PARTIES:	RICHARDS, Graham Edward v CLOSE & CARTER PTY LTD
TITLE OF COURT:	Supreme Court of the Northern Territory
JURISDICTION:	Supreme Court of the Northern Territory exercising Jurisdiction
FILE NOS:	No. 316/1992
DELIVERED:	Darwin 27 July 1995
HEARING DATES:	3, 4, 5, 6 and 7 July 1995
JUDGMENT OF:	Gray AJ

REPRESENTATION:

Counsel:

Plaintiff: B Cassells
Defendant: J Tippett

Solicitors:

Plaintiff: Terrill & Associates
Defendant: James Noonan

Judgment category classification: C
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gra95012

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 316 of 1992

BETWEEN:

GRAHAM EDWARD RICHARDS
Plaintiff

AND:

CLOSE AND CARTER PTY LTD,
MARTIN DAVID CARTER and
VINCENT MICHAEL CLOSE
Defendants

CORAM: GRAY AJ

REASONS FOR JUDGMENT

(Delivered 27 July 1995)

In this proceeding, the plaintiff seeks damages for negligence against his solicitors. The plaintiff, Graham Edward Richards, engaged Close & Carter Pty Ltd on 25 October 1987 in relation to a property dispute with his former wife. Close & Carter Pty Ltd is the corporate entity through which Martin David Carter and Vincent Michael Close carry on practice as solicitors in Darwin. The corporate body and the individual partners have each been joined as defendants. No question has been raised about the identity or liability of any particular defendant. I will hereafter refer to the defendants collectively as "the defendant firm".

Because of the issues raised in this proceeding, it is necessary to say something about the history of the Richards'

marriage and the events leading up to the plaintiff consulting the defendant firm.

The plaintiff married in July 1966 at Toowoomba in Queensland. He was then aged 21 and his wife Carolyn was aged 19. The plaintiff worked as a fitter and turner and his wife as a clerk. Their incomes were combined to meet household expenses.

The couple spent the first two years of their marriage in New Zealand and then returned to Toowoomba where they rented a flat. Each continued to work and their wages were pooled to meet household expenses.

The first child of the marriage, a daughter Alana, was born on 24 January 1970 and Mrs Richards ceased work during the pregnancy. The family moved to Darwin in August 1970 and the plaintiff got work as a diesel fitter. The family lived in a caravan at Nightcliff which had been purchased by the plaintiff in Toowoomba for $3,600. At this stage the only other significant family asset was a car.

The family lived in the caravan for about two years. A second daughter was born on 7 April 1972. Mrs Richards did part-time clerical work to the extent that the care of the young children permitted. The plaintiff worked for Blackwood Hodge as a diesel fitter until, in 1973, he was promoted to service manager for the Northern Territory. The business of Blackwood Hodge was concerned with heavy earthmoving equipment. In late 1972, Mrs Richards returned to full-time clerical work. A baby sitter

minded the children during the working day.

In 1973, the couple moved into a Housing Commission house. The house was damaged during the cyclone at Christmas 1974 and Mrs Richards and the children were evacuated until April 1975, when co-habitation resumed in the repaired house.

In November 1975, the plaintiff resigned from his position at Blackwood Hodge. At that time he was earning about $14,000 per annum. Mrs Richards held a clerical position with the Department of Health. The two incomes were combined to meet the expenses of the family.

In about June 1975, the couple purchased land at Wagaman. The purchase price was $13,500. The couple obtained a government loan which was available to those affected by the cyclone and the plaintiff immediately set about building a house on the land. A previous house on the land had been destroyed in the cyclone. The first task was to clear the land of debris. This was done at week-ends by the plaintiff and his wife assisted by friends.

The construction work started in July 1975 and this was undertaken by the plaintiff, first at week-ends, and later full-time when the plaintiff resigned from his employment. The only professional assistance was provided by an electrician, a plumber and a plasterer. A friend helped with the brick work.

Mrs Richards continued her employment during the construction but gave such assistance to the building project as she was able.

The building of the house was completed in April 1976 when the family moved into residence. The house was a very substantial three bedroom dwelling of brick construction and tiled roof.

After the family moved into the new house, the household duties were shared. The plaintiff did the gardening and his wife did most of the cooking and other domestic tasks. Duties concerning the children were shared.

After the building work was substantially completed, the plaintiff began business on his own account as a builder. This started with general maintenance and sub-contract work. After some years, the plaintiff became a cabinet maker operating out of a factory.

