PARTIES:	ANDREW CHARLES WRENN
	V
	DENNIS WILLIAM HART
	AND
	THE NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction
FILE N^{O}:	453 of 1991 (9124915)
DELIVERED:	Delivered at Darwin 24 May 1994
HEARING DATES:	Heard at Darwin 8 April 1994
JUDGMENT OF:	Mildren J

CATCHWORDS:

Practice and Procedure: Extension of time for Service – Principles Court relies upon to exercise discretion – Balance of convenience lies between hardship to parties and prejudice to defendant – Burden of Proof is not increased if action is Statute barred – intentional or contumelious behaviour, inordinate or inexcusable day held against applicant – extension not warranted because

of defendant's conduct – court has regard to applicant's likelihood of success in action.

LEGISLATION

Supreme Court Rules: r5.12
Police Administration Act: s162, s163

Cases

The Commonwealth of Australia v D.K.B. Investments Pty Ltd (unreported, 12th September 1991, Mildren J) applied
Van Leer Australia Pty Ltd v Palace Shipping K.K. and Another (1981) 34 ALR 1 applied
Finlay v Littler (1992) 2VR 181 followed
Lakersteen v Jones & Others (1987-1988) 92 FLR 6 mentioned.

REPRESENTATION:

Counsel

Plaintiff:	In person
First Defendant:	No appearance
Second Defendant:	Peter Tiffin

Solicitors

Plaintiff:	Self Represented
First Defendant:	Mildrens
Second Defendant:	Solicitor for the Northern Territory

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

No 453 of 1991
(9124915)

BETWEEN:

ANDREW CHARLES WRENN
Plaintiff

AND:

DENNIS WILLIAM HART
First Defendant

AND:

THE NORTHERN TERRITORY OF AUSTRALIA
Second Defendant

CORAM: Mildren J

REASONS FOR JUDGMENT
(Delivered 24 May 1994)

This is an application pursuant to Rule 5.12 of the Supreme Court rules to extend the period of the validity of the writ for service upon the second defendant.

The action is for damages for wrongful arrest and false imprisonment which allegedly occurred on 20 December 1988 at Police Headquarters Berrimah when the first defendant who was then a member of the Northern Territory Police Force, in purported performance of his duties under the Police Administration Act, arrested the plaintiff and deprived him of his liberty.

The writ in this matter was issued by the plaintiff's solicitors on 13 December 1991 only a week before the action was due to become statute barred. The writ was issued against both defendants. It was served upon the first defendant in September 1992. The writ has never been served on the second defendant.

At the time of the issue of the writ the plaintiff was represented by Messrs Waters James McCormack, solicitors of Darwin. Since that time, the plaintiff dispensed with the services of his solicitors and now represents himself. The present application was made by summons dated 8 March 1994. The plaintiff was formerly also a member of the Northern Territory Police Force.

In support of this application the plaintiff relies upon two affidavits, the first sworn 9 March 1994 and the second sworn 18 March 1994. According to those affidavits he claims to have engaged his former solicitors in January 1989 to represent him in relation to this matter and that at the time of his first appointment he instructed his solicitors to issue a writ against both defendants. He claims that in November 1991 he wrote to his solicitors instructing them that he wanted

> "all initiating processes finalised and served prior to 20 December 1991, regarding the suit for false/unlawful/wrongful arrest against Dennis Hart. I have paid in advance for this a considerable time ago, and I have waited before

insisting on it being completed".

He claims that the firm was acting on his behalf on a number of other matters including negotiating a settlement with the Northern Territory Police concerning the question of his retirement from the Police Force. He says that he was not advised by his solicitors that the writ had not been served and he first became aware of this on 31 January 1994 when he made a telephone enquiry with the Supreme Court. The Plaintiff maintains that he instructed his solicitors to serve the writ upon the Northern Territory, that he believed that the writ had been in fact served on the second defendant and he never gave his former solicitors any instructions to discontinue his action against the second defendant.

I have also heard evidence from Mr Gary Schneider, a partner in the firm of Waters James McCormack, who was called by the second defendant. According to Mr Schneider he was first consulted by Mr Wrenn in early 1989. At that stage he was asked to give general advice in relation to the arrest which had occurred in the previous December. After a while the file became dormant and was later closed. A new file was opened on 20 November 1991 in order to initiate proceedings and I find that the probable reason for this was the receipt of the plaintiff's letter exhibit "A" to his affidavit of 18 March 1994 requesting "... all initiating processes finalised and served prior to 20 December 1991."

