IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
No. 948 of 1981
No. 484 of 1985

BETWEEN
JOHN HOLLAND (CONSTRUCTIONS) PTY LTD

Plaintiff

and

KEITH JORDIN

Defendant

MASTER LEFEVRE:

REASONS FOR DECISION
(Delivered 16 July 1992)

The defendant applied, on 15 January 1992, for an order dismissing for want of prosecution the plaintiff's claim in these consolidated proceedings.

The application is made in pursuance of Order 24 and the inherent jurisdiction of the court. Under Rule 77.01 (2) (c) (iii), I have jurisdiction to exercise the inherent jurisdiction of the Court to dismiss a proceeding for want of prosecution.

The grounds on which the application is based are that there has been an inordinate and inexcusable delay in the prosecution of the proceedings and that ultimately the defendant has suffered prejudice.

The history of the occurrences leading to the present application begins with an action in

respect of a workplace injury to one Milo Cindric (Cindric) on 26 August 1978. Cindric who at the time was employed by the plaintiff, had been severely injured when a load of formwork lifted by a mobile crane fell on him. The crane was driven and operated by and under the control of one Keith Jordin (Jordin).

Following the accident, Cindric sued both the plaintiff and Jordin's employers, Simon Engineering (Aust) Pty Ltd trading as Simon-Carves, alleging that they were jointly liable for his injuries. That action was eventually settled on 8 February 1982 in favour of Cindric, as a result of which the plaintiff was obligated to pay a portion of the damages.

On 23 December 1981 however, the plaintiff had commenced a proceeding (No. 948 of 1981 - to which I will refer as **"the first proceeding")** against Jordin as defendant in an attempt to recover from him the damages or part of the damages it had paid out to Cindric, alleging Jordin's negligence had contributed to Cindric's injury. At the time of issue of the writ of summons in that proceeding the claim by Cindric against the plaintiff and Simon-Carves had not yet been determined. Thus, on 27 August 1984, Jordin sought to have the plaintiff's statement of claim struck out as disclosing no cause of action. On 13 December 1984, the application was refused.

On 4 June 1985, the first proceeding came for trial before Nader J when an application to amend the statement of claim was made by the plaintiff. On 11 July 1985, his Honour allowed some of the amendments which had the effect of limiting the plaintiff's claim to one **per quod servitium amisit.** The trial did not proceed, but was adjourned.

On 28 August 1985, the plaintiff issued a new writ of summons (No. 484 of 1985 - the second proceeding) claiming contribution from Jordin, as a joint tortfeasor, on the basis of the causes of action which Nader J had refused to allow as amendments to the statement of claim in the first proceeding.

On 19 May 1988, the first and second proceedings were consolidated by order of Martin J, who also ordered that the plaintiff file a consolidated statement of claim. That not having been done by November 1988, Jordin issued a summons seeking delivery of the consolidated statement of claim.

The statement of claim was filed on 30 November 1988 and, on 15 June 1989, Jordin filed his defence to that statement of claim.

On 16 March 1990, the plaintiff sought an order for further and better particulars of part of Jordin's defence, which order was made on 19 April 1990. The particulars were supplied on 4 May 1990.

The consolidated proceedings were listed in a number of callovers, the first occurring on 15 June 1990. They were listed and adjourned at callovers held on 16 October 1990, 5 December 1990, 2 April 1991, 30 April 1991, 5 November 1991, 3 December 1991 and 4 February 1992.

On 29 January 1992, a notice of trial and copy of the consolidated pleadings were filed by the plaintiff. The matter was last listed in a caseflow management callover on 7 April 1992, when it was adjourned to 9 June 1992. It did not appear in that callover list because the hearing of the present application to strike out had been listed before me.

I now go back in time. Jordin's solicitors, on 18 July 1991, wrote to the plaintiff's solicitors on the subject of settlement, but received no reply. They wrote again on 3 December 1991 and again there was no response. At the callover on 3 December 1991, Jordin's solicitors told the plaintiff's solicitors that they had been instructed to apply for dismissal of the proceedings for want of prosecution.