In the years following the completion of the house, the plaintiff and his wife continued to use their combined income for household purposes. An inground swimming pool was added in 1979. This was built by the plaintiff after hiring a backhoe to do the necessary excavation.

In November 1984, the plaintiff and his wife separated. Mrs Richards left the Northern Territory and the plaintiff continued to live in the house. The children remained with the plaintiff and continued to do so, except that the younger child spent a considerable time with her mother during 1987 and 1988. Since the separation, Mrs Richards has made no contribution to the support of the children when they were in the plaintiff's custody.

The plaintiff and his wife were divorced in 1986, the decree nisi being pronounced on 4 October 1986. An application for property settlement orders should be made within 12 months of the decree absolute, s44(3) Family Law Act.

The plaintiff, being aware of this circumstance, consulted Cridlands, a firm of Darwin solicitors, in September 1987. There had earlier been some discussion between the plaintiff and his former wife about the distribution of property. It appears from correspondence in evidence that the wife's solicitors sent Cridlands a draft form of consent order concerning property, which draft was sent to the plaintiff by Cridlands' letter dated 10 September 1987. However, nothing seems to have come of this and, in the result, the plaintiff consulted the defendant firm on 25 October 1987.

The plaintiff was referred to Ms Karen King, an employee solicitor of the defendant firm, who took instructions concerning an application by the plaintiff to the Family Court for property orders. This application was prepared and duly filed with the Family Court in Darwin on 2 November 1987, thus meeting the time limit imposed by s44(3).

On 3 November 1987, a similar application was issued on behalf of the wife out of the Brisbane Registry of the Family Court. Each application was duly served upon the opposite party in early November 1987. The plaintiff's application was set down for hearing in Darwin on 18 December 1987. The wife's application was set down for hearing in Brisbane on 4 December 1987.

The plaintiff had instructed Ms King that he was seeking a 50/50 division of the matrimonial assets and the plaintiff's application to the court reflected those instructions. The wife's application claimed a share of the property which represented an approximate 70 per centum share of the property.

The plaintiff, having been served with the wife's application and a letter from the wife's solicitor, took the documents to Ms King. By a letter dated 2 December 1987, the wife's solicitor claimed (wrongly as it appears) that the wife's Brisbane application was first in time and thus took priority. The letter enclosed a photocopy of a Family Court order requiring the plaintiff to appear at a conference at the Family Court at Brisbane on 4 December 1987 at 9.15am. The letter asked Ms King to provide the name of the defendant firm's Brisbane agent who would appear for the plaintiff at the compulsory conference.

On 3 December, the wife's solicitor wrote to the defendant firm noting that Power & Power had been appointed the Brisbane agents to act for the plaintiff. There is no evidence as to the precise instructions given by Ms King to her Brisbane agents. But a letter dated 7 December from Power & Power to the defendant firm reports that the agents had appeared for the plaintiff in Brisbane on 4 December and that the wife's application had been adjourned to 11 January 1988 at 9.45am. The letter further advised the steps which needed to be taken if the plaintiff wished to oppose the wife's application. The letter concluded, "We thank you for your instructions and if we can be of any further assistance please do not hesitate to contact our office." Despite the terms

of this letter, it does not appear that Ms King took any step to arrange representation for the plaintiff on 11 January 1988, or to prepare for the defence of the wife's application.

By letter dated 31 December 1987, Power & Power wrote to the defendant firm enclosing an account for their fees and again making it clear that they had completed their involvement in the matter.

This seems to have been accepted by Ms King because on 4 January 1988, she wrote to the wife's solicitors seeking further particulars of the wife's claim. The wife's solicitors wrote to Ms King on 11 January 1988 stating that she had appeared at the Family Court that morning but the plaintiff had not appeared. She informed Ms King that various directions for the hearing had been given including a pre-trial conference on 15 March 1988. The wife's solicitor wrote again on 19 January 1988 seeking certain further information.

On 24 February 1989, Ms King wrote to the plaintiff asking about valuations and stating that it was hoped that the matter would be resolved at the pre-trial conference on 15 March 1989. On 11 March 1989, the wife's solicitor wrote to remind Ms King of the pre-trial conference and enquiring wither her Brisbane agents would be appearing. On 14 March, she wrote again to say that the wife would seek an order for costs if the plaintiff did not appear on the following day and that no further adjournment would be agreed to.

There was no appearance by or on behalf of the plaintiff on 15 March 1989. According to the evidence, the next thing that happened was that the plaintiff was served with a copy of an order made by Bell J on 19 April 1989. This was accompanied by a letter from the wife's solicitors dated 31 May 1989 demanding compliance with the terms of Bell J's order. The orders made by Bell J were identical to those sought by the wife in her application.

