CITATION: *John Bonfazio v Jape Furniture Pty Ltd* [2005] NTMC 033

PARTIES:	JOHN BONFAZIO
	v
	JAPE FURNITURE PTY LTD
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health Act
FILE NO(s):	20114659
DELIVERED ON:	10 June 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	9 December 2004
JUDGMENT OF:	Dr. J. A. Lowndes

CATCHWORDS:

WORK HEALTH ACT – DISMISSAL FOR WANT OF PROSECUTION – RELEVANT CONSIDERATIONS – ABSENCE OF WORKER – DELAY.

Birkett v James [1978] AC 297 applied
Lenijamer Pty Ltd v AGC (Advances) Ltd (1990) 27 FCR 388 considered
Cooper v Hopgood & Garion [1999] Qd R 113 considered
Grovit vDoctor [1997] 2 ALL ER 417 considered

REPRESENTATION:

Counsel:

Plaintiff:	Mr Grove
Defendant:	Mr Morris

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Hunt & Hunt

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 033
Number of paragraphs:	17

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20014659

BETWEEN:

JOHN BONFAZIO
Plaintiff

AND:

JAPE FURNITURE PTY LTD
Defendant

REASONS FOR JUDGMENT

(Delivered 10 June2005)

Dr. J. A. LOWNDES:

1. Following on from my decision given on 9 December 2004, the Court must now determine whether the worker's application should be dismissed for want of prosecution.

2. The power to dismiss for want of prosecution is discretionary. It follows that when considering an application to dismiss a proceeding for want of prosecution, the Court must decide each case according to its own circumstances : see Cairns *Australian Civil Procedure* (Lawbook Co Australia, 5th ed p 394).

3. In *Birkett v James* [1978] AC 297; [1977] 2 ALL ER 801, the House of Lords followed *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 299; 1 ALL ER 543 which established that it is proper to dismiss a proceeding for want of prosecution where the court is satisfied that:

(a) the delay or default on the part of the plaintiff in prosecuting his or her claim has been intentional and contumelious; or

(b) there has been inordinate delay on the part of the plaintiff or his legal representative, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant either as between himself and the plaintiff or between himself and a third party or, where there are several defendants, between the defendants themselves.[1]

4. As was made clear in *Lenijamer Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388 at 402, the breadth of the discretion makes it undesirable to prescribe criteria for exercise of the power. In *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113 at 124, McPherson JA provided the following guidelines for exercising the discretion to dismiss for want of prosecution:

- the duration of the time lapse;`
- the cogency of the explanation for the delay;
- the probable impact of proscrastination on fading recollection;
- the death or disappearance of critical witnesses or records;
- costs already or likely in the future to be expended or thrown away;
- the apparent prospects of success or otherwise at the trial;
- the progressively growing problem of effectively hearing and determining questions of fact arising out of events that have taken place many years before.

5. Prejudice from delay is an important factor in the exercise of the discretion. The authorities are divided on whether the court will infer prejudice from the mere fact of delay: see Cairns, *supra at 394*. There is authority for the

[1] See Williams *Civil Procedure* (hard cover) *par 10.08, p 106.*

proposition that delay itself does not justify a dismissal unless there is actual evidence of prejudice: see *Goldie v Johnston* [1968] VR 651. However, there is authority to the contrary that prejudice can be inferred from the mere fact of delay: see Cairns, *supra at 394.* The real position is that the relationship between delay and prejudice and the nature of the prejudice can vary from case to case; and the manner in which the alleged prejudice is to be established will depend upon the nature of that prejudice.

6. As pointed out by Williams, prejudice to a defendant may be occasioned by delay on the part of the plaintiff in two different ways.[2] First, delay may prejudice the defendant in the conduct of his or her case.[3] For example, evidence may have been lost or destroyed or its cogency weakened through the effluxion of time.[4] As Williams points out, prejudice in this form must be established by evidence: it cannot be simply inferred from unreasonable delay on the part of the plaintiff.[5] The second type of prejudice is " the hazard of being kept at risk with respect to the subject matter of the proceeding. A person may be prejudiced by having a proceeding hanging over his head indefinitely".[6]

7. Although the parties were given the opportunity to make further specific submissions in relation to whether the facts of the present case warranted a dismissal for want of prosecution, the parties elected not to do so. Therefore, it is left to this Court to determine whether it is appropriate to dismiss the worker's application for want of prosecution on the basis of the known facts.

8. The worker commenced proceedings in this jurisdiction on 1 September 2000 in relation to a work related injury in 1999. Following an application for extension of time in order to bring the application for compensation, this

[2] See Williams, n 2 par 10.09, p 107.
[3] See Willimas, n 2 par 10.09, p 107.
[4] See Williams, n 2 par 10.09, p 107; see also *Lenijamer Pty Ltd AGC (Advances)Ltd* (1990) 27 FCR 388.
[5] See Williams, n 2 par 10.09, p 107.
[6] See Williams, n 2 par 10.09, p 107.

Court constituted by Mr Trigg SM ruled in favour of the worker on 2 February 2001. An appeal was instituted to the Supreme Court which was finally dealt with on 21 June 2001.

9. A series of orders/directions were made by this Court, which are referred to on page 2 of Mr Morris' affidavit sworn 10 September 2004 filed in support of the application to dismiss for want of prosecution.

Paragraph 6 of Mr Morris' affidavit states:

> "On the occasion before the Registrar on 22 July 2004 the solicitor for the worker advised that he had regained contact with his client and that he expected that he would be able to obtain instructions from him concerning the future conduct of this matter."

10. Paragraph 7 of the affidavit states:

> "On the 31 August 2004 the solicitor for the worker advised the Registrar that he had lost contact with his client."

