



Précis Paper

Time Limitations and Abuse of Process Applications

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Précis Paper

Time Limitations and Abuse of Process Applications

1. In this edition of BenchTV, Nicholas Newton (Barrister, 11th Floor St James Hall Chambers, Sydney) and Jay Cruikshank (AR Conolly and Company Lawyers) discuss the recent NSW Supreme Court decision in *Estate Judd v McKnight; Gummage v Estate Judd, Channell v Estate Judd; McKnight v Estate Judd (No 4)* [2018] NSWSC 1489.

Background

2. The NSW Supreme Court decision of Justice Garling in the case of *Estate Judd v McKnight; Gummage v Estate Judd, Channell v Estate Judd; McKnight v Estate Judd (No 4)* [2018] NSWSC 1489 analysed authorities relating to abuse of process and whether or not a case involving historical allegations dating back to the 1970s should be stayed as it was an abuse of process.
3. It was alleged that the plaintiff was a victim of a sexual assault when he was 14 in the late 1970s.
4. Two other victims made similar allegations from the 1980s and 1990s against the alleged perpetrator, Mr. Judd.
5. There were great similarities in the allegations of the victims and the proceedings were consolidated.
6. The plaintiff had gone to the police regarding the allegations in 2015 and Mr. Judd had been charged with the offences.
7. The plaintiff had been involved in a surveillance devices recording with Mr. Judd in which they discussed information relevant to the offences which were alleged against Mr. Judd.
8. However, after being charged, Mr. Judd died in March 2016.
9. The plaintiff and the other victims commenced civil proceedings against the estate.
10. The estate claimed that it was prejudiced as a result of proceedings being brought against it in the circumstances, given that the only person who was able to give any evidence to combat the allegations was now deceased.
11. The estate claimed that it therefore suffered quite substantial prejudice and as a result of the prejudice, the estate brought an application to stay the three sets of proceedings that had been brought against it as an abuse of process.

Limitations period

12. The reason why the plaintiffs were able to bring proceedings in the first place was because the limitations period in relation to child sexual and physical assaults has been removed by the NSW Parliament in 2017 as a result of recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.
13. Section 6A of the *Limitations Act 1969* (NSW) reflects the amendment and as a result there have been many historical child sex abuse claims brought against institutions and/or individuals.
14. Under the *Limitations Act 1969* (NSW) it is clear that the court's power to stay proceedings as an abuse of process is retained.
15. The Estate for Mr. Judd was seeking to invoke the Court's power to stay proceedings as an abuse of process.
16. The plaintiffs had made allegations that Mr. Judd had sexually assaulted them in the 1970s, 1980s and 1990s.
17. Generally speaking, the allegations concerned sexual assaults that took place where there was only two people present although there were some allegations that took place with other people present and those people were identified.
18. The Estate claimed that because Mr. Judd was deceased and due to the sheer passage of time, they were not in a position to meet the allegation and that is what is said to have been an abuse of process.

The Transcripts

19. One of the pieces of evidence that the plaintiff had available to him in the civil proceedings, was a recording of a conversation that he had with Mr. Judd which was done with a surveillance devices warrant.
20. Before the police detained Mr. Judd, they obtained a surveillance devices warrant and the plaintiff rang Mr. Judd and the conversation was recorded. There was a lengthy transcript of that conversation taken.
21. The Estate claimed that the transcript and the recording were not admissible in the proceedings. The plaintiff wished to rely upon the transcript as they claimed that it provided corroboration of the plaintiff's account.
22. Under the *Surveillance Devices Act 2007* (NSW) if there is a recording it can only be used for the purpose for which it was obtained which in this case, were the criminal proceedings.
23. However, because Mr. Judd had died, although he had been charged and the recording and transcript had been served upon him, it had never been tendered in evidence in any proceedings.
24. Under the *Surveillance Devices Act 2007* (NSW) it is an offence to use material obtained as a result of a surveillance devices warrant for a purpose other than for the

purpose for which it was obtained unless it has either been tendered in proceedings which would normally be in the criminal proceedings or secondly, when it was in the public domain.

