*Iskandar & Anor v Merpati Nusantara Airline* [2005] NTSC 61

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| PARTIES: | FREDDIE ISKANDAR and<br><br>NATRABU (Australia) TOURS & TRAVEL PTY LTD<br><br>v<br><br>MERPATI NUSANTARA AIRLINE |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction |
| FILE NO: | 248/96 (9626979) |
| DELIVERED: | 6 October 2005 |
| HEARING DATES: | 19, 22 and 23 September 2005 |
| JUDGMENT OF: | THOMAS J |

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

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| Plaintiffs: | F Davis |
| Defendant: | J Reeves QC with D Alderman |

*Solicitors:*

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| Plaintiffs: | Davis Norman |
| Defendant: | Cridlands |

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| Judgment category classification: | C |
| Judgment ID Number: | tho200508 |
| Number of pages: | 37 |

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

*Iskandar & Anor v Merpati Nusantara Airline* [2005] NTSC 61
No. 248/96 (9626979)

BETWEEN:

**FREDDIE ISKANDAR**
First Plaintiff

and:

**NATRABU (AUST) TOURS & TRAVEL PTY LTD**
Second Plaintiff

AND:

**MERPATI NUSANTARA AIRLINE**
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 6 October 2005)

[1] On 15 September 2005, the defendant filed a summons containing a number of applications. The first application to proceed to hearing is an application that the proceedings be dismissed.

[2] It was agreed that there should be submissions and a decision made on this application before any of the remaining applications on summons dated 15 September 2005 were heard and determined.

[3] Mr Frederick James Davis appeared as counsel for the plaintiffs. Mr Reeves QC with Mr David Alderman appeared as counsel for the defendant.

[4] Evidence on affidavit was put forward on behalf of the plaintiffs and the defendant. This included an affidavit of Freddie Iskandar sworn 21 September and affidavit of Frederick James Davis sworn 21 September 2005 on behalf of the plaintiffs.

[5] The affidavit material relied upon by the defendant includes affidavits of Cameron Ford sworn 12 and 18 September 2005, affidavit of Richard Norman Henschke sworn 16 September 2005 and affidavit of Stacey Ann Martin sworn 20 September 2005.

[6] This being an interlocutory application, Order 43.03(2) of the Supreme Court Rules provides that an affidavit may contain a statement of fact based on information and belief, provided the grounds are set out.

[7] Objections to certain parts of the affidavit material raised by Mr Reeves QC on behalf of the defendant, and Mr Davis, on behalf of the plaintiffs, were argued and ruled upon prior to the commencement of submissions.

[8] In this matter, a writ issued on behalf of the first and second plaintiffs on 13 December 1996. The first plaintiff claimed the sum of $552,240.00 for unpaid salary between 1 January 1987 and 15 January 1996.

[9] The second plaintiff sought injunctive relief and specific performance alternatively damages for breach of contract and/or damages in equity.

There was also a claim for $731,982.82 for payment of the balance owing for establishment costs, for orders in equity setting aside the compromise agreement alternatively for damages under the Trades Practices Act.

[10] Since the issue of this writ the plaintiffs' claim has had a lengthy and tortured history. Details of this are set out in a document titled "Combined Chronology" prepared by solicitors and counsel appearing on behalf of the defendant.

[11] Some of the significant items appearing on that detailed chronology, which I have been able to expand upon by my own searches of the Court record and by reference to correspondence between the parties annexed to the affidavit of Cameron Ford sworn 18 September 2005, are as follows:

- On 14 February 1997, the plaintiffs filed an amended statement of claim. The amended statement of claim sought $552,240 unpaid gross salary and other emoluments between 1 January 1987 and 15 January 1996 on behalf of the first plaintiff. The claim on behalf of the second plaintiff was for injunctive relief, damages for breach of contract, a claim for $182,156.00 for payment of amount owing for unpaid establishment costs, orders in equity setting aside the 1995 agreement and damages and injunctive relief pursuant to the Trades Practices Act.

- On 27 March 1997, the defendant filed a defence and counterclaim dated 26 March 1997.

- On 18 November 1998, the plaintiffs filed a defence to the counterclaim.

- On 17 May 2001, the plaintiffs were unsuccessful in obtaining an order for injunction against the defendant.

- On 3 August 2001, the solicitors for the plaintiffs wrote to solicitors for the defendant seeking their consent to file a proposed amended statement of claim. Solicitors for the defendant wrote a letter dated 21 December 2001 advising the defendant would not consent to the filing of the proposed amended statement of claim as the plaintiffs were seeking to introduce statute barred claims.

- On 26 March 2002, the plaintiffs filed a summons seeking leave to file a further amended statement of claim. Copy of the proposed amended statement of claim was annexed to a supporting affidavit of Frederick James Davis sworn 25 March 2002. The matter was listed for hearing before the Master on 28 March 2002.

- On 11 April 2002, the Master delivered his reasons for decision on the plaintiffs' application for leave to amend their statement of claim to allege additional causes of action that had arisen since the issue of the writ. The Master refused the application to amend the statement of claim on the basis that no cause of action was pleaded and the proposed amendments were embarrassing.

- On 24 May 2002, the plaintiffs filed a summons for leave to file and serve the amended statement of claim annexed to the affidavit of Mr Frederick James Davis sworn 24 May 2002.

- The application was listed for hearing before the Master on 30 May 2002. On 29 May 2002 solicitors for the defendant wrote to solicitors for the plaintiffs advising they considered the further amended statement of claim did not deal with the deficiencies as detailed in the Master's reasons for decision delivered on 11 April 2002. Solicitors for the defendant refused to give their consent to the filing of this further amended statement of claim. The plaintiffs were invited to withdraw the application scheduled for hearing the following day being 30 May 2002 and provide a further amended statement of claim that dealt with the matters in the Master's decision dated 11 April 2002.

