JOHN PATRICK DONNELLY

VS

MAEIN DEIREBAGEA

CIVIL ACTION NO. 1 OF 1974

DECISION

There has undoubtedly been an inordinate and inexcusable delay in prosecuting this action. The accident occurred on 23rd April, 1971. The writ was not issued until the very last day of the time allowed, i.e. on 23rd April, 1974. Default judgment was entered in May, 1974. It was set aside in July, 1974; since then there was no further step taken in the action until December, 1979.

Before proceeding further I should make clear that the order which I made on 30th July, 1974, when setting aside the default judgment was that the costs of the application for that order and those of the plaintiff thrown away by entering the default judgment were to be paid by the defendant before the action was heard. As the action has never been even set down for hearing the defendant is not in default in having failed to pay those costs before now. It was certainly not a condition precedent to his filing and serving his defence.

This delay from July, 1974, to mid-1979, and indeed that from 1971 to 1974, was the fault of the barrister and solicitor who was then representing the plaintiff, Mr Bowditch. The plaintiff's present barristers and solicitors have, in my view, acted with reasonable expedition since the representation of the plaintiff was assigned to them by the Australian Legal Aid Office in the middle of last year. The plaintiff himself appears not to have been to blame for the delay. But neither his lack of blame now the reasonable expedition of his present barristers and solicitors in any way affects the inordinate and inexcusable delay for which Mr Bowditch was responsible.

If the defendant has been seriously prejudiced in his defence of the action by that delay, the action should be dismissed.

The only issues in these proceedings, therefore, is whether the defendant has been seriously prejudiced. Mrs Billeam has filed affidavits which establish that none of the witnesses likely to have been able to give evidences material to the defendant's allegation of contributory negligence is readily available. One is somewhere in Indonesia; another is dead. None is now in Nauru. Mr Ramrakha has made a valiant effort to convince me that the defendant will suffer no prejudices, particularly because he has, from the time the action was commenced, had to face the fact that evidence of his conviction for dangerous driving is admissible and is prima facie evidence of fault, by virtue of the provisions of the Civil Evidence Act 1972. But that submission ignores the defendant's defence of contributory negligence and the fact that, in spite of the conviction, he might still have sought to pursuade the Court on the trial of the action that he was not in fact at fault; to attain either of these objects he would have needed to rely on the evidence of the missing witnesses.

I have no doubt, therefore, that the defendant has been seriously prejudiced in his ability to conduct his case, if the action were to come on for hearing.

It would be unfortunate if, due to Mr Bowditch's delay, the plaintiff lost his chance to obtain his remedy. But it is clear from Mr Bowditch's affidavit that he was guilty of serious neglect of his obligations to the plaintiff and the plaintiff should, therefore, be able to obtain his remedy from Mr Bowditch, provided, of course that proceedings against him are taken before they are statute-barred.

ORDER:

The application is granted. The action is dismissed for want of prosecution. The plaintiff is to pay the defendant's costs of this application. The costs payable by the defendant under

the order made on 30th July, 1974, are to be set off against those costs.

2/5/80

I.R. Thompson
<u>CHIEF JUSTICE</u>

ORDER (by consent): Plaintiff to pay defendant $200 costs (inclusive of disbursements) and defendant is discharged from payment of the costs ordered on 30th July, 1974.

2/5/80

I.R. Thompson
<u>CHIEF JUSTICE</u>