

CITATION: *Sarah Miller v JB HI-FI Ltd* [2018] NTLC 010

PARTIES: SARAH MILLER

V

JB HI-FI LTD

TITLE OF COURT: Local Court

JURISDICTION: Interlocutory

FILE NO(s): 21611726

DELIVERED ON: 9 March 2018

DELIVERED AT: Darwin

HEARING DATE(s): 28 February 2018

JUDGMENT OF: J Johnson JR

CATCHWORDS:

JURISDICTION TO SET ASIDE EX PARTE ORDERS – general principle that when a judicial order has been obtained ex parte the party affected by it may apply for its discharge.

TIME FOR SERVICE – Rule 7.06 of the *Local Court (Civil Jurisdiction) Rules*

Where statement of claim not served in time – where no order for extension of time can be made after statement of claim ceases to be valid.

EXTENDING TIME – Rule 3.03(2) of the *Local Court (Civil Jurisdiction) Rules*

Where Court's usual discretion to extend time is conditioned by reference to Rule 7.06.

EXTENDING TIME – Part III Division 2 of the *Limitation Act*

Whether ss 44(1) and 44(2) of the Act can re-enliven the Court's jurisdiction to entertain an application to extend time as if it were not out of time.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Crawley SC
Defendant:	Mr Sanders

Solicitors:

Plaintiff:	Piper Ellis Lawyers
Defendant:	HWL Ebsworth Lawyers

Judgment category classification:	C
Judgment ID number:	[2018] NTLC 010
Number of paragraphs:	29

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

No. 21611726

BETWEEN:

SARAH MILLER
Plaintiff

AND:

JB HI-FI LIMITED
Defendant

DECISION OF J JOHNSON JR

(Delivered 9 March 2018)

1. On 10 January 2018, following submissions in open Court from Senior Counsel for the plaintiff, I made the following ex parte orders in this proceeding:
 1. Pursuant to section 44(1) of the *Limitation Act*, the time in which to seek an extension of the validity of the Statement of Claim in this proceeding is extended.
 2. The validity of the Statement of Claim is extended for a further period of 12 months from 1 March 2017.
2. Those orders were made against the following background facts.
3. The plaintiff's Statement of Claim was filed in the Court by her then solicitors on 2 March 2016 for an action in personal injury arising from an alleged breach of duty by the defendant on 2 March 2013.¹
4. At that time, Rule 7.06 of the Local Court Rules was in the following terms:

7.06 Time for service

(1) A statement of claim is valid for service for 12 months after the date on which it is filed.

¹ See s 12(1)(b) of the *Limitation Act* and s 28 of the *Interpretation Act*.

(2) If a statement of claim has not been served on a defendant, the Court may order that the validity be extended for a period of not more than 12 months from the day of the order.

(3) An application for an extension under subrule (2) is to be made on or before the day on which a statement of claim ceases to be valid and no order for an extension is to be made after a statement of claim ceases to be valid.

(4) Subject to subrules (2) and (3), the Court may make further orders extending the validity of a statement of claim.

5. It will be immediately apparent that such Rule prohibits an order for an extension of time after the Statement of Claim ceases to be valid and, lest there be any doubt, the Court's usual discretionary powers to extend or reduce time are conditioned by reference to Rule 7.06, again, as in force at the relevant time:

3.03 Extending or reducing time

(1) The Court may extend or reduce a time fixed by these Rules or fixed, extended or reduced by an order.

(2) Subject to rule 7.06, the Court may extend a time under subrule (1) before or after the time expires whether or not an application for the extension is made before the time expires.

6. On 27 September 2017 the plaintiff's then solicitors advised her that her Statement of Claim had not been served. On 29 September 2017 the plaintiff engaged new solicitors.
7. On 12 December 2017 the plaintiff's newly engaged solicitors filed an ex parte application in the Court relying upon s 44(1) of the *Limitation Act* for "the time within which to seek an extension of time of the validity of the Statement of Claim [to] be extended". As is my usual practice with ex parte applications of this nature I initially assessed the application on the papers. I thereafter informally advised the plaintiff's solicitors that based upon the explicit wording in Rule 7.06(3) and 3.03(2) I did not think I had jurisdiction to entertain the application and, if they disagreed, invited further submissions in open Court on my interlocutory list.
8. That invitation was taken up by the plaintiff's solicitors and I heard submissions ex parte on 10 January and thereafter made the orders to which I have referred at paragraph 1.
9. Acting upon the terms of those orders the plaintiff caused her Statement of Claim to be served on the defendant on 15 February 2018.
10. On 23 February 2018 the defendant filed an interlocutory application in the Court seeking, inter alia, to set aside my orders of 10 January 2018 and that application came on for hearing before me on 28 February 2018.