- On 4 June 2002, solicitors for the plaintiffs forwarded by e-mail a further proposed amended statement of claim to solicitors for the defendant. On 5 June 2002, Mr Davis swore an affidavit which he filed the same date. This affidavit deposes to his placing a copy of the proposed amended statement of claim in the Court box for the defendant's solicitor on 6 June 2002. I have presumed this paragraph should have read – placed in the Court box for the defendant's solicitor on 5 June 2002, not as stated on 6 June 2002. On 5 June 2002 solicitors for the defendant wrote to solicitors for the plaintiffs

detailing their objections to the proposed amended statement of claim and stating that it did not address the deficiencies outlined by the Master on 11 April 2002 with respect to the earlier proposed amended statement of claim. Solicitors for the defendant invited solicitors for the plaintiffs to withdraw the application originally listed before the Master on 30 May 2002 which had been further adjourned.

- On 12 June 2002, solicitors for the plaintiffs forwarded a further amended statement of claim to solicitors for the defendant and advised this was the amended statement of claim the plaintiffs intended to rely upon on the application before the Master. The application before the Master was listed for hearing on 20 June 2002.

- On 15 July 2002, the Master delivered reasons for his decision on the application. He concluded that the proposed amended pleading is prolix and contradictory. He stated that it disclosed no cause of action and was embarrassing to plead to. The application to file a further amended statement of claim was dismissed.

- On 21 August 2003, the Master delivered his reasons for decision on an application made by the defendant that the following question be tried as a preliminary issue:

> "Whether the first plaintiff's claim for salary for the period prior to 13 December 1993, as pleaded in paragraphs four to twelve, inclusive of the Amended Statement of Claim, is

statute barred by the provisions of section 12 of the *Limitation Act*."

This application was made pursuant to Order 47.04 of the Supreme Court Rules. In his reasons for decision, the Master refused the application to try this issue separately. He stated:

> "[6] … In my opinion, the preparation for, and the conduct of, the trial of this issue separately is more likely to add to the inconvenience and expense.
>
> [7] This proceeding has been on foot for nearly 6 years and it should be resolved as soon as possible. The proposed trial of a preliminary issue is a distraction, which is likely to delay the trial and resolution of this proceeding.
>
> [8] The application will be refused."

- On 13 July 2004, solicitors for the plaintiffs filed a summons seeking leave to file and serve a further amended statement of claim. The application on summons was supported by an affidavit of Mr Frederick James Davis sworn 13 July 2004 annexing the proposed further amended statement of claim. The summons was returnable for a hearing on 15 July 2004.

- On 26 August 2004, the Master delivered written reasons for his decision on the application by the plaintiffs to file a further amended statement of claim. The Master concluded that the proposed pleading was embarrassing and the defendant should not be required to plead to it. He dismissed the application to file a further amended statement of claim.

- At a Directions Hearing on 8 October 2004, the Master raised his concerns at the delays in bringing this matter to trial.

- On 13 December 2004, the Acting Master made an order that the matter be referred to the Registrar for trial. He had before him a certificate signed by solicitors for the plaintiffs indicating the plaintiffs were ready to proceed to trial. Mr Henschke, the then solicitor for the defendant, attended the listing hearing. He advised that at that time the defendant was not ready for trial but anticipated the defendant would be ready for trial in September 2005.

- On 21 January 2005, at a listing conference before the Registrar, the matter was set down in the list of civil matters to be heard in September 2005.

- On 7 July 2005, Mr Henschke obtained the leave of the Court to file a notice that his firm Halfpennys ceased to act on behalf of the defendant.

- On 24 August 2005, the defendant filed a summons making application that the hearing of this matter fixed for 12 September 2005 be vacated and adjourned to a date to be fixed. Mr Henschke advised that the firm of Halfpennys had come back onto the record as solicitors for the defendant solely for the purpose of making an application to adjourn the hearing.

- On 29 August 2005, Mr Davis on behalf of the plaintiff, filed a list of special damages.

- The application to adjourn the hearing was heard by the Court on 1 September 2005. Mr Davis advised the Court on that date that the plaintiffs would not be seeking to amend the statement of claim to include the recently filed particulars of special damages. Mr Davis stated the plaintiffs would proceed to hearing on the amended statement of claim filed 14 February 1997. On 2 September 2005 the Court ruled that the application for adjournment would be refused. The matter was subsequently listed to commence on 19 September 2005.

- On 15 September 2005, the defendant filed the summons which included the application to dismiss the proceedings.

[12] Since the date of the filing of the writ on 13 December 1996, there have been numerous other applications and appearances, some of which I will refer to in the course of these reasons for judgment on the application to dismiss the proceedings. The principles applicable on this application are set out in Williams Civil Procedure at par [I 24.01.30]:

> "Matters to be considered in the exercise of the discretion to dismiss a proceeding for want of prosecution include the length of the delay on the part of the plaintiff, the explanation for the delay, the hardship to the plaintiff if the proceeding were dismissed and the cause of action left statute barred, the prejudice to the defendant if the proceeding is allowed to continue notwithstanding the delay, the conduct of the defendant in the litigation, and the degree of risk that

