CITATION: *BalBal –v- Northern Territory of Australia & Foster* [2003] NTMC 001

PARTIES:	BOOMER BALBAL V NORTHERN TERRITORY OF AUSTRALIA AND BARRY SIDNEY FOSTER
TITLE OF COURT:	LOCAL COURT DARWIN
JURISDICTION:	CRIMES (VICTIMS) ASSISTANCE ACT
FILE NO(s):	20213759
DELIVERED ON:	6 JANUARY 2003
DELIVERED AT:	DARWIN
HEARING DATE(s):	11 DECEMBER 2002
DECISION OF:	D LOADMAN, SM

CATCHWORDS:

APPLICATION FOR EXTENSION OF TIME UNDER THE *CRIMES (VICTIMS ASSISTANCE) ACT* FOR LEAVE TO FILE AN APPLICATION OUTSIDE OF 12 MONTHS PERIOD – RELEVANT ISSUES – CONTUMELIOUS CONDUCT – PREJUDICE TO FIRST RESPONDENT

REPRESENTATION:

Counsel:

Applicant:	Ms M Savvas
1st Respondent:	Ms J Truman Solictors

Solicitors:

Applicant:	De Silva Hebron
1st Respondent:	Halfpennys

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 001
Number of paragraphs:	24

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

No. 20213759

BETWEEN:

BOOMER BALBAL
Applicant

AND:

NORTHERN TERRITORY OF AUSTRALIA
1st Respondent

AND

BARRY SIDNEY FOSTER
2nd Respondent

DECISION

(Delivered 6 January 2003)

Mr David LOADMAN SM:

Preliminary

1. The fate of the application made for dispensing with service filed 05 December 2002 is a matter of record.

2. The outstanding matter relates to resolution of the Extension of Time Application originally filed together with the Application for Assistance itself on 12 September 2002. The Extension of Time application referred to will in the decision be referred to simply as "the application".

3. The application is opposed by the 1st respondent.

4. The following chronology is a chronology complied from the allegations set out in an affidavit filed in support of the application and sworn by the applicant on 25 July 2002, ("the applicant's affidavit"). Further from the contents of an affidavit sworn by Sylvia Tomazos on 12 September 2002 ("Tomazos's affidavit").

5. The chronology is as follows:

03 July 2000:

a) Approximately 04.00 am second respondent discharges a firearm at a car in which the applicant is a passenger, as a consequence of which, he sustains an injury to his right forearm

b) On the same day the matter is reported to the Northern Territory Police Station at Adelaide River.

c) Admitted to Royal Darwin Hospital for treatment of injuries.

04 July 2000:

a) NT police take photographs on the occasion of visiting the hospital.

b) 3 months approximately in Hospital for treatment.

c) Early October 2000 after discharge from Hospital applicant travels to Broome where he takes up residence.

d) "Near end 2000" (this date is significant because it never becomes more precise and the lack of precision and the only information been as quoted is cardinally important).

e) Tom Cannon apparently a legal practitioner employed by NAALAS in Broome advised the applicant of the applicant's ability to make an application under the *Crimes (Victim Assistance) Act*. There is no

indication as to the limitation period being advised to the applicant by the said Cannon.

f) Cannon informs the applicant that he will forward the file to solicitors in Darwin for the purposes of such an application being made.

Unknown date:

Applicant advised that Ward Keller Solicitors in Darwin are engaged. The applicant in paragraph 16 of the applicant's affidavit states "at that point I thought that everything was being dealt with by the Lawyers in Darwin although I did not hear from them". In paragraph 17 of the applicant's affidavit he states "I was very confused about the *Crimes (Victims Assistance) Application*. I thought that it was all part of the criminal proceedings. I didn't think that I had to do anything further or file an application for compensation".

19 September 2001:

The applicant spoke to one Alan Piper best described as a "bush lawyer". He is also advised by Piper that which Cannon had advised, namely an ability to bring an application for compensation. The applicant states in paragraph 16 of the applicant's affidavit "at that point I thought that I had to do something further to proceed with the matter".

