Dismissal for want of prosecution: charting a course between the scylla of binding principles and the charybdis of a discretion at large

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1. Introduction

The court maintains rules of proper conduct, and certain sanctions, to ensure the integrity of its processes and the proper administration of justice. One such power is the power to dismiss a proceeding for want of prosecution.[1] The purpose of this paper is to discover and analyse the principles[2] upon which a court at first instance[3] may act on an application to dismiss a proceeding for want of prosecution.[4] Initially, a brief discussion of the policy rationales which support the power and the courts' approach to the power will be considered. This incursion will help contextualise the larger discussion which follows and will provide a basis for understanding the courts' jurisprudence on dismissal for want of prosecution as it has developed in Australia.

2. The Policy Rationales and History of the Power

In some cases a party is so dilatory in preparing the case that a fair trial of the issues becomes impossible; or even if a fair trial is possible, it may be thought unjust to proceed. Although the general scheme of court rules is

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1 Technically, there are two powers to dismiss a case for want of prosecution; it is an exercise of the court's discretion either under rule 24.01 of the Rules of the Supreme Court ("RSC") or under the inherent jurisdiction of the court which is expressly preserved by rule 24.05 (RSC).

2 This paper is not intended to be a practitioners' guide. For a useful summary of the English principles see: *Trill v. Sacher* [1993] 1 All ER 961 at 978-980. Williams, N.J. 1987, *Civil Procedure Victoria*, Butterworths, Sydney, 3467+ provides a guide for Victoria.

3 Additional considerations arise on appeal, however the principles of appellate review are beyond the scope of this paper.

4 This paper does not deal with significant matters such as the effects of making the order, of the costs implications, that such an order may be made to dismiss a counterclaim and so on. See Williams, fn. 2 at 2.

that litigation will be conducted according to the adversarial system, courts have been concerned lest the justice administered by them be tarnished by delay.[5] There are two important considerations that arise here which are not only of interest to the parties but also to the public. On the one hand, persons with claims should have their claims heard and determined according to law. On the other hand, the legal processes to make that claim should not be prolonged indefinitely.

The power to dismiss serves the dual purposes of ensuring fairness to litigants and preserving the integrity of the judicial system. The former purpose aims essentially to protect the defendant from delay; prolonged delay in litigation may adversely affect a defendant's finances, psychological well-being, and ability to establish a defence. The latter purpose promotes the expedient resolution of cases, enabling a court to manage its docket by dismissing cases which clog the court lists.

It should be noted that the focus of the power is not disciplinary or punitive, but to do justice between the parties before the court.[6] Admittedly, in realising this goal, an unintended effect of a dismissal case is a disciplinary or punitive consequence. However, it is themes of deterrence which are readily discernible.

Of late, the incidence of the exercise of the discretion has been significant. This may reflect a change in judicial philosophy towards the litigious process, wrought by the pressure of overloaded court lists. Moreover, the romantic view taken of adversarial litigation of yesteryear and the courts' role in it are changing.[7] The current era places a premium on the expedient

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5 *Allen v. Sir Alfred McAlpine* [1968] 2 QB 229 at 244 (*Allen*); 'The delay of justice is a denial of justice' - Lord Denning MR cites sources no less authoritative than the *Magna Carta*, Shakespeare and Dickens. Long delays are still commonplace: James, R., 'Want of Prosecution - A Flurry of Inactivity' (1994) 13 *Civil Justice Quarterly* 311 at 316.

6 *Bishopsgate Insurance Australia Ltd v. Deloitte Haskins & Sells* (Unrept, Vic SC, Brooking, Tadgell & Ormiston JJ., 9/9/94) at 32 (*Bishopsgate*); *Department of Transport v. Chris Smaller Ltd* [1989] AC 1197 at 1207 (*Chris Smaller*).

