CITATION: *Gardner v Boral Ltd* [2012] NTMC 022

PARTIES: GEORGE TIPU GARDNER

V

BORAL LTD

TITLE OF COURT: WORK HEALTH

JURISDICTION: Work Health

FILE NO(s): 20726293 and 20928255

DELIVERED ON: 19 June 2012

DELIVERED AT: Darwin

HEARING DATE(s): 30 April and 14 May 2012

JUDGMENT OF: Dr John Lowndes

CATCHWORDS:

WORK HEALTH COURT – NOTICE OF DISCONTINUANCE – REQUIREMENTS FOR EFFECTIVE DISCONTINUANCE OF PROCEEDINGS

Rule 3.07(3) Work Health Court Rules

Re Commercial Union Assurance Co (Ltd) (1899) 18 NZLR 585 followed

REPRESENTATION:

Counsel:
Worker: Mr Gardner (in person)
Employer: Mr Sweet

Solicitors:
Worker: Self-represented
Employer: Cridlands MB Lawyers

Judgment category classification: A
Judgment ID number: [2012] NTMC 022
Number of paragraphs: 58

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

No. 20726293 and 20928255

BETWEEN:

GEORGE TIPU GARDNER
Worker

AND:

BORAL LTD
Employer

REASONS FOR DECISION

(Delivered 19 June 2012)

Dr JOHN LOWNDES SM:

THE WORKER'S APPLICATION TO CONTINUE THE PROCEEDINGS FOLLOWING A PURPORTED DISCONTINUANCE

1. On 25 March 2011 two applications brought by George Tipu Gardner (the worker) in the Work Health Court (bearing claim numbers 20726293 and 20928255) were listed for hearing commencing 29 August 2011.

2. At the hearing on 29 August 2011 the worker's solicitor, Mr Flynn, sought leave to discontinue the proceedings. The employer was represented by Mr Watson SC.

3. Mr Flynn advised the Court as follows:

> I indicate that as result of the time the matter has moved on to a point where I can now confirm my instructions on behalf of the worker are to discontinue the consolidated application that's before you.[1]

[1] See p 3 of the transcript.

4. The Court proceeded to make the following orders:

   1. The worker is to discontinue the consolidated application.

   2. The worker to file a notice of discontinuance within 48 hours.

   3. Hearing dates vacated.

5. Although the Court did not, in explicit terms, grant the worker leave to discontinue the proceedings, it was implicit in the orders made by the Court – and what proceeded the making of those orders - that such leave was granted.

6. As at 29 August 2011 the worker had lost the ability to discontinue as of right.[2] The worker required the leave of the Court in order to discontinue the proceedings. However, in light of the information provided to the Court by Mr Flynn, in the presence of the employer's counsel, together with the exchanges between Mr Flynn and the presiding magistrate,[3] it was clear that it was appropriate to give the worker leave to discontinue the proceedings. Recognising that a party should not be compelled to proceed unwillingly, it was fair to allow the worker to discontinue the proceedings. Secondly, there was nothing to suggest that a discontinuance would prejudice the employer. Mr Watson SC was present in Court and acquiesced in the application for leave to discontinue. Furthermore, the employer was, in the circumstances, adequately protected in terms of costs.[4]

---

[2] See Rule 3.07 of the Work Health Court Rules which provides that at any time before the date fixed for the hearing of a proceeding a party may without the leave of the Court discontinue an application by filing and serving a notice of discontinuance. By necessary implication, a party requires leave to discontinue an application at the hearing of a proceeding.

[3] See pp 2 and 3 of the transcript, and in particular in relation to negotiations between the parties.

[4] See Rule 3.08 (1) of the Work Health Court Rules which states that a party who discontinues must pay the costs of the other party incurred before service of the notice of discontinuance unless the Court otherwise orders.

7. Subsequently, Mr Flynn emailed a letter dated 30 August 2011 to the Senior Court Officer of the Civil Registry of the Work Health Court.[5] Omitting its formal parts the letter read as follows:

> In accordance with the writer's undertaking provided to the Court yesterday we now enclose Notice of Discontinuance.
>
> We confirm the original of this document will be forwarded to you by mail upon the writer's return from Darwin.