> a fair trial of the questions in the proceeding will not be possible. See *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 259; [1968] 1 All ER 543 at 556; *Birkett v James* [1978] AC 297; [1977] 2 All ER 801; *Shepperdson v Lewis* [1966] VR 418 at 419; *Ulowski v Miller* [1968] SASR 277; *Bishopsgate Insurance Australia Ltd (in liq) v Deloitte Haskins & Sells* [1999] 3 VR 863; *Leyburd Nominees Pty Ltd v Coates Brown & Co* (CA(Vic), No 8311/94, 12 September 1995, unreported, BC9503962). …"

and *Muto v Faul* [1980] VR 26 at 30:

> "… It is well established that any court possesses an inherent jurisdiction to stay or dismiss cases brought before it which are frivolous or vexatious or an abuse of the process of the Court. This inherent power must extend, as this Court said in *Duncan v. Lowenthal*, [1969] V.R. 180 at p. 182, to purging the Court list of cases which have not been reasonably prosecuted. This inherent power is of course very sparingly exercised but it is an essential power in the administration of justice. It is no answer to the exercise of the power in a proper case that to do so precludes a party from asserting or exercising a right given to him by statute. The books contain many cases in which the power to dismiss an action for want of prosecution is discussed and the conditions upon which the power will be exercised explained. We select a single passage from the judgment of Salmon, L.J. (as he then was) in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229 at p. 268; [1968] 1 All E.R. 543 at p. 561: 'A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed the defendant must show: -
>
> '(1) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognize when it occurs.
>
> '(2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

> ‘(3) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of the issue between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.’
>
> That case has since been approved in the House of Lord: see *Birkett v. James*, [1978] A.C. 297.”

[13] Order 24.05 of the Supreme Court Rules preserves the Court’s inherent jurisdiction to dismiss a proceeding for want of prosecution. The relevant part provides as follows:

> “Nothing in this Order affects the inherent power of the Court –
> (a) to dismiss a proceeding for want of prosecution; …”

[14] As at 13 December 1996, when the plaintiffs first issued proceedings in the matter, the claim for salary between 1987 to 1993 was statute barred. The plaintiffs had not made any application for an extension of time with respect to the claims outside the limitation period. This may not have been fatal to the claim for salary between 1987 and 1993, but is a factor to take into consideration in deciding whether there has been an inordinate delay on the part of the plaintiffs.

[15] With respect to the claim for salary in the three years prior to the issuing of the writ, the proceedings were commenced near the very end of the limitation period. A plaintiff who has allowed the limitation period to expire and/or permitted the limitation to almost expire, has an obligation to process the proceedings with expedition. See *Bishopsgate Insurance*

*Australia Ltd (in liq) v Deloitte Haskins & Sells* [1999] 3 VR 863 at par [32] and Williams Civil Procedure Victoria [I 24.01.63] and the cases referred to therein:

> "Long delay before filing of the writ will mean that the court will look critically at any post-writ delay and will more readily regard the delay as inordinate and inexcusable than if the proceeding had been commenced soon after the accrual of the cause of action. Further, a defendant who has suffered prejudice as a result of a long delay before the commencement of the proceeding will only have to show something more than minimal additional prejudice as a result of the post-writ delay to justify dismissing the proceeding. …"

[16] In the case before this Court, there were significant delays in the plaintiffs prosecuting their claims. If the Supreme Court Rules, with respect to the conduct of the proceedings, had been complied with it could reasonably be expected to have gone to trial in the latter half of 1998 or early 1999. During the period between the date of the issuing of the writ on 13 December 1996 and 26 August 2004, a period of nearly eight years, the plaintiffs had made three unsuccessful attempts to file an amended statement of claim.

[17] It was only after a Directions Hearing on 8 October 2004, when the Master raised concerns about the delays in this matter, that the matter then proceeded ahead and a hearing date obtained as already detailed. The hearing scheduled for September 2005 is nearly nine years after the first issue of the writ.

[18] In addition to this, the plaintiffs had delayed between seven and seven and a half years between the expiry of the earliest limitation bar and the issue of these proceedings.

[19] Mr Davis, on behalf of the plaintiffs, submitted that there are very complex reasons why the writ did not issue until nearly seven and a half years between the expiry of the earliest limitation bar and the issue of these proceedings. It is Mr Davis' submission that Mr Iskandar will give evidence about these reasons when he gives evidence at the trial. There is presently no evidence before the Court to explain such a substantial delay in issuing a writ.

[20] The amended statement of claim filed on 14 February 1997 is the amended statement of claim on which the plaintiffs rely. In paragraphs 4 to 12 inclusive, of that statement of claim, Mr Iskandar claims the agreement for employment was an oral agreement between himself and Mr Sancha Bakhtiar (acting on behalf of Merpati) that took place in or about 1 January 1987. This is some 18.75 years ago. Mr Bakhtiar died on 18 February 2003.

[21] In paragraph 6 of the statement of claim, reference is made to a document which Mr Reeves QC claims, on behalf of the defendant, has never been discovered. Mr Davis, on behalf of the plaintiffs, submits this document is item No. 9 on the plaintiffs' list of amended documents. I am not able to determine whether or not this is the document referred to in paragraph 6 of the amended statement of claim.

[22] Mr Iskandar seeks to claim wages at the rate of $1,180 per week for the period from 1 January 1987 to 1 January 1996 totalling $552,240. I agree with the submission made by Mr Reeves QC, that the defendant has suffered prejudice because it was not informed that the first plaintiff harboured this claim until these proceedings were issued on 13 December 1996. The defendant was denied the ability to protect itself from this claim by, for example, gathering evidence, terminating the contract and/or seeking a declaration that the contract did not exist.

[23] The claim made by the second plaintiff is essentially a claim for establishment costs due under a general sales agency agreement as pleaded in paragraphs 13 and 14 of the amended statement of claim. Paragraph 14 of the amended statement of claim asserts this agreement was made on 1 July 1986 at a meeting between Mr Iskandar and the now deceased Mr Bakhtiar.