7 *Stollznow v. Calvert* [1980] 2 NSWLR 749 at 754-755 (*Stollznow*).

despatch of cases and is conducive to active judicial involvement in case management.[8]

The *locus classicus* of the modern law is found in the decision of the Court of Appeal in *Allen v. Sir Alfred McAlpine.*[9] In *Allen* the Court heard three appeals together which brought to the fore the issue of dismissal for want of prosecution. In giving the leading judgment, Diplock LJ stated that the order should not normally be made without giving the plaintiff an opportunity to remedy her or his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff/lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues is not possible.[10]

The principles enunciated by the Court of Appeal have been the subject of refinement and, on occasion, revision. As such, *Allen* only provides a starting point for a discussion of the modern law. The latter proposition is an almost inevitable consequence of establishing guiding principles to be applied in all the varied circumstances in which the discretion, or any discretion, is called to be exercised. Another reason why *Allen* can not be said to have laid down settled principles is that even those principles which were enunciated have not gained universal acceptance.[11]

3. A Jurisprudential Issue: The Judicial Approach to the Discretion

It is a basic tenet of the rule of law that discretionary power should be controlled - uncontrolled discretion is an evil to be avoided in most contexts. Consequently, it is not surprising that judicial discretion is subject to controls which purport to confine it, structure it or do both.[12] A perusal of the want of prosecution cases makes clear that there is judicial disagreement

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8 However, a solution to delays can not be found solely in the use of the dismissal power but requires larger changes to the law, the litigation process and the adversarial system: *Chris Smaller*, fn. 6 at 1207; James, fn. 5 at 316.

9 Fn. 5.

10 Id at 359. The judgment of Salmon LJ is substantially similar. This is in distinction to a more discretionary approach taken by Lord Denning MR.

11 For example, see text accompanying notes 65-68.

12 Cane, P. 1992, *An Introduction to Administrative Law*, Oxford University Press, New York, 132-138.

concerning the approach to be taken towards the power to dismiss. At one extreme it is approached as an unbridled power, as exemplified in *Stollznow*[13] where Moffit P observes,

> ... on an application to dismiss a proceeding for want of prosecution, fixed formulae cannot be prescribed to limit the judicial discretion to do that which is just between the parties.

However, it is feared that if there are no guiding principles a court making an order to dismiss becomes susceptible to the charge that it is cultivating palm trees on the sands of procedural law.[14] At the other extreme, principles are viewed as if shibboleth.[15] Yet some judges are loathe to fetter the discretion by viewing the principles as a condition precedent to the exercise of the discretion or as immutable.[16]

It is likely that the true position lies somewhere between the extreme positions and that a particular judge or court merely leans towards one of the extremes. A problem arises when different judges or differently constituted courts within a jurisdiction lean towards one or other position, as exemplified by recent Victorian case law. For instance, in *Masel* the Appeal Division of the Supreme Court emphasised that the principles are not of universal application and may be departed from if justice requires it.[17] Moreover, while principles were stated to be useful, they were not a precondition to dismissal.[18] However, in *Bishopsgate* the Full Court stated that while the principles are neither immutable nor capable of adaptation to

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13 Fn. 7 at 753.

14 *Antonio Sacco v. Renault (Australia) Pty Ltd* (Unrept, Vic CA, Brooking, Ormiston & Callaway JJA., 8/9/1995) at 4, per Ormiston JA (*Sacco*).

15 *Dempsey v. Dorber* (1990) 1 Qd R 417 at 422 (Full Court).

16 *McKenna v. McKenna* [1984] VR 665 at 674-675 (*McKenna*). This is also exemplified by the decision in *Masel and Others v. Transport Industries Insurance Co Ltd* (1995) 2 VR 328 (*Masel*).

17 Id at 332-336.

18 A similar view was taken by Bray CJ in *Ulowski v. Miller* [1968] SASR 277 at 282 (*Ulowski*). In *Masel,* fn. 16 at 16, the Court conceded that it would often be rare where the satisfaction of the principles did not lead to dismissal. Query if the converse is also true, that is, whether a case could be dismissed where the regular principles are not satisfied.

the circumstances of the case,[19] they are useful. Admittedly, the difference may be one of emphasis or even semantic.[20]

A court's leanings may well be subtle but this fact does not detract from its significance: the direction of the leaning either strengthens or weakens the value of the principles in guiding the prospective exercise of discretion. The value of having principles is not an end in itself; principles can be of assistance to litigants and practitioners. Token reference to principles renders superfluous its value both as a means of confining the discretion and in offering guidance to litigants. Ultimately, in the absence of principles, the exercise of the discretion is unlikely to achieve the goal of expeditious litigation because litigants and practitioners will not know if and when they are being tardy.