28 September 2001:

a) The applicant attends at the ODPP. Applicant advised that the current of proceedings against the second respondent are in the arraignment list on 01 October 2001.

b)Alan Piper makes appointment for applicant to instruct De Silva Hebron.

04 October 2001:

a) Pursuant to an appointment made by Alan Piper applicant attends the offices of De Silva Hebron and amongst other things alleges in paragraph 19 of the applicant's affidavit "...instructed her to prepare and file an Application for Assistance pursuant to the *Crimes (Victims Assistance) Act* on my behalf". Significantly in paragraph 20 of the applicant's affidavit he states "after I attended at the offices of De Silva Hebron and instructed Sylvia Tomazos to file an Application for Assistance, I thought that the solicitor was going to handle everything for me. I didn't think that I had to do anything further. I was simply waiting for the Application to be processed and for the monies to be forwarded to me. I am not an educated person and that is why I attended upon a Lawyer.

b) In Tomazos's Affidavit in paragraph 4 however she claims that at that conference the applicant was advised that he "may be entitled to Assistance under the CVA". More importantly allegedly she advised the applicant that in accordance with the *Act* proceedings had to be issued within 12 months of the date of the offence, and that consequently being out of time he would need to make an Application for an Extension of time in order to allow his formal Application for Assistance to proceed.

c) Although unstated it is to be necessarily inferred that he was further told that until or unless $160.00 (one hundred and sixty dollars) was deposited into the solicitors account to cover the filing fee of the actual Application for Assistance nothing would happen.

12 October 2001:

a) The applicant does not deal with the issue of him paying the sum of $160.00 (one hundred and sixty dollars) to his solicitors. From the contents of Tomazos's affidavit however credibility is to be lent to what he says about his state of mind subsequent to the 04 October 2001 and the

consultation he had with Tomazos. This remark is made because there is nothing in paragraph 4 and 5 of Tomazos's affidavit which suggests that the applicant was ever made aware that something more by way of instructions was necessary prior to his instructions being capable of implementation after the payment of $160.00 (one hundred and sixty dollars).

b) In paragraph 8 of Tomazos's affidavit she states that she was unable to finalise the Application for Extension of Time, but no indication is ever given as to what it was that the applicant was supposed to do by way of providing instructions or otherwise for the matter to proceed. Clearly as already referred to the applicant's state of mind was that nothing further needed to be done.

c) Inappropriately in this Court finding Tomazos neglects to file the Application for Assistance without simultaneously filing the Application for Extension of Time. This results in the inevitable return of the Application for Assistance with a requirement that the Application for Extension be filed simultaneously.

07 November 2001:

According to Tomazos's affidavit Alan Piper's enquiry is met with the retort that Tomazos's "needed to speak with the applicant" there is no indication about what it was if anything that she communicated to Piper concerning the details of such need.

12 November 2001:

A scheduled date for a meeting with the applicant results in a telephone call from Mr Piper (paragraph 11 of Tomazos's affidavit) saying that the applicant's lift to the appointment did not turn up and another appointment is organised for the next day.

13 November 2001:

a) In paragraph 12 of Tomazos's affidavit relevantly in respect of this meeting she says "unfortunately, the applicant was unable to provide any additional information as he was unable to communicate and answer any questions in English".

b) There were then searches carried out for an appropriate interpreter which don't bear recitation.

c) A letter is addressed to Piper a copy of same being annexed to Tomazos's affidavit which requires the applicant to provide further instructions because she has "not been able to finalise the same". There is nothing in the text of the letter to indicate what it is she needs by way of instructions.

d) Contact made with Ward Keller (which contact evokes nothing of any special relevance).

15 November 2001:

Alan Piper calls and is advised by Tomazos that the interpreter earlier sought has been identified and is available.

16 November 2001:

De Silva Hebron received Ward Keller's file.

27 November 2001:

Contact with the interpreter is disposed to in Tomazos's affidavit.