The present application was lodged on 15 January 1992. It was adjourned a number of times before it was heard by me on 16 June 1992.

Jordin died on 15 December 1990. Danny Charles Masters, a solicitor employed by the plaintiff's solicitors, says in his affidavit of 26 February 1992 that he did not become aware of Jordin's death until after the application was made to strike out the proceedings for want of prosecution, which means at some time after 15 January 1992.

On 26 March 1992, as the result of an application made by the plaintiff on 23 March 1992, I ordered that the Public Trustee, as Jordin's personal representative, be made the defendant in the consolidated proceedings in substitution for Jordin and that the

proceedings be carried on as so constituted.

The words of Asche CJ in **White v Northern Territory of Australia**, an unreported judgment of this Court, delivered on 13 June 1989, are appropriate to be cited here. At p 9, his Honour said:

> **"These then are the circumstances in which the plaintiff seeks to continue the proceedings, and the defendant seeks to have them dismissed for want of prosecution. As usual in these matters, the court is faced with the task of balancing two equally important considerations in which the interest not only of the parties but of the general public is involved.**
>
> **"On the one hand persons with claims which are not vexatious, repetitious - (in the sense of having been previously heard and determined) - or totally without merit, should have their claims heard and determined according to law. On the other hand, there is the corresponding public interest that where a claim exists, the legal processes to make that claim should not be prolonged indefinitely; lest potential defendants be harassed (sic) many years after the event, when human memory has faded, witnesses have become unavailable and the institution or continuation of proceedings would create oppression or injustice to persons who have ordered their lives in the reasonable expectation that what was once a threat must have ceased to be so. That philosophy is expressed in the maxim: interest reipublicae finis litium.**
>
> **"In the balancing exercise between these two principles, the courts have recognised a number of guidelines which may assist in attaining that result which, overall, the justice of the occasion demands. I have deliberately used the term 'guidelines' rather than some stronger expression, because it has been frequently and, if I may say so, properly emphasised, that to dismiss a case for want of prosecution is an exercise of the court's discretion, either under rule 24.01, or under the inherent jurisdiction of the court which is expressly preserved by rule 24.05. It can never be laid down that certain categorised acts or omissions will automatically excuse or debar the parties seeking the exercise of the court's discretion."**

White's case carefully examines those guidelines. They revolve around the question of

delay and whether or not it was inordinate and unexcusable. Also to be considered is the matter of prejudice that may be suffered by the parties as a consequence of the making of, or refusal to make, the order for dismissal. I have to consider those issues in all the circumstances of the case.

In **Duncan v Lowenthal (1969) VR 180**, the Full Court of the Victorian Supreme Court were faced with an almost similar situation as in the present case. The headnote of that case reads -

> **"In 1959 the plaintiff commenced an action in the County Court against the defendant for damages for negligence on the part of the defendant, a medical practitioner, in the performance of a surgical operation in 1956. The action was fixed for trial in 1962, but adjourned at the plaintiff's request. Thereafter no further step in the action was taken till 1967 when the plaintiff gave notice of intention to proceed and the defendant applied to have the action struck out for want of prosecution. In the meantime two witnesses for the defendant, as well as certain relevant hospital records, had become unavailable. The adjournment of the case in 1962 had been sought by the plaintiff because she needed more evidence and wished to proceed in the Supreme Court. The long delay after the adjournment she attributed to lack of funds and inability to obtain further evidence.**
>
> **"On the return of the summons the County Court judge dismissed the summons on the condition that the plaintiff make certain admissions relating to, inter alia, the said unavailable evidence."**

On appeal it was held that -

> **"Before an action is dismissed for want of prosecution, the inaction by the plaintiff must involve inordinate and inexcusable delay in advancing the case to trial. In the present case there has been such a delay on the part of the plaintiff with the result that, despite the admissions made by her which were only a partial compensation for the unavailability of the evidence to which they related, there was now a substantial risk that a fair trial of the issues would be no longer possible, and the action should be dismissed for want of prosecution.**

"Dictum of Diplock, L.J., in Allen v Sir Alfred McAlpine & Sons Ltd, [(1968) 1 All ER 543 at p 553] applied."