4. The Principles Relevant to the Exercise of Discretion

According to the House of Lords,[21] the decision in *Allen* established that it is proper to dismiss a proceeding for want of prosecution where the court is satisfied either:

(a) that the default of the plaintiff has been intentional and contumelious; or

(b) that there has been inordinate and inexcusable delay on the part of the plaintiff or his or her lawyer and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the questions in the proceeding, or is such as likely to cause, or to have caused, serious prejudice to the defendant as between himself and the plaintiff, or as between himself and another party.

These principles have been endorsed and applied in Victoria[22] and in the other States and Territories, but await the imprimatur of the High Court.

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19 *Bishopsgate,* fn. 6 at 19.

20 In fact in *Sacco*, fn. 14 at 1, Calloway and Brooking JJ did not share the concern of Ormiston J that *Masel* foreshadowed a desertion of principle in favour of palm tree justice.

21 *Birkett v. James* [1978] AC 297 at 318 (*Birkett*); *Chris Smaller*, fn. 6 at 1203.

22 Subject, however, to the qualifications made in the first section of the article: see *Bishopsgate*, fn. 6; *Masel*, fn. 16; *Sacco*, fn. 14.

(a) The first limb

To trigger the first limb it is sufficient and necessary that the default by the plaintiff be intentional and contumelious. Essentially, the court looks for a flagrant want of compliance with its directions,[23] such as a failure to comply with a peremptory order[24] or, as it is known in Victoria, a self-executing order.

(b) The second limb

It is in construing the second limb that courts have emphatically cautioned against viewing the propositions laid down in *Allen* as establishing a code for dismissal.[25] Nevertheless, this limb encapsulates matters which commonly fall for consideration:

(i) The delay must be inordinate

That which is inordinate delay is a question of fact and degree specific to the circumstances of the case.[26] The kind of delay which might kill an action for personal injuries may have no mortal effect on a complicated commercial case. The court looks for irregular, immoderate or excessive delay;[27] the delay must probably exceed, possibly by a substantial margin, the times prescribed by the rules of court for the taking of steps in an action.[28] In *Niemann v. Electronic Industries Ltd*,[29] the Court was not prepared to hold that 15 years, of itself, warranted dismissing an action; in *Bergain v. McIver*[30] delay for four years since the commencement of the action was held to be inordinate. It should be noted that delay need not be continuous;[31] it may comprise of several discrete periods of delay.

The relevant period begins from the issue of the writ. It is delay by the plaintiff after the issue of the writ that is relevant.[32] Delay before the issue

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23 In *Re Jokai Tea Holdings Ltd* [1993] All ER 630 at 641, Megaw LJ observed that the word contumacious would be more apt.

24 *Janov v. Morris* [1981] 3 All ER 780.

25 *McKenna*, fn. 16 at 675; *Stollznow*, fn. 7 at 751-752.

26 *Allen*, fn. 5 at 268.

27 *Muirfield Properties Pty Ltd v. Erik Kolle & Associates* (Unrept, Vic SC, Tadgell J, 7/4/1987) at 16 (*Muirfield*).

28 *Birkett*, fn. 21 at 323; *Trill*, fn. 2 at 978, 980.

29 [1978] VR 431.

30 [1974] VR 811.

31 *Trill*, fn. 2 at 969-970.

32 Id at 978.

of the writ can never be inordinate for these purposes.[33] However, this does not mean pre-writ delay is completely irrelevant. If such delay is present the court will look more critically at any post-writ delay,[34] and will more readily regard the delay as inordinate, than if the proceeding had been commenced soon after the cause of action had accrued.[35] It is arguable that this qualification may well render superfluous the principle against consideration of pre-writ delay and smacks of judicial sophistry. Nevertheless, the qualification is to be welcomed if it deters unnecessary delay.