07 December 2001:

Alan Piper advised by Tomazos that she needed to see the applicant to finalise the Extension of Time Application. Self-evidently such a

communication had been made before. Appointment for 10 December 2001 at 3.30 pm was made via Alan Piper.

07 December 2001:

Piper advises the applicant has gone to Broome as a consequence of his brother's death and is not contactable.

19 February 2002:

Alan Piper tells Tomazos that the applicant is in Darwin for the criminal proceedings and in paragraph 23 of Tomazo's affidavit the need for consultation with the applicant is simply repeated.

19 February 2002:

Alan Piper advised Tomazos that the applicant has returned to Broome and that Piper was unable to and did not in fact make contact with him in respect of the last communication from Tomazos on the 19 February 2002.

30 April 2002:

"Margaret" telephones from NAALAS in Broome. She advises that Tomazos can make contact via her organisation with the applicant. Tomazos tells "Margaret" she needs to speak to the applicant urgently (but not in what precise respect). "Margaret" is to organise an interpreter and an appointment for Tomazos to speak to the applicant in order to finalise his affidavit material.

15 May 2002:

Tomazos phones Margaret at NAALAS in Broome. The interpreter and the appointment for a telephone conference is arranged for 16 May 2002.

16 May 2002:

a) The conference is held. The telephone conference entails the reading and translating to the applicant of the applicant's affidavit as transpires in the same form that he ultimately swore that affidavit.

b) Margaret (it is not clear whether also the applicant) is aware of the need to advise to Tomazos "when the applicant first became aware of his right to file the Application for Assistance". Margaret undertook to advise Tomazos of the date. At that time it is necessarily to be inferred that the only information in possession of Tomazos was that such a date was "at some stage towards the end of 2000" (paragraph 16 Applicant's affidavit).

21 May 2002 Tomazos:

Leaves a message for Margaret to contact her.

22 May 2002:

Margaret telephones Tomazos who advises that Tom Cannon took the initial instructions and that she was awaiting the NAALAS file from the Derby office "in order to obtain the date the initial instructions were taken". Margaret undertakes to contact Tomazos.

03 July 2002:

Margaret advises Tomazo's that the Derby file is to hand but she is unable to read the documentation and has requested clarification, engendering a belief in Tomazos "she would contact the Derby office again to obtain the date the applicant first became aware of his right to file and (SIC) Application for Assistance". It is obvious that nothing further came of this matter.

23 July 2002:

Tomazos unilaterally decides to complete the affidavit omitting "the first date he became aware of his right to claim compensation...". Bearing in

mind the legal position one wonders why that wasn't done at very first instance. Applicant's affidavit dispatched by facsimile.

20 August 2002:

Message left requiring return of sworn affidavit.

12 September 2002:

Sworn affidavit received. The same day the relevant applications and affidavits by the applicant and Tomazos are duly filed.

6. Apart from it perhaps being the case that the applicant was aware there was an outstanding issue of "first awareness", if that was so, in any event there was nothing which he could have perceived he needed to do in light of "Margaret" advising Tomazos that she would attend to this aspect of the matter.

7. Ms Truman says that the delay between the 04 October 2001 and the 16 May 2002 is contumelious: she says that there is nothing in the applicant's affidavit to say that he could not understand: that the applicant does not say, as he could have said, that there were linguistic difficulties.

8. The observation about failing to express a lack of understanding may have had some force, but for the unequivocal perceptions of Tomazos that the applicant was unable to communicate and unable to answer any questions in English. (paragraph 12 Tomazos's affidavit) and (paragraph 8), "the applicant does not have a telephone and cannot read or write English so he is not contactable by correspondence.

9. The court accepts that Tomazos' perceptions and judgements in relation to linguistic and literacy issues are valid and there is no weight to be attributed to the absence of an explicit corroborative utterance by the applicant to the same effect. Ms Truman says that on the principles set out in the decision of this Court (myself) in the matter of Kylie Jean Eldridge file number

20108407 and others ("Eldridge") the Court should not exercise its discretion to allow the Extension of Time necessary for the Application for Assistance to proceed.