Jurisdiction

11. Rules of Court generally include the jurisdiction to set aside an order which is made ex parte. Whilst I can find no such explicit rule in this jurisdiction², I am content to proceed in the absence of any objection by the parties and on the general principle that an ex parte order is by its nature a provisional order always reviewable by intervention and argument adduced by the other side within a reasonable period of becoming acquainted with it. Such principle has been described by the High Court as an “elementary rule of justice”.³
12. As I understand the case law, a subsequent hearing reviewing an ex parte order, either by the judicial officer who made the original order or by another judicial officer, is not an appeal against the first order. Nor is it an application to reconsider the correctness of the original decision. Rather, the application rests upon production of further material not before the judicial officer who heard the ex parte application and which throws a new and different light on the situation of the parties.⁴
13. In my opinion, the defendant’s interlocutory application filed 23 February 2018 sufficiently demonstrates the potential to put the situation of the parties in a new light.

The initial decision ex parte

14. To be brief, my considerations on the first application ex parte were directed to the following matters.
15. Firstly, on a plain reading of the two “draconian” Rules of Court to which I have previously referred, the legislative intention seems clearly directed to ousting the Court’s jurisdiction. As was said by Mildren J in *Jabiluka*:⁵

Rule 4.06 of the Local Court Rules [presumably as it then was] provides that a Statement of Claim must be served within a year after the day it was filed; an application to extend the time for service may be made from time to time; but no such order can be made after a Statement of Claim has ceased to be valid. This draconian rule may be contrasted with Supreme Court Rule 5.12(3) which permits this Court to extend time for the service of originating process at any time. The consequence of the appellant's failure to obtain an extension within time is that, if the appellant wished to proceed against the respondent, the appellant would have been required to issue a fresh Statement of Claim in the court.

² As to the criminal jurisdiction, see Order 81A.30 of the Supreme Court general rules of procedure in criminal proceedings.

³ *The owners of SS Kalibia v Wilson* (1910) 11 CLR 689 at 694.

⁴ See, for example, *Bell Group NV (in liq) v Aspinall* (1998) 19 WAR 561.

⁵ *Jabiluka Aboriginal Land Trust v Stiles* [1994] NTSC 9; 4 NTLR 53 (3 February 1994) @ par 2.

16. Secondly, and allowing that to be the case, the proposition was put that the Court could nonetheless re-enliven its jurisdiction if the plaintiff took recourse in appropriate provisions of Part III, Division 2 of the *Limitation Act* and, specifically ss 44(1) and 44(2):

Division 2 General extension of period of limitation

44 Extension of periods

(1) Subject to this section, where this or any other Act, or an instrument of a legislative or administrative character prescribes or limits the time for:

(a) instituting an action;

(b) doing an act, or taking a step in an action; or

(c) doing an act or taking a step with a view to instituting an action,

a court may extend the time so prescribed or limited to such an extent, and upon such terms, if any, as it thinks fit.

(2) A court may exercise the powers conferred by this section in respect of an action that it:

(a) has jurisdiction to entertain; or

(b) would, if the action were not out of time, have jurisdiction to entertain.

17. Thirdly, reliance upon the *Limitation Act* for the purpose here sought is novel in my experience and I could not find any case law directly on point. Historically, courts have tended to rely in these circumstances on the equivalent of Rule 3.03 to extend the time for service after a writ has become stale. However, as far as I can tell from the cases that was in circumstances where the equivalent Rule was not conditioned by the “subject to Rule 7.06” language used in this jurisdiction. An example of such a case is *Van Leer Australia Pty Ltd v Palace Shipping KK* (1981) 180 CLR 337 where Stephen J considered the law in relation to an application to renew the validity of a writ for service under the High Court rules:

It is not correct to say that the defendant has acquired an absolute right to immunity when a writ issued within the limitation period is not served within twelve months of its issue and the limitation period has in the meantime expired. What has expired is in reality not the limitation period but the period which would have been the limitation period if no writ had ever been issued. What the failure to serve a writ within twelve months gives the defendant is no more than a right to contend that the Court in the exercise of its discretion should not renew the writ. The efficacy of the writ does not expire absolutely at the end of the twelve months, it only expires if and in so far as the Court sees fit not to renew it.

18. Similar propositions were contained in a number of extracts from *Civil Procedure Victoria* referred to me by Senior Counsel, along with the general principle that :

The court is reluctant to see a plaintiff shut out from having his claim tried in the court owing to the negligence of his solicitor in failing to serve the writ in time. The fact that the plaintiff may have a claim against the solicitor is a relevant factor, the weight of which will depend upon the circumstances of the case.