The plaintiff took the documents forthwith to Ms King. She stated that the plaintiff had nothing to worry about because his application was issued first. When asked by the plaintiff what he should do about the orders made by Bell J, Ms King said that she would apply to have the orders set aside.

The plaintiff's evidence is that he was served with the order of Bell J in August 1989. The evidence shows that Ms King initiated an application in the Darwin Registry of the Family Court in September 1989 for an order setting aside the orders of Bell J. This application was supported by an affidavit of Ms King which contained a number of questionable statements of fact. These include a statement that the plaintiff had never received a copy of the orders of Bell J, a statement which is palpably false.

When this application was served, it was opposed by the wife's solicitors and the matter hung fire for many months. The application was still in a state of suspension when Ms King left the employ of the defendant firm in late April 1990. That ended her connection with this transaction and she was not called as a witness. Before her departure, Ms King repeatedly assured the

plaintiff that steps were being taken to have the orders of Bell J set aside.

After Ms King's departure, Mr Vincent Close of the defendant firm took over the plaintiff's file. Mr Close wrote to the plaintiff on 8 May 1990 stating that the application initiated by Ms King, which was still pending, should be transferred to Brisbane. The plaintiff accepted this advice at a meeting with Mr Close on 10 May 1990.

After several adjournments the plaintiff's application came before Smithers J on 2 July 1990. Mr Close appeared for the plaintiff and orders were made by consent. The plaintiff's application for a property settlement dated 2 November 1987 was dismissed and all other applications were transferred to the Brisbane registry. When Mr Close gave evidence in this case he said that the dismissal of the plaintiff's application for a property settlement was a mistake. It was intended to have another application for a change of venue dismissed. However that may be, it is clear that the plaintiff's application to set aside the orders of Bell J remained unresolved.

By letter dated 4 July 1990, Mr Close appointed Spranklin & Co to act as his Brisbane agent in the matter. The letter contains the following admission:

> "Unfortunately for our client's point of view, the wife's former solicitors in Brisbane eventually obtained orders relating to the division of matrimonial property on an undefended basis."

By letter dated 24 July 1990, Spranklin & Co reported that the Registrar of the Family Court at Brisbane took the view that

the property proceedings had been finalised by the orders of Bell J and that no interlocutory application to set aside those orders could be made because there were no proceedings currently on foot.

At this stage, the wife's solicitors were threatening to take proceedings to enforce the orders of Bell J. Mr Close considered that such proceedings would get over the difficulty raised by the Registrar. He communicated this opinion to Spranklin & Co.

By letter dated 7 August 1990, Spranklin & Co disagreed with Mr Close's opinion and stated that the proper course was to endeavour to appeal the orders of Bell J.

Before any further step was taken, some settlement talks ensued and Mr Close communicated an offer to the wife's solicitors by letter dated 20 August 1990.

These negotiations came to nothing. In the period from August 1990 to August 1991 there was sporadic but inconclusive correspondence between Mr Close and Spranklin & Co. There was much discussion as to initiation of proceedings to set aside Bell J's orders but Mr Close at no time provided Spranklin & Co with the material necessary for such an application, whatever form it was to take. Apart from that difficulty, Spranklin & Co were not enthusiastic about the prospects of success and stated that counsel's opinion should be obtained. Throughout this period, the plaintiff was complaining to Mr Close about lack of action.

Eventually, and before anything effective was done, the long

threatened enforcement proceedings materialised. On 12 August 1991, the plaintiff was served with an enforcement summons. He took it to Mr Close on the following day.

There is a substantial dispute between the plaintiff and Mr Close as to what passed between them on this occasion. The plaintiff says that he complained bitterly that he had been trying to get rid of Bell J's orders for three years and asked what he should do about the enforcement summons. Mr Close said that the plaintiff would have to go to Brisbane and "face the music".

Mr Close's version is that the plaintiff came in with the enforcement summons and said that he was tired of all these solicitors and going to court and that he now wanted to comply with the orders. Mr Close said that he repeated his advice that, despite the enforcement summons, the orders could still be set aside but that the plaintiff was adamant that he intended to comply with the orders.

I do not find it necessary to make precise findings about this conversation. I think that the plaintiff probably did feel that he had had enough and resigned himself to submitting to the orders. On the other hand, I think it is very unlikely that the plaintiff encountered any resistance to this view from Mr Close. In view of the history of the case, it is unlikely that Mr Close felt any optimism about getting the orders of Bell J set aside.