[24] Paragraphs 30-32 of the amended statement of claim sets out details of an agreement made between the parties on 20 September 1995 which set aside any obligations of the parties under previous agreements and compromises claims prior to 31 December 1994.

[25] The amended statement of claim filed 14 February 1997, seeks to set aside the agreement made on 31 December 1995, claiming unconscionable conduct including economic duress on the part of the defendant in obtaining the 1995 agreement. The plaintiffs will have to establish that such a cause of action exists – see Cheshire & Fifoot's Law of Contract Eighth Australian Ed 2002

paragraph [13.7]. This details the reluctance of Australian courts to hold there is actionable economic duress and discusses the limits placed on such a cause of action.

[26] The plaintiffs seek to set aside the 1995 agreement in order for them to pursue the claim by the second plaintiff for establishment costs.

[27] Copy of the 1995 agreement is Annexure "A" to the affidavit of Cameron Ford sworn 12 September 2005. Clauses 9 and 11 of that contract provide that the parties agree the law to be applied is that of the Republic of Indonesia. The defendant will be asserting that in those circumstances the Indonesian courts have exclusive jurisdiction to decide disputes arising under the contract or its performance (*Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 224, 230 per Brennan J and 259 per Gaudron J).

[28] The issue of jurisdiction with respect to the 1995 contract would have to be determined as the plaintiffs need to set aside the 1995 contract in order to pursue the claim for establishment costs.

[29] The particulars of the establishment costs between 1987 to 1992 is set out in paragraph 26 of the amended statement of claim, it totals $569,140.00. Paragraph 33 of the amended statement of claim sets out details of the establishment costs that had been paid to arrive at the figure of $182,156.00 which the second plaintiff claims it was owed as at 23 December 1996, being the purported termination by the defendant.

[30] The delays on the part of the plaintiffs in preparing this matter for trial once the writ issued on 13 December 1996, are set out in paragraphs 22, 23 and 24 of the affidavit of Cameron Ford sworn 12 September 2005. I accept the details of these delays as deposed to by Mr Ford.

[31] I accept that the plaintiffs were responsible for a delay of approximately eight years between December 1996 and November 2004 in taking effective steps to bring this matter on for hearing.

[32] The defendant did not have a duty to stir up an inactive plaintiff and is not acting improperly if it lets the action lie (*Duncan v Lowenthal* [1969] VR 180).

[33] In a decision of Master Lefevere in *John Holland (Constructions) Pty Ltd v Jordin* (1992) 108 FLR 174, it was held that a defendant generally may leave a dormant plaintiff lie and have no fear that his inaction may constitute part of the excuse for the plaintiff's own inaction in prosecuting his claim.

[34] In the case before this Court, the plaintiffs could not be said to be inactive. However, a great deal of the activity did not effectively advance the matter toward a hearing. For example, four years of the period of seven years that elapsed since the issue of the amended statement of claim filed on 14 February 1997 were taken up with a number of unsuccessful attempts on behalf of the plaintiffs to further amend the statement of claim. There were also substantial delays in providing discovery. On 1 September 2005,

Mr Davis, on behalf of the plaintiffs advised the court that the plaintiffs were ready to proceed to hearing and would stand or fall on the amended statement of claim that issued on 14 February 1997.

[35] Whilst a defendant has no obligation to stir up a plaintiff to pursue its action, it is relevant to my consideration on the issue of inordinate delay, that in this matter the defendant did in fact take steps on a number of occasions to prompt the plaintiffs to proceed with the claim.

[36] The affidavit of Cameron Ford sworn on 18 September 2005, contains an index of correspondence between solicitors for the parties. A few examples of letters from solicitors for the defendant seeking to prompt the plaintiffs into action are as follows:

- On 7 February 1997, solicitors for the defendant wrote to solicitors for the plaintiffs seeking that the plaintiffs file its proposed amended statement of claim within 14 days.

- I note that during the first six months of 1997, there was a considerable amount of correspondence and references to time limits not being adhered to by both the plaintiffs and the defendant.

- On 15 May 1998, solicitors for the defendant wrote to solicitors for the plaintiffs noting that on 9 December 1997 the plaintiffs had been ordered to file a defence to the defendant's counterclaim. An extension of time had been obtained which expired on 27 February 1998. Solicitors for the

defendant advised that unless a defence to the counterclaim was filed within 14 days, they would be making application for judgment by default. A further letter giving the plaintiffs until 4.00 pm on Friday 5 June 1998 to file a defence to the counterclaim was forwarded by solicitors for the defendant on 3 June 1998. This was followed by correspondence between the solicitors for the parties concerning the plaintiffs application for leave to file a further amended statement of claim. By letter dated 5 June 1998, solicitors for the defendant consented to the plaintiffs' request for an extension of 28 days to provide an amended statement of claim.

- It appears that these matters were not attended to and on 4 August 1998 solicitors for the defendant wrote to the solicitors for the plaintiffs pointing out that there was still no defence filed to the counterclaim and neither had solicitors for the defendant received the proposed amended statement of claim. Solicitors for the defendant advised that failure to file a defence to the counterclaim within seven days would result in an application to the court to compel compliance with orders made by the Registrar on 9 December 1997 and 27 February 1998.