8. The enclosed Notice of Discontinuance only referred to Claim No 20928255 and stated that

> The worker gives notice that the claim filed on 15 February 2011 is discontinued.

9. The letter dated 30 August 2011 (enclosing the original notice) was subsequently sent by ordinary mail and received by the Court on 7 September 2011.[6]

10. The matter is clouded by the fact that there is on the Court file a copy of the letter in the same terms as the emailed letter to the Court dated 30 August 2011, with the exception that it is dated 5 September 2011 and bears a court stamp that reads " Received 5 September 2011, Courts Office Darwin".

11. On 30 August 2011 the employer's solicitors received from Mr Flynn via email a letter dated 30 August 2011(to the employer's solicitors) attaching a copy of emailed letter to the Registrar of the Work Health Court, bearing the same date and enclosing the Notice of Discontinuance as referred to above.

12. On 31 August 2011 the employer's solicitors wrote (via email) to the worker's solicitor. The material parts of that correspondence read as follows:

> I refer to your letter dated 30 August 2011. The employer is concerned that the notice enclosed with your correspondence will not discontinue the applications.

---

[5] That email was sent to the following email address: lucy.quall@nt.gov.au

[6] See the affixed court stamp "Received 7 September 2011 Courts Office Darwin".

> I respectfully request that the document be in the form of the attached pro-forma.

13. In contradistinction to the Notice of Discontinuance dated 30 August 2011, the attached pro forma referred to both applications made by the worker bearing claim numbers 20726293 and 20928255.

14. In response to the correspondence from the employer's solicitor Mr Flynn sent a second letter dated 5 September 2011 (via fax) to the Senior Court Officer Civil Registry Work Health Court. Omitting the formal parties, that letter read as follows:

> We have subsequently received correspondence from the respondent's lawyers requesting a further Notice of Discontinuance be filed which is now enclosed, in triplicate.
>
> We look forward to a sealed copy in due course.

15. That second Notice of Discontinuance referred to both applications, and again stated that "the worker gives notice that the claim filed on 15 February 2011 is discontinued."

16. According to the court stamp affixed to that Notice of Discontinuance the notice was received by the Court on 12 September 2011.

17. On 5 September 2011 the employer's solicitors received correspondence (via email) from the worker's solicitor. That correspondence stated: "We now enclose copy of letter forwarded to the Work Health Court NT this instant".

18. The next relevant event is that the second Notice of Discontinuance was served on the employer on 19 September 2011.[7]

19. Between the date of the purported filing of the first Notice of Discontinuance and the service of the second Notice of Discontinuance there was another material event.

[7] See paragraph 17 of the affidavit of Mark Flynn sworn 8 December 2011.

20. On 2 September 2011 Mr Gardner, who was no longer represented by Mr Flynn, filed an interlocutory application seeking an order that the proceedings be re listed.[8] In support of that application the worker relied upon his affidavit sworn 2 September 2011. The material parts of the affidavit are as follows:

> I would like to advise the Court that my current lawyer will not be representing me any further in this matter as a consequence of the failure to appropriately deal with and advise me on the necessary steps to conciliate or conclude this matter.
>
> I seek leave to continue with the application and ask that a conciliation conference be set at the discretion of the Court as there appears to have been no genuine attempt by the employer to conciliate this matter so that this can be concluded with the best result for all parties concerned.

21. The worker also relied upon his affidavits sworn 12 October 2011, 9 January 2012 and 17 February 2012 and the affidavit of Robbie Bowden sworn 17 February 2011.

22. It was apparent from the worker's initial application that he wished to continue to litigate the proceedings, despite the contraindication given to the Court on 29 August 2011. Mr Gardner was, in effect, seeking to withdraw the notice of intention to discontinue the proceedings given on that date. That was reinforced by the more precise orders sought in the worker's subsequent application filed on 12 October 2011.The gist of the worker's application is that he should be allowed to continue to litigate his two claims against the employer, as his solicitor discontinued the proceedings contrary to his instructions. The worker claims that he only instructed his solicitor to discontinue settlement negotiations – not to discontinue the proceedings.

