

PARTIES: Gillian Pamela Edwards and Mitchell
James Edwards v Health & Life Care
No. 8 Pty Ltd and Darwin Private
Hospital Pty Ltd and Lee

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

JURISDICTION: Interlocutory Application

FILE NO.: 70 of 1993

DELIVERED: 19 January 1995

REASONS OF: Master Coulehan

CATCHWORDS:

Practice & procedure - application to set aside
extension of period of validity of Writ - O.46.08 -
onus on plaintiffs

Practice & procedure - obligation to serve Writ
promptly - unexplained delay in service

Cases followed:

Wrenn v Hart & Anor - unreported decision of
Mildren J dated 24 May 1994

Mahon v Frankipile (Australia) Pty Ltd (1990)
157 LSJS 52

Soper v Matsukawa (1982) VR 948

Cases referred to:

Deputy Commissioner of Taxation v Abberwood Pty Ltd
(1990) 19 NSWLR 530

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

Ramsey v Madgwicks (1989) VR 1

Finlay v Littler (1992) 2 VR 181

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

70 of 1993

BETWEEN:

GILLIAN PAMELA EDWARDS
First Plaintiff

AND:

MITCHELL JAMES EDWARDS by his
litigation guardian GILLIAN
PAMELA EDWARDS
Second Plaintiff

AND:

HEALTH & LIFE CARE NO. 8 PTY LTD
(formerly known as DARWIN
PRIVATE HOSPITAL PTY LTD)
(ACN 009 632 393)
First Defendant

AND:

DARWIN PRIVATE HOSPITAL PTY LTD
(ACN 009 653 712)
Second Defendant

AND:

THONG TECK LEE
Third Defendant

MASTER COULEHAN: REASONS

(Delivered 19 January 1995)

This proceeding was commenced by Writ on 10 May 1993, the Plaintiff claiming damages for negligence. The cause of action appears to have arisen on 10 May 1990. The Second Plaintiff is an infant.

There is no evidence of any further action on the part of the Plaintiff before 27 April 1994, when the Plaintiff's solicitor conducted searches at the office of the Australian Securities Commission. The Second and Third Defendants were served shortly thereafter.

As to the First Defendant, the searches revealed that its registered office was at premises at Surrey Hills, Victoria. On 28 April 1994 the Plaintiff's solicitor attempted to effect service at that address by forwarding the Writ by Security Post.

On 4 May 1994 the letter was returned marked "Return to Sender - Left Address, 2 May 1994".

On 5 May 1994 the Plaintiff's solicitors made enquiries and ascertained that the First Defendant was not carrying on business at its registered office. Their enquiries did not reveal its address.

On the same day a copy of the Writ was left at the premises in Surrey Hills.

On 10 May 1994 the Plaintiff's solicitor was advised by an employee of a firm which occupied the premises that the First Defendant no longer carried on business there and there was no forwarding address.

On 17 May 1994 the Plaintiff's solicitor applied for an extension of the period of validity of the Writ. This had become necessary because it was apparent that the Writ had not come to the knowledge of the First Defendant (see Deputy Commissioner of Taxation v Abberwood Pty Ltd (1990) 19 NSWLR 530).

By this time the First Plaintiff's cause of action had become statute barred, however, this was not fatal (0.5.12 (3)).

On 26 May 1994 the period of validity of the Writ was extended to 10 August 1994. A further extension was ordered on 20 October 1994.

The First Defendant seeks to have these orders set aside (O.46.08). The challenge was to the validity of the order made on 26 May 1994, it being assumed that if this order was set aside, it would follow that the order made on 20 October 1994 should also be set aside.

The relevant principles have been set out by Mildren J in The Commonwealth v DKB Investments Pty Ltd, an unreported decision dated 12 September 1991, and reiterated in Wrenn v Hart and the Northern Territory of Australia, an unreported decision dated 24 May 1994, as follows:-

"... The Court will not grant an extension unless good reason is shown for the extension and whether there is good reason depends on all the circumstances of the case. The question of whether an extension should be allowed is 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. The fact the cause of action against the second defendant would be statute barred if the extension is granted does not increase the burden of proof upon the plaintiff and in some cases may be regarded as a good reason for extending the Writ. Further, the discretion should only be exercised adversely to the plaintiff where the plaintiff's default has been intentional or contumelious or where there has been inordinate or inexcusable delay on the part of the plaintiff or his 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."

There is no evidence that the Plaintiff attempted service prior to 28 April 1994 and no explanation for the failure to do so. It is argued on behalf of the First Defendant that this failure vitiates the order extending the validity of the Writ.

The Plaintiff had an obligation to serve the Writ promptly (see Ramsey v Madgwicks (1989) VR 1 and Finlay v Littler (1992) 2 VR 181). However, had the attempted service on 28 April 1994 been effective, the First Plaintiff could not reasonably have been prevented from continuing the action.

It was suggested that the Plaintiff, by not attempting prompt service, took the risk of failing to effect service prior to the expiry of the Writ, which could not then be renewed because of the deliberate course of action taken by the Plaintiff.

In Mahon v Frankipile (Australia) Pty Ltd (1990) 157 LSJS 52, a decision of the Full Court of the Supreme Court of South Australia, White J said at p.54:-

"... The prejudicial delay by the Plaintiff did not commence on the date when he issued the Writ (July 17 1984) but on July 17 1985, the date when he failed to serve it within the one year period allowed by the Supreme Court Rules for service. It may well be that the late issue of a Writ within the three year limitation period and late service of the Writ aqt the end of the year allowed for service together tend to exacerbate or compound any later prejudicial delay but such legitimate delay, in itself, cannot be held against the Plaintiff since it is permitted by the law. It is the further delay after the Writ has lapsed and the further delay again in failing to apply to renew which is most relevant although such further delays may be exacerbated or compounded, as I said, by initial legitimate delays."

It appears that if the Plaintiff does take a risk, it is the risk that the Defendant has suffered serious prejudice by reason of the delay.

There is no evidence which suggests that the First Defendant has suffered any prejudice by reason of the delay and, although the First Defendant did not appear to have knowledge of the claim until 27 July 1994, the circumstances are not such that prejudice may be inferred.

Bearing in mind the onus on the Plaintiffs (see Soper v Matsukawa (1982) VR 948, 954) I am satisfied that notwithstanding the unexplained delay it was appropriate that the period of validity of the Writ be extended.

The application is dismissed.