If there ever was doubt that an order for dismissal could be made within the limitation period[36] it was removed by the decision in *Birkett*.[37] Subject to exceptions, an action will not normally be dismissed within the currency of the limitation period.[38] This is because the plaintiff may be able to issue a fresh writ. However, the principle does not require that an action can never be dismissed merely because a fresh action can be issued, but that the possibility of issuing a fresh writ is a relevant matter which weighs very heavily against dismissal. While it is possible that tardiness within the limitation period causes a defendant prejudice and results in inefficiency, such 'delay' does not ordinarily suffice to trigger the exercise of discretion.

At first glance, the principle is amenable to criticism.[39] If the legislature's intention is, as the Court found it to be, that the plaintiff enjoy the benefit of the statute of limitations, then it should never be open for the court to treat any period within the limitation period as delay. Yet post-writ delay within the limitation period is relevant delay for the purposes of an application to

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33 *Bishopsgate*, fn. 6 at 22 approves *Birkett* and *Chris Smaller; Sacco*, fn. 14 at 2, per Callaway J. Contra *Ulowski*, fn. 18 at 281.

34 *Chris Smaller*, fn. 6 at 1207-1208. In practice though, there may be a risk of undue concentration on pre-writ delay: *Sacco*, fn. 14 at 2, per Ormiston J.

35 While the defendant must show post-writ prejudice, if the defendant has suffered prejudice as a result of pre-issue delay, then s/he will need to show only something more than minimal additional prejudice: *Lovie v. Medical Assurance Society* [1992] 2 NZLR 247 at 253.

36 *Austin Securities v. Northgate Stores* (1969) 2 All ER 753 at 756, per Denning LJ (obiter).

37 Fn. 21.

38 Id at 298-299.

39 *City of Westminster v. Clifford Culpin & Partners* (1987) 137 New LJ 736.

dismiss a proceeding after the expiry of the limitation period.[40] Moreover, the exceptions to the principle against dismissal within the limitation period may call into question its utility.

However, the Court's reasons and the policies underlying the statute[41] are consistent with the rationales of the dismissal power. It is not for the courts to deny the plaintiff her or his right to bring an action within the statutory period,[42] and lest the principle be the subject of abuse, the court expressly countenances dismissals within the period in exceptional circumstances.[43] Significantly, the principle does not apply where a plaintiff is guilty of contumelious conduct and the action is dismissed under the first limb of *Allen*.[44] In such circumstances the plaintiff is said to forfeit the plaintiff's rights and can be said to be disqualified from exercising them.[45] It should also be noted that there are safeguards to prevent the frivolous issue of fresh writs, ranging from the imposition of cost penalties to striking out a proceeding as an abuse of process.[46]

Moreover, if the principle or position were otherwise, as noted above it would be open to the plaintiff to initiate proceedings by issuing a fresh writ;[47] the effect of issuing a second writ would be to prolong the time

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40 *Trill*, fn. 2.

41 *Birkett*, fn. 21 at 331.

42 *Chris Smaller*, fn. 6 at 1206.

43 *Birkett*, fn. 21 at 328. However it may be that such exceptional circumstances are indeed an extremely rare species: *Williams v. Zupps Motors Ltd* [1990] 2 Qd R 493 at 499. On the other hand, given the concern over the efficient use of court time, there may be pressure to read the exception more widely.

44 *Birkett*, fn. 21 at 321. Consequently, a defendant who wanted to hurry a proceeding could apply to the court for a peremptory order. Breach of such an order allows for dismissal of the action and the possible staying of a subsequent action: *Tolley v. Morris* [1979] 1 WLR 592.

45 *De Nier v. Beicht* [1982] VR 331 at 338. The foregoing explanation provides an uneasy reconciliation with the court's insistence on preserving the statutory right.

46 The mere fact that a previous writ is dismissed under the second limb does not necessarily make the issue of a fresh writ an abuse of process: *Birkett*, fn. 21; cf a case within the first limb of *Allen* where a second action may be struck out, albeit within the limitation period: *Janov v. Morris* [1981] 1 WLR 1389.