10. In short compass she said there is nothing that can be levelled by way of criticism at the applicant by way of any dereliction of duty on his own part.

11. It is this Court's observation that Tomazos should have lodged the application at first instance when she could have, although armed with no precise date, but armed nethertheless with information such that the current Application for Extension of Time would not have been necessary. In any event there is little criticism that can be levelled at the applicant who had no knowledge or personal knowledge of any difficulties attendant on his instructions being implemented. It is perfectly understandable in this Court's perception for the applicant to have laboured under the impression that he deposes to in paragraph 20 of the applicant's affidavit.

12. Ms Savvas says that it is necessary before the Court refuses the Application for Extension of Time to conclude: - (i) that the delay in filing the Application and by inference the Application for Extension for Time must be attributed to a "contumelious delay; - and (ii) there must be prejudice to the first respondent the onus of establishing which rests on the first respondent. She submits that the first respondent has failed to discharge the burden of proof in relation to the second aspect and that there is nothing by which any conclusion can be reached to support a contention that there is a course of contumelious conduct which can be attributed to the applicant in relation to the lodgment of his Application for Assistance or the Application for Extension of Time.

13. Although there is nothing deposed to on affidavit as to the criminal proceedings against the second respondent, it was asserted by Ms Savvas and not contested by Ms Truman, that the Supreme Court trial had proceeded: that the second respondent had been found guilty as charged: that

there was available obviously a Court transcript of the proceedings and that consequently there was no source of information denied to the first respondent as a consequence of the delay in particular in seeking the relief by way of extension under section 5 ordinary number 3 CVA. There was succinctly stated no prejudice to the first respondent established.

14. Of course, in this matter as opposed to the matter of Eldridge there is no time bar which would preclude the applicant instituting proceedings against the second respondent for damage suffered by him on a cause of action founded on his common law rights. The probable futility of any reward flowing from such a course of action is in this Courts perception obvious.

15. Clearly the applicant suffered a serious injury. That must be inferred by virtue of his detention in Hospital for three months.

16. From what is obvious by way of deduction from the chronology set out and the observations made in the course of setting same out, it is this Court's perception that there is no positive omission to be attributed to the applicant directly for any of the delay.

17. As is equally obvious, it is this Court's perception that there was a seemingly futile delay for the purposes of seeking specificity which was ultimately never obtained and which ultimately did not preclude the lodging of the application.

18. The Court accepts in broad terms the submissions otherwise made by Ms Savvas.

19. It does not in this Court's perception require a further exhaustive exposition of the law, which is to be found in the decision of Eldridge. Obviously and logically this Court adopts mutatis mutandis the legal conclusions propounded by it in Eldridge.

20. There is pursuant to Eldridge an obligation on the first respondent to lead evidence as to prejudice which will flow in the event the application for Extension is granted. It hasn't done so and none in this Court's perception is otherwise evident.

21. By virtue of this Court's observations that the applicant's conduct cannot be described as contumelious and as a consequence of what flows from the preceding paragraph of this Court's decision there is no basis upon which the applicant's application ought justifiably to be refused.

22. In the circumstances this Court will make an Order in terms of paragraph one of the application supplemented with the following additional sentence "the filing and service of the Application for Assistance on 12 September 2002 is deemed to be an Application made within the period of time, governing the institution of such proceedings".

23. In case there is a need to address some "verbal fine tuning" the Order will not be made until the parties have had the opportunity of making any submission either one or both of them wish to make in this regard.

24. In respect of the Order to be made following upon the findings in the decision of this Court, the parties may if they so choose, prepare Minutes of Consent Orders. If such Minutes are lodged signed by or on behalf of both parties then an Order will be made in chambers obviating the necessity for the attendance of either party at Court.

Dated: 06 January 2003

DAVID LOADMAN
STIPENDIARY MAGISTRATE