The enforcement summons required the plaintiff to attend at Brisbane on 22 August 1991. At the meeting on 13 August, Mr Close

dictated a letter to the wife's solicitor which was sent by fax on 14 August. This letter sated that the plaintiff intended to comply with the orders of Bell J and proposed to sell the Wagaman property to provide the finance. The letter sought an adjournment of the enforcement summons for three months.

The wife's solicitors replied by letter dated 14 August. It imposed strict conditions upon any adjournment of the summons. These conditions included a requirement that the plaintiff agree to pay back interest from 19 April 1988 upon the $50,000 which was required to be paid under Bell J's order. By letter dated 16 August, Mr Close demurred concerning the question of interest on $50,000 and another condition in relation to costs.

In the event, the plaintiff terminated his retainer to the defendant firm and travelled to Brisbane to answer the enforcement summons. He engaged Spranklin & Co to act for him. Mr Horgan of that firm appeared for the plaintiff on the return of the summons on 22 August.

Negotiations took place which resulted in a consent order being made. The order required that the Wagaman property be sold under the joint control of the plaintiff and the wife, and that the proceeds be disbursed in satisfaction of the orders of Bell J. The plaintiff also agreed to pay the wife's party and party costs to be assessed. In relation to interest, the plaintiff agreed to pay $20,000. This settlement represented the best result for the plaintiff that was able to be negotiated on 22 August. In due course the Wagaman property was sold and the disbursements were

made to the wife as required by the orders of Bell J and the subsequent settlement. These payments were made on 7 January 1992.

The foregoing narrative represents the setting in which the questions of liability and damages must be determined.

The plaintiff's case is that the defendant firm was negligent in two broad respects. First, in allowing the wife's application to go by default, and, second, by failing to take appropriate steps to restore the status quo and protect the plaintiff from economic loss. The defence case is that there is no adequate evidence of the first suggested default and, in any event, the plaintiff failed to act reasonably to mitigate his loss. The secondary defence case is also expressed in terms of waiver and estoppel. It was also pleaded that the action is statute barred, although this defence was not argued.

I have no hesitation in concluding that Ms King was in breach of her duty as a solicitor in allowing the orders of Bell J to be made by default. The circumstances I have set out point inescapably to that conclusion. Ms King's unexplained absence from the witness box merely fortifies the adverse inference. When giving evidence, Mr Close suggested that Power & Power might have been expected to appear for the plaintiff on all the occasions to which the wife's application was adjourned. However, the correspondence shows that no such instructions were given to Power & Power.

Once it became apparent to Ms King that the orders of Bell J had been made, one might have expected an acute reaction, accompanied by apologies and promises to restore the position without cost to the plaintiff. In fact, Ms King offered bland assurances that there was nothing to worry about. Furthermore, the situation called for immediate and urgent action to seek to have the orders of Bell J set aside. It is highly likely that a prompt application under s79A of the Family Law Act would have succeeded, even if subject to conditions. The plaintiff should have been fully informed and undertakings offered to indemnify the plaintiff against the expenses associated with a s79A application.

It should have been appreciated by Ms King that speed was of the essence in making the application. Every month that passed reduced the chances of success. But what happened was a series of misconceived and ineffectual steps accompanied by long periods of unexplained delay. All the while, the plaintiff was re-assured that all was well.

After Ms King's departure from the scene, matters hardly improved. No purposeful, effective steps were taken to get a s79A application on foot and the plaintiff was still kept completely in the dark.

By the time the enforcement summons was served in August 1991, there had been nearly three years of unexplained and unexplainable delay and no end was in sight.

It is hardly surprising that the plaintiff felt that he had

had enough by August 1991. His decision to comply with Bell J's orders is entirely understandable. The circumstances by August 1991 were such that the prospects of success in a s79A application were, in my opinion, very doubtful. If success were achieved, it would have been conditional upon paying the wife's costs thrown away, including the costs of the enforcement proceedings. In view of the relatively small difference between the positions of the plaintiff and the wife, the whole operation had become economically impractical. The plaintiff, to my mind, was entirely justified in feeling that he had to make the best settlement he could manage.

The defence contention that the plaintiff has failed to mitigate his loss is, in my view, quite untenable.

If the defendant firm had frankly conceded its neglect and offered to fully indemnify the plaintiff against loss, a refusal by the plaintiff to seek to set aside the orders might operate as a failure to mitigate his loss, particularly if this had occurred soon after the orders of Bell J were made. But in the circumstances which prevailed in August 1991, I am not satisfied that the plaintiff's conduct operated as a failure to mitigate his damage. The damage had been done beyond hope of effective mitigation. The defences of waiver and estoppel can be dismissed without comment.

