THE COMMONWEALTH OF AUSTRALIA v. DKB INVESTMENTS PTY LTD

Supreme Court of the Northern Territory of Australia

Mildren J

6 and 12 September 1991 at Darwin

PRACTICE AND PROCEDURE - service of writ - application to extend time for service - considerable delay - discretion of court - principles relevant to exercise of discretion considered - *Supreme Court Rules* 5.12(2), 5.12(3), 5.12(1)

PRACTICE AND PROCEDURE - application to extend time for service - onus - applicant must show good cause - evidentiary onus on respondent to show prejudice and risk of unfair trial

Other Legislation referred to:

Limitation Act

Cases applied:

Birkett v. James [1978] A.C. 297
Irving v. Carbines [1982] V.R. 861
Kleinwort Benson Ltd v. Barbrak Ltd [1987] 1 A.C. 297; [1987] 2 W.L.R. 1053
Mahon v. Frankipile (Australia) Pty Ltd (1990) 157 LSJS 52
Soper v. Matsukawa [1982] V.R. 948
Van Leer Australia Pty Ltd v. Palace Shopping K.K. and Another (1981) 34 A.L.R. 3
Williams v. F.S. Evans & Sons and District Council of Stirling (1988) 52 S.A.S.R. 237
Zappelli v. Falkiner & Others (Supreme Court of Victoria, O'Bryan J., unreported, 21/9/87).

Counsel for the Plaintiff : D. Trigg
Solicitor for the Plaintiff : Australian Govt Solicitor

Counsel for the Defendant : S. Southwood
Solicitor for the Defendant : Poveys

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

No. 644 of 1989

BETWEEN:
THE COMMONWEALTH OF AUSTRALIA
Plaintiff

AND:

D.K.B. INVESTMENTS PTY LTD
Defendant

CORAM: MILDREN J.

REASONS FOR JUDGMENT
(Delivered 12 September 1991)

This is an application pursuant to Rule 5.12(2) of the *Supreme Court Rules* to extend the period of the validity of the Writ in this action until 6 October 1991.

The action is for damages for breach of contract. The Plaintiff alleges that in August 1986 it entered into an agreement for lease with the Defendant whereby it agreed to take portion of a certain building on the 1st Floor of the Ford Plaza (then under construction) in Alice Springs for a term of 5 years. The Plaintiff alleges that in late 1986 the Defendant repudiated the agreement, that the Plaintiff accepted the repudiation, but is entitled to damages for breach. It is apparent that the Plaintiff's cause of action, if it has one, probably arose on or about 20 November 1986 when the Defendant purported to withdraw its offer to the Plaintiff to lease the premises to it. When this occurred, the

Plaintiff referred the matter to its solicitors, the Australian Government Solicitor ("AGS") in about December 1986. The solicitor then handling the matter for the AGS, wrote to the Defendant by letter dated 15 December 1986 and also sent two telex messages in January 1987, in which, inter alia, there is reference to the Plaintiff's belief that (a) there is a binding agreement between the parties (b) if the agreement is repudiated, the Plaintiff will suffer "no inconsiderable" expense; but nowhere does the Plaintiff's solicitors indicate that the Plaintiff intends to bring any legal action against the Defendant.

Nothing happened thereafter until 6 October 1989, shortly before the action would have become statute barred, when the Writ in this action was issued. No explanation is given for this delay. The Writ was generally endorsed with a claim for damages for breach of contract only. The Writ was not served within the period of 12 months required by Rule 5.12(1). The reasons given for this are that the solicitor employed by the AGS to attend to the matter, decided to brief counsel to settle a Statement of Claim before serving the Writ, and, in order to do this, further instructions were needed from the Commonwealth Department of Administrative Services. Those instructions arrived on 11 December 1989, but no further steps were taken, initially because the solicitor handling the matter was not aware of the receipt of the information requested from the Department, and subsequently because the matter was overlooked, the solicitor concerned even failing to appreciate that the Writ would expire if it was not served within a year. The said solicitor seems to have been under the impression throughout that the information sought from the client was still outstanding. No system of follow up appears to have been in place. These circumstances do little credit to the solicitor concerned.

The Defendant did not file any affidavit in opposition to the application and could point to no prejudice to it should the application be granted save the loss of a defence based on the *Limitation Act*.

After hearing submissions on 6 September 1991, I granted the application and made the following orders:

1. Order in terms of paragraph 1 of the Summons filed 13 June 1991.

2. Order that the Plaintiff pay the Defendant's costs of the application to be taxed or agreed.

3. Certify fit for counsel.

4. Liberty to apply.

I indicated then that I would publish my reasons at a later time. I do so now.

Rule 5.12(2) enables the court to extend a Writ for such period as it thinks fit up to 12 months from the date of the Order. No criteria are set out in the *Rules of Court* which determine the factors to be considered on whether to grant or refuse such an application. Rule 5.12(3) provides that an order may be made before or after the expiry of the Writ. The relevant legal principles which apply to the exercise of the court's discretion in these matters are 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 K.K. and Another* (1981) 34 A.L.R. 3; *Mahon v. Frankipile (Australia) Pty Ltd* (1990) 157 L.S.J.S. 52.

Applying these principles to the present case, the application in my opinion must be granted. Firstly, the reason for the delay was ignorance, incompetence and oversight by the Plaintiff's solicitor; not by a deliberate or contumelious decision on its part or that of its solicitor. Secondly, there is no risk of prejudice to the Defendant in this case; indeed, none has been alleged. Thirdly, there is no substantial risk that a fair trial may not be had. The issues to be debated are still able to be litigated - certainly the Defendant has not attempted to show otherwise. Although the onus of showing good reason for granting the extension rest on the Applicant, the Defendant in this regard bears an evidentiary

onus to raise facts which it says amount to prejudice, or an inability to obtain a fair trial, and if it does not do so, the court may assume that there are none: *Williams v. F.S. Evans, supra*, at 249 per Bollen J. Although the delay here is very considerable, and the correspondence between the parties did not in specific terms alert the Defendant that the Plaintiff intended to sue the Defendant for damages for breach of contract, in the absence of a any submission from the Defendant that there was substantial risk of prejudice or an inability to get a fair trial, the balance of hardship favours the granting of the extension.

Although the Defendant was unsuccessful in resisting the application, the fault lay with the Plaintiff which had to seek the indulgence of the court in order to get the extension, which is a matter of judicial discretion. In these circumstances, the Defendant is entitled to its costs in resisting the application

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