23. The employer relied upon the affidavit of David Sweet (a member of Cridlands MB having care and conduct of the matter on instructions from

---

[8] The worker also filed a further interlocutory application on 12 October 2011 seeking the following orders:

1. That the order for discontinuance of 29 August 2011 be set aside.
2. Leave to continue the applications.
3. An order for a directions/conciliation conference to resolve all issues within a timely allocation as the Court sees fit.

the employer) sworn on 26 October 2011. The employer principally relied upon the transcript of proceedings on 29 August 2011 and the orders made by the Court on that date as effectively disposing of the proceedings.

24. The Court also received an affidavit from Mr Flynn sworn 8 December 2011. That affidavit was to the effect that Mr Flynn had received written instructions from Mr Gardner to discontinue the proceedings. A copy of the written instructions was annexed to the affidavit.

IS THE WORKER PREVENTED FROM CONTINUING THE PROCEEDINGS?

25. The employer sought to argue that the worker was prevented from continuing the proceedings by reason of the orders made by the Court on 29 August 2011. The employer submitted that the Work Health Court had no power to revoke or recall its orders of 29 August 2011.[9] Alternatively, it submitted that even if the Court had such power it should not exercise it in favour of the worker.[10]

26. The employer's primary argument implicitly rests on the proposition that the orders made by the Court on 29 August 2011 effectively disposed of the proceedings – that is, they had the immediate effect of discontinuing the proceedings. The argument cannot be sustained, because the orders had no such effect for the following reasons.

27. The argument advanced by the employer overlooks Rule 3.07 (3):

> Discontinuance or withdrawal is effective when the relevant notice has been filed and served.

28. It is the filing and service of a Notice of Discontinuance that effectively disposes of a proceeding and brings it to an end. That is the case where a

[9] See paragraph 1 of the employer's written submissions dated 1 March 2012.
[10] See paragraphs 2 and 3 of those submissions.

party discontinues an application before the date fixed for the hearing of a proceeding. It is equally the case where a party is given leave, on the date of the hearing, to discontinue a proceeding. Where leave is granted, it is not until the Notice of Discontinuance (which is the subject of leave) has been filed and served that the proceedings are terminated such that the proceedings can no longer be continued. However, where proceedings are brought to an end in that manner a worker is not necessarily precluded from commencing another proceeding:

> A party who discontinues an application or counterclaim may commence a similar application or make a counterclaim for the same cause only:
>
> (a) with the leave of the Court; or
>
> (b) with the consent of the other party.[11]

29. Given the operation of Rule 3.07(3), the question is whether the first or second Notice of Discontinuance signed by Mr Flynn effectively discontinued the proceedings brought by the worker.

The First Notice of Discontinuance

30. Although the first Notice of Discontinuance sent by Mr Flynn to the Work Health Court Registry by email was headed "Form 5B" rather than "3B", that discrepancy is of no moment, and certainly would not invalidate the notice.[12]

31. As noted above, the first Notice of Discontinuance was emailed to the Court, with an indication that the original of the notice would be forwarded to the Court by mail. The letter forwarding the original of the notice was received by the Court on either 5 or 7 September 2011.

32. The question that arises is whether the first Notice of Discontinuance was ever filed in the Work Health Court.

[11] See Rule 3.09 of the Work Health Court Rules.
[12] See Rule 2.05 of the Work Health Court Rules – in particular sub-rule 3.

33. The word “file” is defined in Rule 1.08 of the Work Health Court Rules as meaning “to lodge in a registry approved by the Chief Magistrate as a place where documents may be lodged for the purposes of these Rules”. In the absence of any statutory definition, the word “lodge” is to bear its ordinary natural meaning.

34. One of the ordinary meanings of the word “lodge” is “to put or deposit, as in a place, for storage or keeping”: *Macquarie Dictionary.* This appears to have been the meaning attributed to the word “file” by Stout CJ in *Re Commercial Union Assurance Co (Ltd)* (1899) 18 NZLR 585 at 588:

> …What is the meaning of the word “filed”? Filing, it has been said, is the means adopting of keeping Court documents (see *Tomlins Law Dictionary* and *Sweets Dictionary*). The method of filing, or of putting the documents on a file of thread, wire or string has, in all Courts, it is said, but the English Bankruptcy Court, been discontinued, but the word has been kept. In its primitive meaning “filing” means putting the documents on a file (See *American and English Encyclopaedia of Law: Title ‘File’*).; but now documents are kept together by other methods. “Filing” now really means depositing in a Court office. It has, in my opinion, acquired this secondary meaning; and in *Wharton’s Law Lexicon* it is said that “to file” means to deposit at an office: see also *Hunter v Caldwell* 10 QB 69 at 80. I am bound, in my opinion, to interpret the word “filed” in its popular and usual sense. In none of the Supreme Court offices of this colony are any documents filed, using that word in its primitive sense…In its popular and usual sense, “filing” means no more than depositing the document at the relevant court office for the purpose of its use in the court.

35. In my opinion, to file a document in the Work Health Court is to deposit the particular document in the Registry of the Work Health Court. That requires the person proposing to file the document to personally attend at the Registry to deposit the document, and have it placed on the court file.

36. There is no provision under the Work Health Court Rules for a document to be filed by any other method, for example by mail or facsimile, or electronic transmission.[13]

[13] This is contrast to Rule 3.10 of the Local Court Rules which allows for the filing of documents by electronic transmission under certain circumstances. Although the Work Health Court or a magistrate presiding over the Court has all the powers of a Local Court or a magistrate under the *Local Court Act* , Rule 3.10 of the Local Court Rules has no application to proceedings in the Work Health Court. But even if the rule did apply, the preconditions for the operation of that rule neither existed nor were met in the present case.

37. Neither the Notice of Discontinuance emailed to the Court nor the original of the notice subsequently sent to the Court by ordinary mail were filed in the requisite manner. As the first Notice of Discontinuance was never filed it was ineffective, and did not discontinue the proceedings.

38. The first Notice of Discontinuance was ineffective on another ground. Rule 4.01 of the Work Health Court Rules provides that a copy of each document filed by a party is to be served on each other party. In my opinion the operation of that rule requires a document to be filed before it is served. Any purported service of the first notice on the employer's solicitors in the present case was ineffective as the document was not filed prior to service. As the notice was never served in the manner contemplated by the Rules, the first Notice of Discontinuance was ineffective, and again did not have the effect of discontinuing the proceedings.

39. The Notice of Discontinuance emailed to the Court – and subsequently sent to the Court by ordinary mail - was ineffective for an additional reason. The Notice of Discontinuance only purported to operate in relation to Claim No 20928255. It was because of this deficiency that the employer's solicitors expressed concern over the effectiveness of the notice, and suggested that the notice be redrafted to cover both applications.

40. In my opinion, the concern expressed by the employer's solicitors had a sound basis. Although the worker filed a consolidated Statement of Claim in respect of both applications (in accordance with a court direction), there was never any order of the Court consolidating the two applications. In those circumstances, in order to effectively discontinue the proceedings – constituted by the two applications- the first notice of discontinuance should have referred to both applications. That should have been done to make it clear that the worker was discontinuing both applications - and not merely Claim No 20928255. The worker's solicitor purported to rectify the

deficiency by forwarding to the Court the second Notice of discontinuance, bearing both claim numbers.

41. Moreover, the statement made in the body of the document that "the worker gives notice that the claim filed on 15 February 2011 is discontinued" is perplexing. It is unclear as to what is meant by the claim filed on 15 February 2011. An examination of the court files has failed to identify any document meeting that description. This adds further uncertainty as to the nature and extent of the proceedings which the first Notice of Discontinuance purported to discontinue.

42. For one or more of the reasons stated above, I consider that the first Notice of Discontinuance did not effectively discontinue the proceedings (constituted by both applications), and the proceedings remain on foot.

The Second Notice of Discontinuance

43. The second Notice of Discontinuance is as problematic as the first notice of discontinuance in terms of its ability to effectively discontinue the present proceedings.

44. The second Notice of Discontinuance was faxed to the Court. That method of filing is not countenanced by the Work Health Court Rules. No subsequent steps were taken to file the notice in accordance with the requirements of the Rules of Court. The second notice was never filed in the requisite manner.

45. Although the second notice was served on the employer's solicitors on 19 September 2011 the notice was never filed in accordance with the Rules of the Work Health Court. Service of a notice of discontinuance is only effective if the notice has been properly filed.