- Further correspondence ensued and on 18 November 1998 solicitors for the plaintiffs wrote to advise that notice of defence to the counterclaim had been filed on that date. The filing of the defence to the counterclaim was 20 months later than provided for in the Rules. Rule 14.04 states as follows:

" In a proceeding commenced by writ, a defendant who files an appearance shall serve a defence –

(a) where the endorsement of claim on the writ constitutes a statement of claim in accordance with rule 5.04 – within 14 days after filing the appearance;

(b) where the plaintiff serves a statement of claim – within 14 days after service of the statement of claim; or

(c) within such time as the Court directs."

- On 22 June 1999, solicitors for the defendant wrote to solicitors for the plaintiffs noting that on 23 April 1999 the Registrar of the Supreme Court had ordered the plaintiffs file and serve a list of discoverable documents within two months of that date and advising that if the plaintiffs did not comply with the order the defendant would be making application for appropriate orders.

- On 5 June 2002, solicitors for the defendant wrote to solicitors for the plaintiffs referring to the Master's reasons for decision dated 11 April 2002 and setting out the defendant's objections to the matters raised in the proposed further amended statement of claim. In subsequent correspondence solicitors for the defendant indicated they would oppose the application for leave to amend the statement of claim forwarded to them by e-mail on 4 June 2002. The plaintiffs were subsequently unsuccessful in their application for leave to file a further amended statement of claim.

- By letter dated 20 December 2002, solicitors for the defendant advised solicitors for the plaintiffs that they would make an application to have

the issue of the limitation period resolved before the matter is listed for hearing. I note that such an application was subsequently made by solicitors for the defendant and was not successful – see Master's reasons for decision delivered 21 August 2003.

- On 4 July 2003, solicitors for the defendant stated that it had come to their attention the second plaintiff was deregistered on 10 July 1999. They indicated an intention to apply to remove the second plaintiff from the proceedings. Further correspondence was entered into on that issue. The application was listed for hearing on 17 July 2003. Apparently the hearing did not eventuate as the plaintiffs attended to the requirements for registration.

- On 9 March 2004, solicitors for the defendant wrote to solicitors for the plaintiffs stating that when the matter was before the Master on 28 January 2004 solicitors for the plaintiffs had indicated they would provide a marked up version of the proposed amendments to the statement of claim.

- On 15 April 2004, solicitors for the defendant again wrote to solicitors for the plaintiffs noting they had not received a reply to their letter of 9 March 2004 and again asked for a copy of the marked up version of the proposed amendments to the statement of claim.

[37] I have not mentioned all of the correspondence or applications made by the defendant to prompt the solicitors for the plaintiffs to proceed with the claim.

[38] I have referred to a sample of the correspondence which supports the fact that over a number of years the defendant was active in prompting the plaintiffs to proceed with the claim. There was no obligation upon the defendant to prompt the plaintiffs into action. The fact they did is a matter I also take into account in deciding whether or not there has been an inordinate delay on the part of the plaintiffs.

[39] There is no material before the Court from the plaintiffs to satisfactorily explain these delays.

[40] On 20 August 2003, Mr Davis came back onto the record by filing a notice that he now acted for the plaintiffs. There had been several changes of solicitors for the plaintiffs prior to that date.

[41] On 22 November 2004, Mr Davis filed a certificate of readiness for trial on the part of the plaintiffs. The matter came before the Acting Master on 13 December 2004. On that date, solicitors for the defendant had indicated they were of the opinion the matter was not ready for trial.

[42] On 13 December 2004, the Acting Master referred the matter to the Registrar for hearing. The matter was subsequently listed for hearing in the civil sittings to be held September 2005.

[43] On 7 July 2005, the then solicitors for the defendant obtained the leave of the Court to cease to act for the defendant. Despite obtaining leave to cease to act, solicitors for the defendant forwarded a facsimile transmission to solicitors for the plaintiffs setting out details of documents the defendant wished to inspect and their concerns with deficiencies in an audit report prepared by Howarth and Howarth. There followed further correspondence concerning inspection of documents.

[44] On 18 August 2005, solicitors for the defendant advised solicitors for the plaintiffs by letter that they would be making application for the trial to be postponed. They advised that part of the reason for seeking a postponement was that the "first and second plaintiffs' claims, as particularised at the recent settlement conference, do not accord with the plaintiffs amended statement of claim, are not supported by expert reports and documents supporting some heads of damages claimed have not been discovered".

[45] A letter in similar terms dated 22 August 2005, was forwarded by solicitors for the defendant to solicitors for the plaintiffs.

[46] Solicitors for the defendant came back onto the record solely for the purpose of arguing an application to adjourn the hearing of the matter.

[47] An application, made by Mr Alderman on behalf of the defendant, to adjourn the trial dates was heard on 1 September 2005. The application to adjourn the trial was opposed by Mr Davis, counsel for the plaintiffs. Mr Davis stated that he would not be seeking to further amend the statement of claim.

He advised the Court that the plaintiffs' claim would stand or fall on the amended statement of claim filed on 14 February 1997.

[48] The application to adjourn the trial was also made on the basis that solicitors for the defendant had difficulties in obtaining instructions from the defendant and a number of essential witnesses would not be available to give evidence for the defendant because they had either died or were too old or infirm to travel to Australia from Indonesia. On 2 September 2005, the application to adjourn the trial was refused. The hearing was scheduled to commence on 19 September 2005.

[49] On 15 September 2005, the defendant filed a summons seeking a number of orders, the first being that the proceedings be dismissed. This application on summons was returnable for 19 September 2005. On 19 September 2005, Mr Davis on behalf of the plaintiffs, sought an adjournment to enable him to prepare the plaintiffs' defence to this summons.

[50] The defendant's application on summons was adjourned to 22 September 2005. The application was heard over a period of two days being 22 and 23 September 2005.