On 5 December 1991 Messrs Waters James McCormack wrote to the Plaintiff enclosing a copy of a draft writ and asking him to check it to ensure that it reflected his instructions.

The letter pointed out that the action against the Northern Territory of Australia may be futile if the first defendant's actions were not done in pursuance of the *Police Administration Act* and recommended not serving it until advice from counsel on the matter had been obtained.

According to Mr Schneider at no time was he instructed to serve the writ on the second defendant and that by letter of 16 December 1991 the plaintiff's former solicitors said:

> "... we confirm that as per your instructions we have filed but not served the writ."

By letter dated 17 January 1972 Messrs Waters James McCormack advised the plaintiff that they were looking forward to receiving his instructions and pointed out that the writ must be served by 13 December 1992.

On 25 May 1992 the plaintiff entered into a deed releasing the Northern Territory from any claim which the plaintiff might have against the Territory connected with his employment with the Northern Territory Police. According to Mr Schneider on 11 September 1992 his receptionist received a message from the plaintiff to the effect that he wanted to ensure that the first defendant had been served with the writ but that he wanted no other action to be taken on his behalf. Mr Schneider said that on 20 October 1992 he had a telephone conversation with the plaintiff who instructed him to discontinue the writ against the Northern Territory.

It appears from the affidavit of Mr Grant sworn 3 March 1994

and filed on behalf of the second defendant that the second defendant had been advised on 25 September 1992 by Mr Schneider that the plaintiff was not intending to serve the writ upon the second defendant. Mr Grant further says that on 8 December 1992 Mr Schneider advised the second defendant's solicitors that the plaintiff would be filing a notice of discontinuance against the second defendant. Mr Grant swears that as a result of this advice the second defendant has taken no steps in preparation of this matter and has not proofed any witnesses including the first defendant who has recently been compulsorily retired by the Commissioner of Police.

In fact Messrs Waters James McCormack did not discontinue the proceedings against the second defendant.

On 29 April 1993 Messrs Waters James McCormack wrote to the plaintiff enclosing an account for their services in relation to this matter and in which Mr Schneider wrote:

> "I have advised the Solicitor for the Northern Territory that you will not be pursuing this proceeding against the Government ... According to my file, neither of the Defendants has lodged a Defence to that action. You will no doubt recall your instructions of some months ago that I was not to take any steps in relation to any of your matters unless it has been absolutely necessary to protect your interests. Accordingly, I have not taken any steps to obtain a Judgment in default of

defence."

The implication of this letter is that the writ had been served upon both defendants, and that both defendants had entered appearances.

However, according to Mr Schneider on 31 May 1993 he had a further telephone conversation with Mr Wrenn and on that date he advised the plaintiff that he had not served the writ on the second defendant at all.

On 17 August 1993 Mr Schneider wrote again to Mr Wrenn advising that he ought to file a Notice of Discontinuance against the second defendant.

It is clear to me from all the material that the plaintiff is well aware of the difference between the issue and the service of proceedings and that he had been advised that the writ had to be served on or before 12 December 1992. The only evidence that shows that the plaintiff instructed his solicitors to issue and serve the writ against the second defendant is the letter of November 1991, but that letter is equivocal because it is also consistent with the view that the plaintiff wished proceedings to be issued and served against the first defendant and the first defendant alone.

I accept the evidence of Mr Schneider that subsequent correspondence to the plaintiff from Waters James McCormack requested instructions as to whether the plaintiff wished to proceed against the second defendant and in particular as to whether the writ should be served upon the second

defendant and that no such instructions were ever received.

On the basis of the evidence presently before me I am not prepared to make a finding that the plaintiff instructed his solicitors to discontinue the writ against the second defendant. The plaintiff was not cross examined on his affidavit and I have not had an opportunity to have his evidence tested on that issue. I also think it is quite possible that the plaintiff at all times throughout 1992 and most of the early part of 1993 thought that the writ had been served on both defendants. However, I do accept the evidence of Mr Schneider that he made the position clear in his telephone conversation with Mr Wrenn on 31 May 1993. I also find that the Northern Territory was lead to believe at all times that the matter would not be proceeding against the second defendant and that the second defendant has taken no steps to investigate the matter. I am mindful that the plaintiff has in his written submissions claimed that the matter of the alleged assault and wrongful imprisonment was investigated and became the subject of the so called "Mulholland Report." However there is no evidence before me to this effect. Mr Wrenn makes no reference to the Mulholland Report in either of his affidavits and nor was that Report tendered in evidence.

