



Précis Paper

Want of Prosecution

Kavita reviews a local court dismissal of a plaintiff claim for want of prosecution. An appeal was unsuccessful. This is discussed also. Just, quick and cheap in action.

Discussion Includes

- What happened that led to this case before the Supreme Court?
- When will matters be dismissed for want of prosecution?
- How can a plaintiff whose claim has been dismissed for want of prosecution appeal against that decision?
- What principles are applicable in such an appeal?
- Will the decision to dismiss a claim for want of prosecution be an interlocutory decision? If so, what factors are considered in deciding to grant leave from such a decision?
- What did the Court decide regarding the grant of leave in this case?
- Regarding whether the appeal should succeed, what issues did the Court consider in this case?
- What did the Court decide?

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1. In this edition of BenchTV, Kavita Balendra (Barrister) and Jaimee Burke (Solicitor) discuss the NSW Supreme Court's (Harrison AsJ) decision in *Onik New Energy Australia Pty Limited v Henderson* [2016] NSWSC 186, which reviews a Local Court dismissal of a plaintiff claim for want of prosecution.

Facts and Local Court Proceedings Preceding *Onik New Energy Australia Pty Limited v Henderson* [2016] NSWSC 186

2. The case of *Onik* initially involved Onik Energy suing three defendants in the Local Court for a relatively small amount of money (approximately \$40,000) in relation to the installation of some solar energy electrical systems on their property. There was a dispute over the amount of money owing and a dispute on the defendants' part about whether or not the defendants should have been joined together into the one proceeding, as there were three different claims with three different contracts. In particular, one of the claims may have been under the Small Claims Division threshold of the Local Court. The case was listed in the Local Court, had a normal directions hearing, there was compliance with the orders by the defendants but there was non-compliance by the plaintiff, Onik Energy. After non-compliance by Onik Energy at two directions hearings and upon application of the defendants, the matter was dismissed. Onik Energy then appealed the dismissal of the proceedings in the NSW Supreme Court.
3. The proceedings in the Local Court were dismissed largely because of procedural and institutional issues. At the time that the Magistrate was determining the dismissal application there were several outstanding matters which the plaintiff had not addressed including outstanding lay witness statements that had not been provided and there had been non-compliance on the part of the plaintiff with two directionary orders. The Magistrate also expressed concern about the three defendants joined in the one claim. Moreover, since dismissal does not mean a final disposal, the Magistrate took into consideration that dismissing the application would not prevent the plaintiff restarting the application since there was no time limit issue for the claim.
4. It should also be noted that there had been an application by the plaintiff to vacate the hearing date in the Local Court on the basis that their solicitor would be unavailable on that date. The Magistrate determined that the hearing date should not be vacated, stating that the unavailability of the solicitor was not a sufficient reason as an agent could attend or a barrister could be briefed.

Want of Prosecution

5. A application to dismiss a case on the grounds of want of prosecution is an interlocutory application. Dismissal for want of prosecution can result from tardiness, non-compliance with orders, or no communication with the other side. Dismissal orders are recognized as acting as a gateway which allows the court to stop meandering actions.
6. Whether or not a claim is dismissed for want of prosecution very much depends on which court the proceedings are in, but a claim can be dismissed in all three courts. Ms Balendra notes that there is much more leeway in the higher courts than the lower courts, such that Local Court matters can be dismissed quite easily for non-compliance with orders. This is because in the lower courts (Local Court and Small Claims Division) there are much greater time pressures and there is also less money involved. On the other hand, in the Supreme Court and District Court, there is more leeway.
7. A court will consider in determining whether or not to dismiss, whether there is a time limit issue and whether the time limit will stop a claimant from bringing their claim back.
8. In response to a dismissal for want of prosecution, a party can appeal, like Onik Energy, to the Supreme Court or can restart their claim in the same court. In appeals, the following considerations are taken into account:
 - a. If the plaintiff has no opportunity to come back
 - b. The reasons for non-compliance
 - c. What steps have been taken to rectify any non-compliance with orders
 - d. Whether there have been issues of tardiness from the other parties