[51] At the hearing of the application on 22 September 2005, Mr Reeves QC outlined the prejudice to the defendant as a consequence of the delays on the part of the plaintiffs.

[52] In paragraphs 4, 14 and 24 of the amended statement of claim, the plaintiffs assert an oral agreement was reached between the plaintiffs, Mr Iskandar and Mr Bakhtiar, on behalf of the defendant. It is alleged these agreements were made at meetings between Mr Iskandar and Mr Bakhtiar during 1986 and 1987. These conversations took place some 18-19 years ago. In his affidavit sworn 12 September 2005, Mr Ford a solicitor with Cridlands who have recently gone on record as solicitors for the defendant, deposes to the fact that Mr Bakhtiar died on 18 December 2003. A Death Certificate is Annexure "A" to Mr Ford's affidavit.

[53] In paragraphs 9 and 10 of this affidavit, Mr Ford deposes as follows:

> "9. In his statement taken by the defendant's legal advisers, Mr Bakhtiar said:
>
> "I did not at that time [when Iskandar became a general sales agent] nor do I currently have authority to make an offer of employment. Only top management can employ staff.
>
> 10. Since that time, there was never any further discussion about Freddie Iskandar becoming an employee. I did not appoint Freddie Iskandar as an employee but as a general sales agent."

[54] Mr Davis, on behalf of the plaintiffs, submitted that the defendant could tender Mr Bakhtiar's statement in evidence at the hearing. There is provision under s 26D of the Evidence Act for the Court in certain circumstances to receive the statement of a witness who is deceased. However, this is subject to certain conditions being met, one of which is that the statement by the deceased witness was written, made or produced by him with his own hand or was signed or initialled by him or otherwise

recognised by him in writing as one for the accuracy of which he is responsible. The statement obtained from Mr Bakhtiar is in writing but has not been signed by him or adopted in any other way to comply with s 26D(4). The reason for this is set out in the affidavit of Richard Henschke sworn 16 September 2005. The statement had been obtained from Mr Bakhtiar in 1997. Mr Henschke was a solicitor with Halfpennys who were solicitors on the record at that time for the defendant. Mr Henschke had travelled to Indonesia to obtain the statement. Mr Henschke deposes to the fact that the reference in the affidavit of Cameron Ford sworn 12 September 2005, to the draft statements are a true record of what was said by the respective persons in the interview. Mr Henschke further deposes to the fact that after preparing the draft statements he did not attend to having them finalised and signed by the potential witnesses. This was because of the subsequent delays on the part of the plaintiffs. Mr Henschke stated that to finalise the statements and have them signed would have required him travelling to Indonesia. As a consequence of the substantial delays on the part of the plaintiffs, Mr Henschke formed the belief that the urgency had gone out of the matter from the plaintiffs point and there was no pressing need for him to return to Indonesia.

[55] I accept that the death of Mr Bakhtiar is a matter that is prejudicial to the defendant's presentation of its case at the hearing.

[56] In paragraph 25 of the amended statement of claim, the second plaintiff claims establishment costs based upon correspondence with Mr Wayan

Rubeg. At paragraph 11 of his affidavit sworn 12 September 2005, Mr Ford deposes to the fact that Mr Rubeg has suffered a stroke and is now mentally impaired as a result and unable to provide evidence in this proceeding. In paragraph 15 of his affidavit, Mr Ford deposes to that fact that Mr Rubeg's evidence is crucial to the defence of the claim.

[57] I accept that Mr Rubeg is a crucial witness for the defence and that his inability to give evidence because of infirmity is prejudicial to the defence.

[58] Mr Reeves QC refers to two other witnesses who are crucial to the defence, they are:

(1) Mr Sukamto who is a witness with respect to an oral employment agreement that the first plaintiff, in his amended statement of claim, asserts took place in or about April or May 1987 between himself and Mr Sukamto relating to a salary package for Mr Iskandar. In paragraph 14 of the affidavit of Mr Ford sworn 12 September 2005, Mr Ford deposes to the fact that Mr Sukamto is too old and ill to travel to Darwin from Indonesia. His evidence is crucial to the defence. Mr Ford sets out a statement that had been obtained from Mr Sukamto in which Mr Sukamto denies ever talking to Mr Iskandar about a salary or appointment and denies the assertions made by the plaintiffs in paragraph 7 of the amended statement of claim.

(2) Mr Ibrahim Hamid is a critical witness for the defence in relation to the claim contained in paragraph 16 of the amended statement of

claim that he had agreed to extend the general sales agency. His evidence is also crucial for the defence with respect to the plaintiffs' claim in paragraphs 30-32 of the amended statement of claim to set aside the 1995 agreement. The defendant's legal advisers obtained a statement from Mr Hamid denying that he had promised an extension of 10 years to Mr Iskandar of the general sales agency. Mr Hamid was present during the entering into and signing of the 1995 agreement and his evidence is vital to the defence as to the circumstances surrounding the entering into this agreement.

[59] In paragraph 17 of his affidavit sworn 12 September 2005, Mr Ford deposes to the fact that Mr Hamid is too old and sick to obtain a visa or physically travel to Darwin from Indonesia.

[60] I accept the evidence that both Mr Sukamto and Mr Hamid are persons whose evidence is vital to the defence case. I accept the evidence put forward that they are now both too old and too ill to travel to Darwin from Indonesia for the purpose of giving evidence. This is a significant prejudice to the defendant.

[61] Mr Davis, on behalf of the plaintiffs, submitted that arrangements could be made for the defendant to call witnesses to give evidence on video.

