudice to the defendant if an extension is allowed: Kleinwort Benson Ltd v. Barbrak Ltd, supra; Zappelli v. Falkiner & Others (Supreme Court of Victoria, O'Bryan J., unreported, 21/9/87).

"3. The fact that the action is statute barred if the extension is not granted may be a good reason for extending the Writ. As O'Bryan J. observed in Zappelli, supra:

'In my view, should the extension not be granted the plaintiff's claim against the defendants may be time-barred and they would have to look to their solicitors for a remedy. Such a result would be inconvenient, time-consuming, wasteful of costs and tend to bring the law into disrepute. Further delay in the prosecution of this proceeding is contrary to the interests of justice.

"This is all the more so where the solicitors are the clients' own employees, as is the case here. Be that as it may, the fact that the action is statute barred if the extension is not granted does not increase the burden of proof upon the plaintiff: Soper v. Matsukawa, supra; Williams v. F.S. Evans & Sons and District Council of Stirling (1988) 52 S.A.S.R. 237; Kleinwort Benson Ltd v. Barbrak Ltd, supra.

"4. The discretion should only be exercised adversely to the plaintiff where the plaintiff's default has been intentional and contumelious or where there has been inordinate or inexcusable delay on the part of the plaintiff or its solicitors giving rise to a substantial risk that a fair trial is not possible or to a substantial risk of serious prejudice to the defendant: Birkett v. James [1978] A.C. 297; Van Leer Australia Pty Ltd v. Palace Shopping (sic) K.K. and Another (1981) 34 A.L.R. 3; Mahon v. Frankipile (Australia) Pty Ltd (1990) 157 L.S.J.S. 52.

Notwithstanding the lack of a proper explanation, I consider that the balance of hardship favours the plaintiff.

The defendant has known of the claim since 20 February 1991 and

was expecting litigation to ensue.

The failure to proceed appears to have been caused, to some extent, by confusion as to the proper name of the defendant, which confusion does not appear to have been the fault of the plaintiff.

If the validity of the writ is not extended, the plaintiff may lose its right to claim and at best will only have a claim against its solicitor which will cause further delay and uncertainty.

There appears to be no substantial risk of serious prejudice to the defendant.

I order as follows:-

1. That B & D Milk cease to be a party.
2. That B & D Lane Pty Ltd be added as a party.
3. That the validity of the writ be extended until the expiration of one month from today.