25. The plaintiff had obtained a copy of the transcript by making an application under the *Government Information (Public Access) Act 2009* (NSW).
26. The plaintiff's argument was that it had gone into the public domain as a result of them obtaining access to it.
27. Ultimately, Justice Garling did not find it necessary to decide this point and it remains an issue for the Final Hearing whether or not the plaintiff will be able to rely on the transcript.
28. The reason why Justice Garling decided it was not necessary to resolve this issue about the transcripts was because he essentially decided the case on the assumption that it was not available for the plaintiff to use.
29. Justice Garling said that even in that situation, the estate had not demonstrated that the prejudice that it had suffered was such that it couldn't have a fair trial.
30. It is likely that this issue will arise further in the future as now that the limitations period has been removed, it is really the only avenue for defendants to try to stop proceedings that a defendant claims are so old that the evidence available to meet the allegations is not available.
31. This is now the only way a defendant can do this, that is by alleging an abuse of process.
32. Justice Garling's decision demonstrates a very high hurdle for defendants to overcome in order to succeed in such an argument.

The requirement for enquiries to be made

33. The defendant will need to make extensive factual enquiries in regard to the allegations which ultimately prove to be unsuccessful. The defendant must then put evidence on in the application about the enquiries and the lack of success of the enquiries.
34. In the present case, Justice Garling found that there were investigations which the Estate could have been undertaken but that they did not undertake.
35. For example, the police brief which had been served on Mr. Judd identified a number of witnesses that may or may not have been able to say something about the offences which were being alleged.
36. The Executor had not contacted any of those people to find out what, if anything, they could have said.
37. It may be, that had they made those enquiries, that there would have been nothing that those witnesses could have said and this would have substantially assisted the Executor in bringing the application.

38. Similarly, there were friends of Mr. Judd who the plaintiff had identified and indeed, one of them was the beneficiary to Mr. Judd's estate, however no enquiries were made with those friends as to whether or not they could shed light on the allegations.
39. As a result, Judge Garling described the enquiries that had been made as desultory and noted that should a defendant bring this type of application, they must make extensive enquiries and put on evidence in the proceedings of such enquiries.

Successful claims

40. The case of *Connellan v Murphy* [2017] VSCA 116 is an example of the circumstances in which a defendant may successfully apply for a permanent stay.
41. The case involved old allegations from the 1960s.
42. The alleged perpetrator was a child at the time, as was the alleged victim.
43. All of the persons who had been adults at the time of the alleged offences and who may have been able to give evidence were deceased and the house that the alleged offence took place could not be identified.
44. As such, there was no background information to assess the truth or otherwise of the allegations.
45. The defendant put on evidence of the enquiries that they had made and revealed that they could not find anything to confirm or deny the allegations. Therefore a permanent stay was granted.
46. This can be contrasted with the present case where the house where the offences took place still existed and yet the Executor had not gone to the house and conducted any enquiries.
47. The victims had put on very detailed statements about what had allegedly happened to them, identifying places and other information which could be tested and cross examined on. However, the Executor did not make any enquiries to confirm or deny such information.
48. Ultimately, the difference between *Connellan*, where the defendant was successful in seeking a stay and this case where the defendant was unsuccessful was that the Judge was not satisfied that there was enough evidence to justify the notion that a fair trial was not possible.
49. The case of *Batistatos v Roads and Traffic Authority of NSW* [2006] HCA 27 was another case where the defendant was successful in seeking a stay.
50. The case of *Batistatos* was a High Court case where an abuse of process argument was advanced and upheld. The case involved a motor vehicle accident which involved very old allegations in circumstances where there was no limitations period.
51. Extensive inquiries were made by the defendant to establish that there was not enough evidence for a fair trial to be possible, which the Judge accepted.

52. The main takeaway from these cases is that a defendant must make enquiries and put on evidence about those enquiries when bringing such an application.

Interests of the beneficiaries

53. The Executors of the estate put the interests of the beneficiaries into evidence in this case claiming this to be prejudice.
54. Ultimately it does not appear from Judge Garling's judgement that the interests of the beneficiaries was prejudice in the relevant sense.
55. The prejudice which was relevant was any prejudice which was suffered by the defendant caused by the passage of time and the death of Mr. Judd and how, as a result of those matters they effected the defendant's capacity to have a fair trial.

BIOGRAPHY

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Nicholas has over 20 years' experience in legal practice and litigation. He has a broad civil litigation practice encompassing advisory and advocacy work in the areas of common law, commercial/equity, family provision, insolvency and judicial review matters. He regularly appears in the Supreme Court and the District Court of NSW, the Federal Court, coronial inquests and inquiries and the NCAT. He appears for individuals, corporations and government agencies.

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***Batistatos v Roads and Traffic Authority of NSW* [2006] HCA 27**

***Connellan v Murphy* [2017] VSCA 116**