[62] In paragraph 50 of his affidavit sworn 12 September 2005, Mr Ford deposes to the fact that the Republic of Indonesia is not a signatory to the Hague Convention on taking of evidence abroad in civil and commercial matters.

A list of countries that are signatories to the Convention is Annexure "M" to Mr Ford's affidavit of 12 September 2005.

[63] An application to take evidence on video from the Republic of Indonesia involves a request to a competent judicial authority within the Republic of Indonesia to take such evidence or for assistance in taking evidence on behalf of an Australian court – see *Yamouchi v Kishimoto* (2002) 12 NTLR 32. There is no certainty that either of these requests would be successful.

[64] In addition to the witnesses for the defence who have either died or become unavailable to give evidence because of age and/or ill health, it is the submission for the defendant that all witnesses are likely to have impaired memories of matters that occurred up to 18 years ago.

[65] I accept as a general proposition that the passage of time makes it increasingly difficult for witnesses to accurately remember what occurred. I accept there must be some prejudice arising from the length of time that has elapsed since certain agreements and contracts have allegedly been entered into.

[66] Of the seven persons identified by the plaintiffs in the amended statement of claim dated 14 February 1997, only three are now available to give evidence. Mr Laban, Mr Nursatyo and Mr Siregar. Of these three, Mr Siregar is now quite old and in ill health. In his affidavit sworn 12 September 2005, Mr Ford deposes in paragraph 12 to the age and ill health of Mr Siregar and that the three witnesses Messrs Hamid, Sukamto

and Siregar have lost their memory of the events the subject of the claim and are not able to provide information to the defendant's advisers or to the Court.

[67] I accept that these witnesses have all become unavailable after 1998 or early 1999, the time at which this matter could have been heard, if the plaintiffs had proceeded expeditiously to have the matter listed for hearing.

[68] I accept the present unavailability of key witnesses for the defence will result in considerable prejudice to the defendant in the presentation of its case to the Court.

[69] Mr Reeves QC points to the prejudice caused by the stresses of having to continue to defend proceedings. I accept that being involved in litigation can be a stressful experience for the litigants.

[70] Mr Reeves QC also points to the matters set out in the affidavit of Stacey Ann Martin sworn 20 September 2005 which go to this issue. Whilst I accept Ms Martin is recording her observations and belief as to the effect of these proceedings on the defendant, I do not attach any great weight to these matters. I do accept that individuals within the defendant's office are concerned about these proceedings but do not put that in any higher category than the normal stresses resulting from being involved in contested litigation.

[71] Mr Davis, on behalf of the plaintiffs, made a number of submissions in opposition to the defendant's application to have the proceedings dismissed. Mr Davis relied on submissions he had made, both in writing and orally, at the time the defendant sought to adjourn the trial on 1 September 2005. He also referred to written submissions and authorities he had put forward with respect to the defendant's application to have the proceedings dismissed.

[72] Mr Davis argues that the defendant has taken a "scattergun" approach and that having failed to obtain an adjournment of the hearing they now seek to make application to dismiss the proceedings and have a further series of applications they intend to pursue. Mr Davis submits that this amounts to an abuse of the due process of the Court.

[73] I do not accept this submission. The defendant's application to adjourn the hearing of this matter was not successful. However, there are very different considerations that apply with respect to the application for an adjournment and the application that the proceedings be dismissed. It may well be that it would have been more appropriate to have brought on the application to dismiss the proceedings before making an application to adjourn the hearing. However, the fact that this did not occur does not, in the circumstances of this case, amount to an abuse of the Court's process.

[74] The affidavits of Mr Richard Henschke sworn 30 June 2005 and 24 August 2005, were put forward in support of the application for adjournment. These affidavits indicate the defendant acknowledged it had not provided sufficient

instructions to their solicitor to enable the case to be ready for trial in September 2005. There is also an admission that the defendant had not taken the requirement for preparation of the claim by Mr Iskandar sufficiently seriously in the past. There was evidence that since the matter came before the Master on 13 December 2004 and was listed for hearing, the defendant has been remiss in attending to the preparation of their case for trial. After Mr Davis made it clear on 1 September 2005 that there was no further attempt being made to amend the plaintiffs' statement of claim the only other basis for the adjournment application was the defendant's lack of preparation since December 2004. The application for an adjournment of the hearing was refused and the matter listed to proceed to hearing on 19 September 2005. The lack of action by the defendant since December 2004, does not excuse the many delays occasioned by the plaintiffs prior to December 2004 which forms the basis of the defendant's application that the proceedings be dismissed.

[75] Mr Davis submits that the defendant is precluded from succeeding on the application to dismiss the proceedings on the principles of res judicata and issue estoppel – *Port of Melbourne Authority v Anshun Proprietary Limited* (1981) 147 CLR 589 at 598:

> "The critical issue, then, is whether the case falls within the extended principle expressed by Sir James Wigram V.C. in *Henderson v. Henderson*. The Vice-Chancellor expressed the principle in these terms:
>
> 'where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires

> the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'
>
> The existence of the principle has been affirmed by the Judicial Committee on four occasions (*Hoystead v. Federal Commissioner of Taxation*; *Kok Hoong v. Leong Cheong Kweng Mines Ltd*; *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.*; *Brisbane City Council v. Attorney-General (Q)*. See also *Carl Zeiss)*. In two of these cases the principle was applied so as to shut out litigation of an issue which could and should have been litigated in the earlier proceedings."

See also *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 and *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

[76] I do not consider the fact that the defendant's application for an adjournment was refused, gives rise to an issue estoppel or res judicata with respect to the application to dismiss the proceedings. The refusal to grant an adjournment of the trial was not a final determination of the issue.