The most difficult problem in this case is to assess the damage to the plaintiff which flowed from the defendant's breach of duty.

I am satisfied that the plaintiff lost his chance of participating in a defended contest over the distribution of the matrimonial property. That means that some estimate has to be made of the likely outcome of such a case had it taken place.

There are a number of difficulties in the way of such an exercise. Apart from its hypothetical character, there is the added problem that the wife is not a party to the present litigation. In her application she made some claims that are disputed by the husband's evidence in the present case. The wife claimed that she had made a much larger financial contribution than the plaintiff and that she carried out the whole of the household duties and homemaking. Each of those statements is disputed by the plaintiff. The wife claimed that the plaintiff's earnings as a builder were minimal. This seems improbable because the plaintiff gave up a well paid position as a service manager to become a builder. Furthermore, the wife's application does not reveal that the plaintiff largely built the matrimonial home at Wagaman which was by far the most substantial asset of the marriage.

When he first sought advice from Ms King, the plaintiff was told that he could expect a 50/50 result in disputed proceedings. Accepting the wife's valuation of the various assets, the result of Bell J's orders, was a 63% to 37% split in the wife's favour. As I have already said, Bell J simply made the orders sought in the wife's application. The likelihood is that her application was in the nature of an "ambit claim" and went significantly beyond her actual expectations.

The only question which would, in defended proceedings, have been in much controversy is the question of the respective financial contributions to the marriage. I feel it is unlikely that the wife's claim that she was the major contributor would have prevailed. It is true that the wife had a period of ill health following the separation. This affected her earning capacity for some time and was relied upon in her application. This, in my view, would be largely counterbalanced by the fact, not revealed to Bell J, that the plaintiff had largely built the matrimonial home and had largely maintained the children in the period following the separation.

The considerations which are relevant to the exercise of the Family Court's discretion under s79 of the Act are referred to in s79(4). The discretion conferred is a very wide one. In the context of this case, the primary consideration was the contribution made by each spouse to the build up of the matrimonial assets. I feel no need to make reference to the countless cases in this area to which I was referred by counsel. The problem posed by the present case necessitates a very broad approach.

The primary asset was the property at Wagaman and the primary question was the amount of money to be paid to the wife from the realization of that asset. This, in turn, depended largely upon the respective contributions of the spouses in straight economic terms and otherwise.

The plaintiff's position was that the cash payment to the

wife should be $30,000. If there had been defended litigation in early 1988 or a settlement at that time, the likely outcome would, in my view, have been markedly more favourable to the plaintiff than the orders made by Bell J. I would assess the difference as $15,000. Counsel referred to various factors which may have influenced the result one way or the other. I have considered those matters but, in my view, they largely balance each other out.

The plaintiff was obliged to pay $16,666 for his wife's costs pursuant to the consent order made on 21 August 1991 and this amount is clearly recoverable. This is so because, in the event of a contested hearing in early 1988, the plaintiff would probably not have been required to pay the wife's costs, s117(1).

The plaintiff also claimed part of the $20,000 interest which he was obliged to pay under the agreement made on 21 August 1991. Mr Cassells put it that although the plaintiff had the benefit of the $50,000 until he paid it on 7 January 1992, he would have been better off if he had had to find the money for his wife in early 1988. He claimed somewhat arbitrally, a sum of $7,000. I do not think that this head of damage has been sufficiently proved.

There is one further matter to which reference should be made. Upon the assumption that the plaintiff's cause of action arose on 19 April 1988, the present action was commenced beyond the time fixed by s12 of the Limitation Act. To meet this possible difficulty, the plaintiff has asked in his Statement of Claim for an extension of time under s44.

On the findings of fact that I have made, it is doubtful if the proceeding was commenced out of time. If it was, the case falls squarely within the provisions of s44(3)(b)(ii) which authorise an extension of time in such cases.

There being no opposition to this course, I will extend the time within which the proceedings may be commenced until 23 November 1992. I give leave to the plaintiff to endorse the writ in accordance with s44(4) of the Act.

The result is that there should be judgment for the plaintiff for $31,666 to which should be added interest under s84 of the Supreme Court Act from 7 January 1992 until judgment. The interest is to be calculated at the rates fixed by the Master for the purpose of calculating interest on judgments under s85 of the Act.

I further order that the defendant firm pay the plaintiff's costs of the proceeding, including any reserved costs.