Onik New Energy Australia Pty Limited v Henderson [2016] NSWSC 186

9. The Supreme Court decided that it would not grant leave to appeal the decision of the Magistrate for a number of reasons. The Court determined that the case did not raise any new issue of principle, the only loss which Onik Energy would suffer was its costs (considered an appropriate detriment for non-compliance), there was no bar to Onik recommencing proceedings and there was no particular question of public importance nor grave injustice which needed to be rectified.
10. In relation to the substantive appeal, Her Honour considered a number of factors including:
 - a. Appropriate legal representation had been provided

- b. There was nothing to suggest that the agent was not able to meet and deal with an application for dismissal
 - c. There was nothing before the Magistrate to explain why there was non-compliance with orders in relation to lay witnesses or to advise when compliance would occur
- 11. It should be noted however that there had been a conversation between Onik Energy's solicitor and the defendant's solicitor prior to the dismissal in which Onik's solicitor informed the defendant's solicitor that Onik Energy could not comply with the orders but they expected to comply with them within a short period of time. However, there was no assurance that the orders would be complied with in a short period of time, which is why an application for dismissal was made. The correspondence and the fact that this conversation had occurred was told to the agent but the agent at no point told the Magistrate that this is what was going to occur or that there was any intention by the plaintiff to actually comply with the orders in a short period of time. Since the Magistrate had to make a determination on the information before him, the Magistrate decided to dismiss the statement of claim. In the Supreme Court, the additional information that the agent had was provided to her Honour, but for the purpose of determining the appeal her Honour could only make a determination based on the information before the Magistrate when he dismissed the statement of claim and thus could not take this additional information into account. However, for the purposes of determining leave her Honour considered some of the additional information.

Inappropriate Dismissal Applications

- 12. The decision of *Kapoor v State Transit Authority of NSWCA* [2010] NSWCA 143 was discussed in *Onik* in order to determine whether the Magistrate should have been entertaining the dismissal application at all. In *Kapoor*, the plaintiff was self-represented against the State of NSW, the State of NSW made a dismissal application in court, there was a long period of time before the determination was made and during that time the State of NSW formerly filed a motion seeking a dismissal and provided fairly lengthy affidavit evidence. The Court of Appeal said that the District Court Judge should not have been entertaining a dismissal application as it was determined that the plaintiff did not have sufficient time to consider that evidence. One of the issues in that case was that the plaintiff, Mr Kapoor, was a self-represented litigant against the State of NSW, which is fairly well resourced compared to him, Onik Energy tried to rely on the case of *Kapoor* to say that the applicant did not provide time or opportunity for Onik Energy to deal with the application to dismiss the case. In *Onik*, her Honour distinguished *Kapoor* from *Onik Energy* because *Onik Energy* had an agent, they were properly instructed and while it may have been a short period of time between the making and determination of the dismissal application, it was a sufficient amount of time for the agent to adjourn the proceedings or take some other action, which the agent did not.

Costs

13. Ultimately, the orders in relation to costs were that the costs follow the event. It should be noted that one of the main detriments Onik Energy said it would suffer as a result of the dismissal of its claim was that its costs would be thrown away. However, Justice Harrison suggested that these sorts of costs orders are the inevitable result of non-compliance with orders made by the court.

BIOGRAPHY

Kavita Balendra

Barrister, 4th Floor Wentworth Chambers - Sydney

Kavita Balendra was admitted as a Solicitor in 2003 and called to the NSW bar in 2008. Her primary practice is in common law, personal injury, administrative law, commercial and equity. She is a member of the NSW Bar Association Education Committee, Information Officer and past Secretary of the Women Barristers Forum, as well as a performer and board member Lingalaym Dance Company.

Jaimee Burke

Lawyer, A R Conolly & Company – Sydney

BIBLIOGRAPHY

Focus Case

Onik New Energy Australia Pty Limited v Henderson [2016] NSWSC 186

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_15-03-2016_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/56dca546e4b0e71e17f4fe41>

Cases

Kapoor v State Transit Authority of NSWCA [2010] NSWCA 143