In **McAlpine's** case Diplock L.J had said -

"There may come a time, however when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest and the administration of justice demands that the action should not be allowed to proceed."

In **Patsalidies and Another v Magoulias and Another 29 NTR 1,** a decision of O'Leary J, as he then was, of this Court, his Honour at page 5 said -

"It is true that inordinate delay itself may well create difficulties for a defendant who has to call witnesses to give evidence as to events long since past. As Lord Denning MR has said: 'Every year that passes prejudices the fair trial'. It is also true that, by reason of the delay, the defendants are being kept at risk in respect of the subject matter of the action for an inordinate length of time: Ulowski v Miller [1968] SASR 277."

In **White's** case (supra) at p 21 Asche CJ said -

"In this case, however, it is said that the defendant suffers real prejudice because one eyewitness is dead, and the other may be suffering from impaired memory. In many cases, those would be powerful reasons to establish that the defendant would be prejudiced and, further, that there would be a substantial risk that it would not be possible to have a fair trial. As to the latter consideration, see McAlpine's case and Birkitt v James [(1977) 2 All ER 801]."(emphasis mine).

Although in **White's** case, Asche CJ was not satisfied that a risk to a fair trial existed, it was clear that he approved the guiding principles.

In **Chandler v The Council of the South Australian Institute of Technology 6 SASR 162**, there had been a delay between 1965 to March 1972 when the plaintiff had given notice of intention to proceed. This had permitted the defendant to apply for an order for dismissal for want of prosecution. There also, a witness had died in that intervening period. The appeal court found that, on the pleadings, the witness would have been a material witness. Accordingly, it restored the order for dismissal which had been reversed by a Judge on appeal from the Master. In arriving at this decision, the court considered and discussed the factors that are guides to the court's exercising of its jurisdiction in matters of this kind. It applied **Ulowski v Miller** (supra). The guiding factors are referred to in that case, at pp 281-283 in the judgment of the Chief Justice, and I do not see the need to repeat them here.

The defendant in the present application alleges that there has been inordinate and inexcusable delay on the plaintiff's part in prosecuting its claim in the consolidated proceedings. The first proceeding was commenced about ten and a half years ago and the second proceeding about seven years ago. It is about seven years since the proceeding came on for trial before Nader J. The incident which gave rise to the proceeding occurred in August 1978, about fourteen years ago. In the past eighteen months, the defendant has died. This all means, says the defendant, that there cannot be a fair trial and the consolidated proceedings should be struck out.

The plaintiff argues that there has not been any inordinate or inexcusable delay on its part. In support, the plaintiff draws attention to the fact that the first proceeding came on for trial on 4 June 1985. It was adjourned, says the plaintiff, because of the need to amend the statement of claim. The second proceeding was commenced on 28 August 1985 and those actions have been consolidated. These steps, it is submitted, are indications of activity and not of delay.

The plaintiff argues that there has been **"significant delay"** on the part of the defendant in -

(a) providing particulars (which had been sought by the plaintiff on 15 September 1985) in respect of which the plaintiff had to seek and obtain an order for particulars on 19 April 1990 - those particulars were not delivered

until 4 May 1990;

(b) advising as to the acceptance of service of process;

(c) delivering a defence to the consolidated statement of claim, which was not done until 15 June 1989; and

(d) notifying the plaintiff of Jordin's death.

The plaintiff submits that, since the present application was filed, the plaintiff has -

(a) filed a notice of trial and copy pleadings which was done on 29 January 1992;

(b) filed a bill of costs consequent to the order of Nader J on 13 December 1984 which bill was filed on 27 April 1992; and

(c) taken action in consequence of Jordin's death by having the Public Trustee substituted as defendant.