Oddly enough there is a statement of claim in this matter prepared by Mr Schneider and dated 8 December 1992 which is suitable to serve as a statement of claim against both defendants. It is clear from that statement of claim that the claim against the second defendant is that it is vicariously liable for such of the torts of the first

defendant as he committed in the purported performance of his duties under the *Police Administration Act*. There is no attempt to make the second defendant liable on any other basis.

The principles on which the court will act in exercising its discretion as to whether or not to grant relief are referred to in my own judgement in The Commonwealth of Australia v. DKB Investments Pty Ltd (unreported, delivered 12 September 1991). 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 not 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.

In Van Leer Australia Pty Ltd v. Palace Shipping K K & Another (1981) 34 ALR 1 Stephen J, sitting as a single Judge of the High Court exercised his discretion against renewal of a

writ without evidence of particular prejudice suffered by the defendant (or even evidence from which prejudice might be inferred) in circumstances where there was considerable delay not caused in any way by the defendant's conduct, the delay was deliberate, there was no question of mishap or oversight and no notice of the action had been given to the defendant. I accept that other circumstances coupled with long delay may well justify the refusal to exercise my discretion in favour of renewal without evidence of particular prejudice and without even a need to infer prejudice, although as the Full Court of the Supreme Court of Victoria said in Finlay v. Littler (1992) 2 VR 181 at 187 "... delay, to be relevant, must not merely be delay in the abstract"; there must be some connecting link between the delay and the determination as to the manner in which the discretion vested in the court should be exercised.

In this case there has been considerable delay. The writ having expired in December 1992, the total delay involved before making an application for extension is some 14 months. I find that the reason for the delay was in part caused by a misapprehension on the part of the plaintiff that the writ had in fact been served; but also I find that the delay was caused because the plaintiff was not so much concerned with proceeding against the second defendant as he was with proceeding against the first defendant. There was no particular difficulty in effecting service upon the second defendant. No attempt was made to serve the writ upon the second defendant during the period of the writ's validity and the reason for that, I find, was because the plaintiff never made it clear to his solicitors that he

wanted the writ served upon the second defendant despite their specific request for instructions. Whilst I am not prepared to infer that the plaintiff deliberately decided not to serve the writ upon the second defendant, I think the failure to serve the writ was deliberate in the sense that the plaintiff either chose not to make a decision about it, or if he did, chose not to communicate that decision to his solicitors, and was also deliberate in the sense that his solicitors deliberately chose not to serve the writ without the plaintiff's specific instructions.

As to the position of the second defendant there is nothing in the second defendant's conduct to favour the grant of an extension; it did nothing to induce the delay or to encourage a belief on the part of the plaintiff that the claim might be settled, nor did it act in any other way so as to give rise to any unfairness to the plaintiff should this application be refused.

There is nothing to suggest, in relation to the question of balance of hardship, that the plaintiff, should he succeed against the first defendant, would not be able to recover his damages and costs against that defendant. The claim against the second defendant is purely vicarious and is attended with serious difficulties in any event brought about by the provisions of SS 162 and 163 of The Police Administration Act. The cause of action may well have been statute barred against the defendant even when the writ was issued because s162 of the Act requires action to be brought against persons doing things in pursuance of the Act within two months. If the acts complained of were not done in

pursuance of the Act, s162 may not bar the action against the first defendant, but the second defendant would not then become vicariously liable under s163. In the circumstances of this case, there is a high degree of probability that the action against the second defendant would fail in any event, even if it were to succeed against the first defendant: c.f. Lakersteen v. Jones & Others (1987-1988) 92 FLR 6.

Also I take into account the fact that the first defendant is no longer in the employ of the second defendant, having been compulsory retired, and that the delay involved will inevitably cause attendant difficulties to the second defendant in investigating the allegations should this application be granted. I note that some notice of the fact of the proceedings was given to the second defendant in September/October 1992 but there was nothing in that notice which would cause the second defendant to have thought that it was necessary for it to then conduct enquiries.

In all the circumstances I consider that the plaintiff has not established any good reason for the extension, that there has been intentional and inexcusable delay on the part of the plaintiff and his solicitors which has given rise to a substantial risk of serious prejudice to the defendant, and that there is a high degree of probability that the action against the second defendant would fail in any event. Accordingly the application should be dismissed with costs.