[77] Mr Davis made similar submissions with respect to the order made by the Acting Master on 13 December 2004 when the matter was listed for hearing on the application of solicitors for the plaintiffs.

[78] Mr Davis submits that there was no appeal from the Acting Master's decision in accordance with Order 77.05 of the Supreme Court Rules.

Accordingly, on Mr Davis' submission, the order of the Acting Master creates an issue estoppel. Again, I do not accept that the decision of the Acting Master to list the matter for hearing acts as issue estoppel or res judicata in respect of the application to dismiss the proceedings - *Tracey Ann Renehan (by her litigation guardian Renehan) v Leewin Ocean Adventure Foundation Ltd & Anor)* [2005] NTSC 22 BC200502806 decision of Mildren J delivered 5 May 2005 at par [24]:

> "… Whilst I accept that issue estoppel can sometimes arise even in interlocutory applications (*Santos v Delphi Petroleum Pty Ltd* [2002] SASC 272; BC200208003) as Lander J said at paras [394]-[400] whilst the fact that a decision made was at an interlocutory application is relevant but not decisive of the question of whether or not a judicial determination gives rise to an issue estoppel and precisely the width of the estoppel, 'no issue estoppel can arise unless the issue decided by the previous determination is a final judgment. The premise upon which issue estoppel is based is that there has been a final determination of the issues'".

[79] There was no final determination of the issues, either when the Acting Master listed the matter for hearing or when this Court refused the defendant's application for an adjournment.

[80] Mr Davis submits on behalf of the plaintiffs, that there has been no delay in providing discovery and points to the list of documents filed by the plaintiffs and the subsequent amended list of documents filed on behalf of the plaintiffs on 8 October 2002.

[81] There is still an issue as to whether the plaintiffs have made full discovery of all documents. For example, paragraph 7 of the plaintiffs' amended

statement of claim refers to a discussion between Mr Iskandar, on behalf of the plaintiffs, and Mr Sukamto, on behalf of the defendant in or about April or May 1987. There is reference to a piece of paper stating "this is what we offer as your salary". There then follows a list of figures under the heading "Particulars". The amended list of documents does not make any reference to a document dated April or May 1987 or any document that appears to fit the description given in paragraphs 7 or 8 of the amended statement of claim.

[82] Paragraph 23 of the amended statement of claim, refers to correspondence from Mr Bakhtiar on 31 July 1987. The amended list of documents does not contain a reference to any such correspondence.

[83] Mr Davis submitted that the defendant had delayed in prosecuting its counterclaim. I accept the defendant has the onus of proving its counterclaim. This does not mean there is any obligation on the defendant to prosecute its counterclaim, provided it does nothing to delay or obstruct the plaintiffs in the prosecution of the plaintiffs' claim. This has not occurred in this case. The fact that the defendant has not pursued its counterclaim is irrelevant to the delay of the plaintiffs in bringing its claim to hearing.

[84] Mr Davis made reference to the settlement negotiations that had taken place and the meetings that had been effected in an attempt to achieve a settlement. This was put forward as evidencing the fact that the plaintiffs

did have a meritorious claim which had only been further delayed by settlement negotiations. The fact that there may have been settlement negotiations is not a matter that concerns the Court. There are many reasons why parties may decide to attempt to settle a claim, it does not indicate an acceptance of a genuine claim. There is no evidence that in attempting to seek some settlement of the claim that the defendant has been responsible for delaying the plaintiffs in properly prosecuting their claim.

[85] I am satisfied on the evidence presented to this Court that there has been an inordinate delay on the part of the plaintiffs in prosecuting the claim. In particular there was a delay of between seven and seven and a half years between the expiry of the earliest limitation bar and the issue of the writ on these proceedings on 13 December 1996.

[86] The second substantial delay is the eight years between the issue of the proceedings on 13 December 1996 and December 2004 when the most recent solicitor for the plaintiffs moved to have the matter listed for hearing. The fact that in the months subsequent to December 2004, the defendant was lax in preparing for trial, does not excuse the earlier delay on the part of the plaintiffs. It is understandable that after a period of eight years the defendant may well have not taken the plaintiffs' efforts to list the matter for trial very seriously.

[87] Finally, on the evidence that has emerged in this application, the defendant would have had great difficulty in preparing a case for trial or providing to

their lawyers instructions, as a consequence of the death or infirmity, of a substantial number of the defendant's key witnesses combined with the fact that certain alleged significant conversations and agreements occurred many years ago, some almost 19 years ago.

[88] The plaintiffs have not sought to file any material explaining any of the delays that I have referred to. Accordingly, there is before this Court no explanation for the delays for which the plaintiffs have been responsible.

[89] I accept that the defendant would suffer prejudice if this matter now proceeded to trial. This prejudice results from the death of Mr Bakhtiar, who would have been a key witness for the defendant. There is further prejudice occasioned by the fact that another four of the seven persons mentioned in the amended statement of claim, who would be key witnesses for the defence, are unable to attend Court to give evidence. Mr Rubeg has suffered a stroke and is mentally impaired. Mr Sukamto and Mr Hamid are too old and ill to travel to Darwin to Indonesia give evidence, as is Mr Siregar. Even if these three persons were physically able to attend Court, the length of time that has elapsed since the dealings between the plaintiffs and the defendant are alleged to have occurred must affect their ability to accurately remember.

[90] I have come to the conclusion in these circumstances there could be no possibility of a fair trial. I therefore determine that the proceedings should be dismissed.

[91] The order of the Court will be as sought on the defendant's summons filed on 15 September 2005.

[92] The proceedings are dismissed.

[93] Leave is granted to apply on the question of costs.

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