These submissions are, for the most part, made on the facts alleged in the affidavit of Brian Llewellyn Johns of 26 February 1992, filed on the plaintiff's behalf, and purport to provide some explanation, reason or excuse for the time it has taken to have the proceedings reach their current stage. I find that what the plaintiff has provided is inadequate to explain satisfactorily why it has taken so long for the consolidated pleadings to reach the present stage, nor does it, in my view, furnish an acceptable reason or excuse for the delay. It appears to me that there has been a delay more than enough to be termed inordinate and inexcusable.

I am not satisfied that the "flurry" of activity by the plaintiff since the filing of this application makes any amends or offers any explanation or excuse for the delay that has occurred since the commencement of the first proceeding or even since the consolidation order was made. Nor am I satisfied that any delay of which the defendant was responsible is relevant. On the authorities, a defendant is under no duty to stimulate a plaintiff to action. A defendant generally may leave a dormant plaintiff lie and have no fear that his inaction may constitute part of the excuse for the plaintiff's own inaction in prosecuting his claim: see Professor Williams, "Supreme Court Civil Procedure Victoria", at p 108, par 10.11; **Allen v Sir Alfred McAlpine** (supra); **Duncan v Lowenthal** (supra). Williams adds in that paragraph that **" ... a warning to the plaintiff of the consequences of further delay may strengthen a claim by a defendant that justice requires the**

proceeding be dismissed." In mid-1991 and, at least, at the callover in December of that year such a warning was given.

On the evidence, the defendant has had occasion to rouse the sleeping plaintiff during the course of the current litigation. Such arousals were but momentary, however, and it resumed its slumber. The alarm-clock chimes emanating from the filing of the application certainly woke the plaintiff, but it seems to me, all too late.

I now turn to the question of hardship.

The prejudice that the plaintiff will suffer is that, if an order for dismissal is made, it will lose its cause of action whatever its chances of success might be. Clearly, the plaintiff would not be able to comence fresh proceedings as its claim would then be time-barred by the **Limitation Act.**

The failure to prosecute the proceedings with the appropriate promptness may be attributable to the plaintiff's own action (or perhaps more correctly, inaction) or it may be because of the dilatoriness of its solicitors. If the plaintiff is responsible for the delay, then it must bear the consequences. If its solicitors are fully responsible, there are authorities which indicate that the sins of those solicitors are not necessarily to be visited on their client. Asche CJ in **White's** case (after citing **Birkitt v James** (supra); Diplock L.J. in **McAlpine's** case (supra) at 809; **Ulowski v Miller** (supra) and McGarvie J in **McKenna v McKenna (1984) VR 665**), said of that question at 17 to 18 -

> **"I would not, however, consider that it would be usually of any great significance. I would, with respect, adopt the approach of Lord Salmon in Birkett v James (1977) 2 All ER at 814-5, where he regards it as an 'ancillary consideration' which 'may carry little weight but it is not irrelevant'. He felt that where other factors were evenly balanced such a consideration 'might in some cases, quite properly, just tip the balance in the plaintiff's favour'. "**

However, I feel I must adopt the same approach as Asche CJ did in **White's** case. His Honour took the approach which Bray CJ had taken in **Ulowski v Miller** (supra). I too leave that question open for the very reason that there is no evidence from which I can

conclude where responsibility for any delay lies as between the plaintiff and its solicitors. There has been inexcusable and inordinate delay no matter who is responsible.