11. The facts disclosed in Mr Morris' affidavit were not contradicted by the worker's counsel. The question that arises is whether those facts provide a proper basis for dismissing the worker's application for want of prosecution.

12. In dealing with this application I consider it appropriate to have regard to the court file and the court record of the various procedural steps undertaken by the parties. The file and record of proceedings comprises various orders as referred to by Mr Morris in his affidavit as well as various notations by the Judicial Registrar at various stages of the proceedings and correspondence between the parties' legal representatives and the Court.

13. In considering the first limb of the dual test in *James v Birkett*, I find myself unable to reach the conclusion that there has been default on the part of the worker of either an intentional or contumelious character in the form of disobedience to a peremptory order. However, the matter has had a protracted history, as evidenced by the number of adjournments principally

for internal review. Those internal reviews were apparently undertaken to facilitate settlement negotiations between the parties. The available evidence indicates that the employer was content for that process to occur. During 2004 there was spasmodic contact between the worker and his solicitors. It appears from the notes made by the Judicial Registrar at the internal review conducted on 30 April 2004 that the solicitor for the worker was experiencing difficulties in obtaining instructions from the worker. According to Mr Morris' affidavit the solicitor for the worker advised the Judicial Registrar at the internal review on 22 July 2004 that he had re-established contact with the worker and expected that he would be able to obtain instructions from him regarding the future progress of the proceedings. It can be reasonably inferred from this evidence that at a prior time the solicitor for the worker had lost contact with the worker; and that accounts for the difficulties the solicitor was having getting instructions as at 30 April 2004. A mere five weeks after having re-established contact with the worker the worker's solicitor advised the Judicial Registrar on 31 August 2004 that he lost contact with the worker. On that occasion the Judicial Registrar noted the employer's intention to apply to the Court to strike out the worker's claim for want of prosecution, which application was filed on 10 September 2004.

14. In my view the periodic loss of contact between the worker and his solicitors during 2004, in the context of ongoing settlement negotiations which had commenced a couple of years before, is a circumstance which is very relevant to the application to dismiss for want of prosecution; and indeed relevant to the first limb of the test propounded in *Birkett v James*. It is reasonable to infer from the available evidence that the worker was responsible for the loss of solicitor- client contact; and that inference remains open on the balance of probabilities. If there were any other explanation for the loss of contact which was favourable to the worker, then one would have expected that such an explanation would have been

proffered by counsel for the worker at the hearing of the application for dismissal. In turn, the Court can reasonably infer from the loss of solicitor-client contact that the worker was disinterested in bringing the proceedings to a conclusion either by way of compromise or through the normal process of litigation. It should be noted that settlement negotiations were protracted, and the prospects of the matter resolving by way of compromise after such a lengthy period of negotiations were in my opinion remote. On top of that, the worker removed himself from the "negotiating table" and the ongoing adversarial process by discontinuing contact with his solicitors. It is now some nine months since the application for dismissal was filed and during that period the worker has apparently not re-established contact with his solicitors; nor has he personally communicated with the Court regarding the progress of his claim. The facts in this case evince an intention on the part of the worker not to bring the proceedings (commenced by him in 2000) to a conclusion. Such conduct can amount to an abuse of process, and "in those circumstances, if justice so requires, the court may under its inherent jurisdiction dismiss the proceeding, and it is strictly not necessary to show want of prosecution under either of the limbs identified in *Birkett v James*".[7] However, in my view, the facts do satisfy the first limb identified in *Birkett v James*.

15. As noted earlier, the second limb of the test requires evidence of inordinate and inexcusable delay on the part of the worker and either a substantial risk that a fair trial cannot be had because of that inordinate and inexcusable delay or a likelihood of serious prejudice to the employer (or its insurer[8]). In my opinion the circumstances of this case give rise to an inordinate and inexcusable delay: see the discussion in relation to the first limb identified in *Birkett v James*. Furthermore, I am of the opinion that such delay is likely to cause serious prejudice to the employer (or its insurer). That prejudice can be identified as the hazard of being kept at risk in relation to the subject

[7] See Williams *Civil Procedure Victoria* Butterworths Loose Leaf Service par 24.01.20

matter of the present proceedings. As things presently stand the employer (or its insurer) is prejudiced by having the proceedings hanging over its head indefinitely. The worker has presently "dropped off the radar", and there is no telling when he might re-appear on the scene and seek to once again pursue his claim. If and when that occurs the employer (or its insurer) must be ready to answer that claim. In the interim the employer (or its insurer) must take all such steps, as best it can, to preserve the evidence relating to the subject matter of these proceedings for an indefinite period. It is conceivable that a point will be reached where evidence will be either lost or destroyed or the cogency of evidence weakened through the effluxion of time, resulting in further and more tangible prejudice to the employer (or its insurer).

16. It should be noted that in *Grovit v Doctor* [1997] 2 ALL ER 417; [1997] 1 WLR 640 the House of Lords left open the possibility that inordinate and inexcusable delay on the part of a plaintiff might be sufficient to warrant dismissal of a proceeding for want of prosecution – an approach that would make it unnecessary for the court to inquire whether the defendant had been prejudiced by the delay.[9] If indeed that is the law, then the present proceeding brought by the worker would be liable to be dismissed for want of prosecution on the grounds that there has been an inordinate and inexcusable delay on his part.

[8] See *Bourke v Kecskes* [1967]VR 894.
[9] See Williams, n 7, par 24.01.24.

17. For the reasons given above I dismiss the worker's claim for want of prosecution. I will hear the parties in relation to any ancillary matters.

Dated this 10th day of June 2005.

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Dr. J. A. Lowndes
MANAGING MAGISTRATE OF
THE WORK HEALTH COURT