19. In the event, and albeit ex parte and in the absence of reference to any applicable case law, the words of the statute appeared to me on their face clear enough to do that which the plaintiff sought. I could nowhere see that the *Limitation Act* is not intended by the legislature to interfere with the power of the Court to extend time in circumstances where Rule 7.06 applies and that I therefore had the jurisdiction to entertain the plaintiff's application as if it were not out of time. The clearly apparent purpose of Part III Division 2 of the *Limitation Act* is to empower the Court, in its discretion, to resuscitate expired remedies and causes of action, and to defeat statutory limitation periods.

20. The only provision which initially caused me pause was ss 44(6)(a) which stipulates that:

(6) This section does not:

(a) derogate from any other provision under which a court may extend or abridge time prescribed or limited by an Act or an instrument of a legislative or administrative character; or

(b)

21. However upon a reading of the relevant case law it is tolerably clear that ss 44(6)(a) merely provides that Part III, Division 2 does not derogate⁶ from any other provision under which a Court may, inter alia, extend time. The applicant may have a concurrent right to utilise s 44(1) of the *Limitation Act* or some other Act in his application to extend time, in which case it is but an additional source of jurisdiction.

22. Fourthly, I then moved to a consideration of *Ulowski v Miller*⁷ wherein Bray CJ observed that the discretion to extend time should not be fettered by any absolute or inflexible rules, and went on to outline what he referred to as five paramount matters to be considered in the exercise of the discretion. Those factors are: the length of the delay; the explanation for the delay; the hardship to the plaintiff if the action is dismissed and the cause of action left statute-barred; the prejudice to the defendant if the action is allowed to proceed notwithstanding the delay; and the conduct of the defendant in the litigation.

⁶ The word "derogate" is variously defined as "detract" - "take away part": *The Concise Oxford Dictionary*.

⁷ [1968] SASR 277.

23. In that consideration I took into account the affidavit of the plaintiff sworn 11 December 2017, and the annexures to that affidavit comprised a file copy of a letter from the plaintiff's then solicitors dated 13 May 2013 addressed to the defendant and putting the defendant on notice of the plaintiff's claim; and the expert opinions of Consultant Orthopaedic Surgeons Phil Allen dated 21 March 2016 and John Talbot dated 20 May 2014. I weighed that material, along with the written and viva voce submissions of Senior Counsel, against the five factors identified in *Ulowsky* in coming to the decision reflected in my ex parte orders at paragraph 1.

The defendant's submissions on rehearing

24. The defendant provided comprehensive written and viva voce submissions on its application for rehearing which I have carefully considered. I will not for present purposes reiterate those submissions in full other than to say that they founded upon three essential grounds.
25. The first of these was that s 44(1) of the *Limitation Act* cannot overcome the second limb of Rule 7.06(3), ie, "...that no order for an extension is to be made after a statement of claim ceases to be valid". The drafters of these provisions, it is said "carefully worded them such as to avoid being susceptible to attack by s 44 of the *Limitation Act*". Further, "that the drafters of the court rules have bound the hands not only of the parties, but also of the judges" and that "section 44 of the *Limitation Act* permits the judge to unbind the litigants' hands from these restraints, but not to unshackle his own".
26. The second ground was that "Rule 7.06 only makes provision for the extension of the period of validity for service of a statement of claim, and does not empower the court to create a second period of validity for service". It was observed that order 1 of the orders which I made on 10 January 2018 "purports to be retrospectively operative from the date of expiry of the statement of claim's validity rather than operative 'from the day of the order' as required by Rule 7.06(2)".
27. The final ground was that the application ought to have been dismissed on its merits because the plaintiff has provided "no cogent explanation for the delay in service" and that "it is clear from the face of the plaintiff's evidence that the defendant will be prejudiced in responding to the case against it".
28. With respect, after carefully considering those submissions and the cases provided, I reject the defendant's submission on the first two grounds for the reasons which I have attempted to articulate at paragraph 19. I have also undertaken a careful further review of the factors in *Ulowsky* and similarly reject the defendant's submissions on the merits, noting that the defendant has been on notice of the plaintiff's claim since at least 13 May 2013.

29. I will exercise my discretion and order accordingly.

Orders:

1. The defendant's interlocutory application filed 23 February 2018 to set aside the orders of the Court made in this proceeding on 10 January 2018 is dismissed.
2. The defendant is to file and serve a defence to the plaintiff's Statement of Claim served on 15 February 2018 within 28 days of today.
3. Costs of the application in the cause certified fit for Counsel.

Dated this 9th day of March 2018

JULIAN JOHNSON
JUDICIAL REGISTRAR