In paragraph 14 of its statement of claim, the plaintiff, in alleging Jordin's part in causing the injury sustained by Cindric, supplied particulars of Jordin's alleged negligence. Those particulars are that Jordin -

(a) operated and continued to operate the mobile crane when he knew or ought to have known that it was unsafe so to do;

(b) failed to ensure that the load was rigged properly and with all adequate precaution for the safety of others when having the load so rigged;

(c) operated and continued to operate the mobile crane when being unable to see the load being lifted or what persons were in the immediate vicinity;

(d) jibbed out the crane when being unable to see where the load was in proximity to any obstacles in the way of the load as the crane was being jibbed out; and

(e) operated the crane without having a dogman in a suitable location to give him adequate directions.

Those allegations, the defendant submits, are crucial to the plaintiff's case and only Jordin can give evidence to rebut them. Jordin's evidence is therefore itself crucial to the defence of the plaintiff's claim as only he can give an account of what he did and what he saw or what he was unable to see or indeed what occurred at the times relevant to the incident involving the operation of the crane. The defendant argues that Jordin's death has thus deprived the defendant of the chance of a fair trial as his evidence cannot be adduced in defence of the crucial allegations against him.

The law of evidence allows a statement of a deceased to be given in evidence only in certain limited circumstances.

One of those circumstances is found in section 26 D of the **Evidence Act**, the relevant parts of which read -

> **"(1) In any civil proceedings where direct oral evidence of a fact would be admissible, a statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of the fact if the following conditions are satisfied, that is to say -**

(a)if the maker of the statement either -

(i)had personal knowledge of the matters dealt with by the statement; or

(ii)where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b)if the maker of the statement is called as a witness in the proceedings,

but the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

"(2) In any civil proceedings, the Court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in sub-section (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence -

(a)notwithstanding that the maker of the statement is available but is not called as a witness; and

(b)notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the Court may approve, as the case may be.

"(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

The deceased, the defendant submits, comes within the meaning of the expression **"a person interested"** in sub-section (3) of that section. That provision is therefore of no

avail, even if there were in existence, a statement capable of being adduced in evidence. It seems to me that that submission is correct.

Cross on Evidence, 4th Australian edition, at paras. 33005 et seq. deals with those kinds of statements by deceased persons that are otherwise admissible as evidence of the truth of their contents. These the learned author lists as follows -

. declarations against interest;
. declarations in the course of duty;
. declarations as to public or general rights;
. pedigree declaration;
. dying declarations; and
. statements by testators concerning the contents of their wills.

The learned author deals with these categories and the conditions of admissibility at length and in detail, and it is submitted by the defendant that clearly any statements of the deceased would not fall into any of those categories and therefore cannot be admissibile in evidence. I agree.

All avenues of admissibility are exhausted. Therefore, even if a statement of the deceased exists (and there is no evidence that such a statement does exist), there is no means whereby that statement can be adduced in evidence in the consolidated proceedings. Jordin's death has shut out completely such evidence as he might have been able to give in defence of the plaintiff's claim.

The plaintiff argues that it cannot be made responsible for the consequences of the defendant's death. If there has been delay, no matter how inordinate or inexcusable, there is no causal connection between it and the death of the deceased. It cannot be said, argues the plaintiff, that the death is a consequence of the delay. If the death had occurred say early in the proceedings, there would be no ground, it is submitted, to argue prejudice. It does not, says the plaintiff, constitute an aspect of any prejudice which may arise from any delay on its part.

In my view, the defendant is now in a situation where, through Jordin's death, he has been deprived of his ability to controvert the allegations material to the successful prosecution of the plaintiff's case. It is not a question of whether there is any causative link between

the delay and the death, but what is of significance is the cumulative effect of the inordinate and inexcusable delay and the death which has thus deprived the defendant of his defence. The plaintiff's inactivity has created the delay during which time it bore, it must be said, the risk of such an event as the defendant's death occurring.

There can, in the circumstances, be no possibility of a fair trial. A material witness is no longer available to the defendant. Justice demands therefore that the proceedings be dismissed for want of prosecution.

There will be an order that the consolidated proceedings be dismissed for want of prosecution. The plaintiff will pay the costs of the application and the costs of the consolidated proceedings.