47 A fresh writ may be issued because the matter is not *res judicata*. In *Muirfield*, fn. 27 at 30-31, the first action was dismissed even though the plaintiff was not statute barred from issuing a fresh writ upon another, albeit different, cause of action; if similar issues could have been raised in the first proceeding, an *Anshun* estoppel may preclude the second action.

which must elapse before trial and so contributes to further delay, prejudice and inefficiency. The courts are alert to the great practical difference between the dismissal of actions which could be revived and those which could not. Dismissal of the latter would effectively remove them from the court lists, but dismissal of the former would not. Hence, the general principle is the product of logic which links the question of dismissal with the possibility of issuing a fresh writ in the limitation period.

(ii) Delay which is inordinate is prima facie inexcusable

Delay found to be inordinate will not necessarily result in a dismissal. There may be a reason for the delay and it is for the plaintiff to make out a credible excuse.[48] Generally, a valid excuse for delay involves something beyond the control of the plaintiff and her/his solicitor. Excuses sufficient to justify a delay include the illness of the plaintiff or solicitor, difficulties with regard to obtaining evidence and legal aid, illness of a key witness, an error by the court or clerk, or contributory delay on the part of the defendant.[49] Furthermore, as observed candidly by Moffit P in *Stollznow*, delay is often due to congestion of court lists and the practice of law.[50]

(iii) Prejudice to the defendant or the risk that a fair trial is not possible

If the delay which is inordinate and inexcusable does not cause the defendant any prejudice, the proceeding will not be dismissed unless there is a risk that a fair trial is not possible; if the delay is such that a fair trial is not possible, an order for dismissal will be made. In most cases a fair trial is not possible because delay causes prejudice to the defendant.[51] In fact the

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48 *Allen*, fn. 5 at 268; *Duncan v. Lowenthal* [1969] VR 180 at 185.

49 *Allen*, fn. 5 at 269. Moreover, the court looks at the whole delay by both parties: *Birkett*, fn. 21. It should be noted that legal doctrines of waiver and estoppel are not the basis on which a tardy defendant is precluded from succeeding because the discretion to dismiss is a judicial one which can not be so fettered. Again it was only recently that this matter was conclusively determined: *Roebuck v. Mungovin* [1994] 1 All ER 568; *McKenna*, fn. 16 at 676. Cf *Allen*, fn. 5 at 260, 272.

50 Fn. 7 at 754. Indeed, some rules of court - a product of adversarial litigation - and limitation statutes allow proceedings to be commenced and pursued at times which make a fair trial difficult.

51 It is possible, however, that the plaintiff's delay causes prejudice to the plaintiff or to third parties and for that reason makes a fair trial difficult: *Allen*, fn. 5 at 258, 268-269.

two indicia overlap.[52] For instance, the loss of witnesses renders the elucidation of the truth more difficult, prejudicing the litigants and the quality of justice provided by the courts.[53] However, the two factors do not necessarily coalesce. Delay may well prejudice the defendant without making it impossible for a fair trial and, conversely, a fair trial may be difficult even without prejudice to the defendant.[54]

Relevant prejudice includes not only past and present prejudice. In adopting a pragmatic approach, the court may look at likely prejudice right up to the trial.[55] Prejudice itself is manifested in numerous ways and can be conveniently categorised as prejudice in the proper conduct of the defence and the hazard of being kept at risk in respect to the subject matter of the litigation.[56] Examples of the former category include the loss of opportunity to locate a witness, the death of a witness, the unavailability of documents and the loss of a defence.[57] Examples of the latter include damage to the defendant's business interests and even anxiety and personal stress.

It is not settled whether the degree of harm to the defendant need be proven or whether the prejudice may be presumed from the procedural history of the case.[58] In *Bishopsgate* the Court stated that prejudice, actual and potential, must be established but added the rather disingenuous rider, that prejudice may be established by circumstantial evidence and the necessary

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52 *Muirfield*, fn. 27 at 17.

53 *Stollznow*, fn. 7 at 754.

54 Fn. 49. Another consideration may be inordinate delay which ties up the procedures and resources of the Court. Such delay is contrary to the public interest. In *Bishopsgate*, fn. 6 at 20-21, the Court was cautious about taking into account the effects of delay on the management of the court's business, but could not say it would never be relevant.

55 *Bishopsgate*, fn. 6 at 25.

56 The defendant has an interest in the reasonably prompt determination of her or his claim, and the fact that s/he is being kept at risk is relevant as a matter distinct from prejudice in the conduct of the proceeding: *Birkett*, fn. 21 at 331.