46. Although the second Notice of Discontinuance referred to both claims, the notice continued to give notice that "the claim filed on 15 February 2011 is

discontinued". Again, that statement engenders some uncertainty or ambiguity as to the nature and extent of the discontinuance of proceedings.

47. For one or more of the above reasons the second notice was ineffective in discontinuing the proceedings.

48. However, even if the second Notice of Discontinuance were considered to have been properly filed and served - and to be sufficiently certain in its terms - the fact that the worker filed his initial application (returnable on 5 September 2011) prior to the filing and service of the second notice is a significant matter.

49. As stated earlier, the worker's initial application signified a desire on the part of Mr Gardner to continue the proceedings, despite the notice of intention to discontinuance the proceedings given to the Court on 29 August 2011. Mr Gardner made it clear that he did not wish to be bound by the communication Mr Flynn made to the Court on that day. He was seeking to withdraw the notice of intention to discontinue the proceedings.

50. There is nothing in the Rules of the Work Health Court that would prevent a worker from withdrawing an intention to discontinue proceedings prior to the filing and service of a Notice of Discontinuance – both of which are preconditions for bringing proceedings to an end. Furthermore, there is nothing in the Rules that would require a worker to obtain the leave of the Court to withdraw an intention to discontinue proceedings. However, where, as in the present case, the hearing date was vacated on the basis that it was the intention of the worker to discontinue the proceedings – and the worker subsequently seeks to continue the proceedings, he or she would be at extreme peril of suffering the brunt of a very substantial costs order. Moreover, the worker may only be permitted to continue the proceedings upon certain terms.

51. Given that the orders made by the Court on 29 August 2011 did not effectively bring an end to the proceedings, and that a discontinuance of proceedings is only effective when the relevant notice has been filed and served (via Rule 3.07(3)), it was open to the worker to withdraw any prior notice of intention to discontinue the proceedings - for whatever reason - prior to the filing and service of a relevant notice.

52. In my view, it would be an abuse of the Court's process to allow the provisions of Rule 3.07(3) to operate against a worker in circumstances where he or she has given notice to the Court – prior to the filing and service of a Notice of Discontinuance - of a wish to withdraw notice of an intention to discontinue proceedings.

53. However, in the event that leave of the Court is, in fact, required in circumstances where a worker seeks to withdraw an intention to discontinue proceedings, I would have been prepared to give leave in the present case. It is difficult to comprehend how a worker would decide to discontinue proceedings because an offer of settlement from an employer was considered to be inadequate and was rejected by him or her. In the normal course of events, an inadequate offer of settlement would result in the worker pursuing his or her claim – rather than "throwing in the towel". What is the explanation for this anomalous situation? Did the worker misunderstand the advice he received from his lawyer? Or did the worker simply change his mind in relation to an impetuous ill-considered decision? Whatever the explanation, I think it would be unfair to deny the worker the opportunity to continue the proceedings (subject to whatever terms the Court considers fit). The alternative would be to hold the worker to his intention to discontinue the proceedings, and to require him to seek the leave of the Court to commence similar applications in accordance with Rule 3.09 of the Work Health Court Rules. That alternative would, in all probability, have attendant financial costs, as well as inevitable psychological costs associated with the anxiety occasioned by protracted litigation.

THE RULING OF THE COURT

54. In my opinion, it is unnecessary for the Court to make an order setting aside the order for discontinuance made on 29 August 2011.

55. None of the orders made on 29 August 2011 had the effect of bringing the proceedings to an end. Furthermore, for the reasons given earlier in this decision, neither the first nor the second Notice of Discontinuance was effective in discontinuing the proceedings. Consequently, the proceedings remain on foot.

56. What remains to be considered is the future progress of these proceedings. There is obviously a significant costs issue. The Court is also yet to consider the application made by Mr Flynn with respect to ceasing to act on behalf of the worker. That also has costs implications, which may well overlap with the worker's application (being the subject of this decision).

57. Ultimately, it will be necessary for the Court to determine the terms upon which the present proceedings are to be continued, which may well include orders as to the payment of costs.

58. I propose to hear the parties in relation to these issues at a convenient time.

Dated 19 June 2012

……………………………..

Dr John Allan Lowndes