57 *Muirfield*, fn. 27 at 26. A defence formerly available to the defendant had since been abolished by parliament. If the proceedings had been brought in time, the defence would have been available.

58 In *Goldie v. Johnston* [1968] VR 651 the Court considered that evidence of prejudice caused by delay must be shown. The contrary view, that the court may infer prejudice from the fact of delay, was adopted in *Duncan v. Lowenthal* [1969] VR 180 (*Duncan*).

processes of inference.[59] The latter qualification has the effect of weakening the onus on the defendant to show prejudice.

(iv) Conduct of the defendant

The court considers the conduct of all the parties to the litigation. Significantly, the defendant is not under a duty to stimulate the plaintiff into action.[60] This principle reflects the dictates of an adversarial system which generally encourage the parties to take whatever procedural steps they see fit.[61] Nonetheless, a warning by the defendant to the plaintiff may strengthen the application to dismiss. Similarly, a failure to warn may render a claim of prejudice less creditworthy and the prejudice, if established, a less weighty factor.[62] It is submitted that the defendant should have to notify the plaintiff.[63] Although such a requirement would sit uneasily with an adversarial premise, it is likely to prevent further delay and prejudice and so promote efficiency. It may also be justifiable given the draconian nature of the dismissal order. However, the mandatory notice requirement has not found favour in Anglo-Australian jurisprudence.[64]

(v) Hardship to the plaintiff, if the action is dismissed

Seldom is the plaintiff personally responsible for the delay. Invariably, it is the dilatory conduct of the solicitor which causes the delay. It is trite that the plaintiff may have an action against the solicitor and from the court's point of view this threat would encourage expediency by solicitors. However, if the solicitor is impecunious, it may leave the plaintiff without

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59 *Bishopsgate,* fn. 6 at 24.

60 *Allen*, fn. 5; *Duncan*, fn. 58 at 186. Contra *Stollznow*, fn. 7 at 753 - no rigid rule can be laid down on this matter.

61 *Allen*, fn. 5 at 258. However, it is perhaps too simplistic to regard preparation for trial as a one sided affair resting entirely on the plaintiff: *Stollznow*, fn. 7 at 754.

62 *Stollznow*, fn. 7 at 753. In *Ulowski*, fn. 18 at 282, Bray CJ accepted that a defendant's failure to stir the plaintiff into action is relevant to the question of prejudice, although the defendant is not under a duty to give the plaintiff any notice.

63 In fact Diplock LJ's formulation of the test for dismissal in *Allen* expressly states that an order to dismiss ought not normally be made unless the plaintiff is given an opportunity to remedy her or his default: fn. 5 at 259. However, this aspect of his Lordship's formulation has apparently been overlooked.

64 Contra the position which obtains in some jurisdictions in the United States. See Vineyard, R. 'Dismissal with prejudice for failure to prosecute: visiting the sins of the attorney upon the client' (1987) *Georgia Law Review* 195.

recourse to a remedy. This problem is particularly acute where, if dismissed, the plaintiff's action against the defendant would be statute barred. The issue then is whether possibility of such hardship to the plaintiff, albeit speculative, is a relevant consideration in exercising the court's discretion.

Again the courts have spoken with a plethora of voices. In *Allen*, the Court regarded it as relevant.[65] However, in *Birkett* a majority of their Lordships agreed that it was irrelevant and significantly, Lord Diplock corrected the view expressed by his Lordship previously in *Allen.*[66] Lord Salmon, dissenting on this point in *Birkett*, found that this factor could be relevant but confined it to a function of tipping the scales where the other considerations are evenly balanced.[67] Australian courts tend to view this factor as relevant.[68]

In strict logic, the impecuniosity or otherwise of the plaintiff's solicitor should not affect the defendant's dismissal application. If the defendant has been prejudiced by inordinate and inexcusable delay, it is immaterial that the plaintiff is innocent or has no effective remedy against her or his solicitor.[69] However, there is a tension here because a court is also concerned with fairness. To justify dismissal by visiting the sins of the solicitor on an innocent plaintiff detracts from fairness; in exercising this discretion, it is open for the courts to temper the result compelled by the logic of the law with humanity.[70] Furthermore, the premise of the majority view in *Birkett* is open to the criticism that it mechanically applies an

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65 Fn. 5.

66 Fn. 21 at 324.

67 Id at 331.

68 In *McKenna*, fn. 16 at 677 McGarvie J disagreed with the limited weight given to this consideration by Lord Salmon. Instead, it is a relevant consideration whose weight will depend on the particular circumstances of the case: *Ulowski*, fn. 18 at 282. In *Stollznow*, fn. 7 at 752-753 Moffit P called it 'a material consideration'.

69 The proposition is unassailable if full weight is given to the 'prejudice to the defendant' factor.

70 *Allen*, fn. 5 at 261; cf the comments of Sheller JA in *Cohen v. McWilliam and Anor* (1995) 38 NSWLR 476 at 491 where, in a different context, his Honour describes a consideration of a potential suit against a solicitor as 'strikingly inefficient'. His Honour was concerned that such a suit would involve more litigation, albeit separate litigation.

agency rationale to the solicitor-client relationship.[71] While there are circumstances in which the client is responsible for the actions of the solicitor, a broad application of the proposition is not necessary. It is open for the court to adopt a pragmatic view of the relationship,[72] recognising the realities of litigation, where a layperson can not be expected to supervise the daily activities of a professional.

6. Conclusion

The foregoing discussion indicates that the large body of case law is wanting in consistency and awaits clarification by the High Court of Australia. One explanation for the inconsistency is attributed to the extremely fact-specific nature of the cases.[73] Yet such a conclusion lacks force in the face of the courts' insistence that the exercise of the discretion is generally governed by principles; *ipso facto*, notwithstanding factual differences, case reconciliation should not be difficult. A better explanation then is found in the judicial disagreement over the utility of, content of, and weight to be attached to the principles.

Perhaps the divergence of views also signals dissonance between the principles and the purposes which the principles are designed to realise.[74] It also reflects the existence of several, sometimes conflicting, policy rationales which must be taken into account. The principles which guide the exercise of the discretion are a microcosm of the several policy considerations with which adversarial litigation is concerned. Superimposed on the private interests of the litigants is the public interest in the integrity of the court's processes.[75] The various interests and considerations underlying the power to dismiss do not always coalesce. Consequently, by

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71 This view also assumes that the solicitor is freely chosen. Often a party does not have a choice of solicitor.

72 The average client is passive, follows instructions, and trusts the professional - held out by the State to be competent and skilled - without criticism..

73 *Stollznow*, fn. 7 at 751; *Lewandowski v. Lovell* (Unrept, WASC(FC) 24/3/1994) at 11.

74 In *Clifford Culpin*, fn. 39, Kerr LJ described the principles as unsatisfactory and inadequate for they were far too lenient to deal effectively with excessive delays.

75 Query whether the principles do give sufficient recognition to the public interest, which is obviously not confined to the necessity to avoid unfair trials. It may be that the procedures of the adversary system are not adequately suited to its protection.

no means can the task of laying down an exhaustive set of guiding principles ever be an easy one.

However, the foregoing does not prevent one from reaching the conclusion that a set of principles can be established and that the principles serve a useful function without unduly fettering the discretion. The establishment of a comprehensive set of principles will be a large step towards certainty and consistency. What such a step will not decide is the question of the extent to which a set of principles should fetter the discretion. It is maintained that the application of a comprehensive set of principles would serve a useful function without unduly fettering the discretion.

That several of the principles which guide the exercise of the discretion have exceptions or are inconsistent with one another in specific circumstances does not necessarily detract from their settled or useful nature. That the application of a given concatenation of principles does not lead to a predictable result is not necessarily to refute their utility, for by their very nature, principles can be balanced against one another and outweigh each other;[76] that the principles are not immutable is a consequence of properly preserving a discretion. This state of affairs may be unsatisfactory from the point of view of certainty and consistency. It is submitted that this is probably a price paid in the theoretical realm. In any event, it is a small price to be paid for a necessary modicum of flexibility in this area of the law.

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[76] See generally Dworkin, R. 1977, *Taking Rights Seriously,* Duckworth, London, Chs 2-4.