

SHELLARD & ORS V ORLANSKI [2001] VSCA 147

Supreme Court of Vic – Court of Appeal – 7 September 2001

FACTS

Orlanski was an accountant who was sued by Shellard & Ors (Shellard) for work that he had failed to do while acting for them.

At the initial trial the judge found that the case could not proceed due to unreasonable delays caused by the plaintiff. A significant proportion of the delay was in relation to the discovery of documents which had originally been in the control of Orlanski and were returned to Shellard so that another accountant could use the documents to complete the work which he had failed to do. Shellard appealed the finding of the first judge.

ISSUES

Whether the first judge fell into error in striking out the case for want of prosecution.

Whether the delay caused by Shellard was inordinate and inexcusable.

FINDING

On appeal it was held that the judge had erred in finding that Shellard had caused an inordinate and inexcusable delay and that the appeal should be allowed.

It was held that while the plaintiffs were responsible for the majority of the delay, Orlanski also had to take responsibility for a significant amount of that delay.

On analysis of the documents, the court held that Orlanski had used the process of discovery as a tactic to delay the matter by requesting more and more detailed discovery to which the solicitors for Shellard made attempts to respond on each occasion.

Further, Orlanski had asked for better descriptions of documents where a simple inspection of the documents would have provided the information requested. The solicitors for Orlanski took large amounts of time to inspect the documents after the Affidavit of Documents were served by Shellard and did not appear to hurry in making several applications for further discovery, in one instance not requesting further discovery for some 10 months after the Affidavit of Documents was served.

QUOTE

“Yet, rather than taking the foregoing matters into account – and in particular the fact that the lapse of time since notice was first given for discovery was not wholly the responsibility of the plaintiffs but was in part due to the defendant and his legal advisers – it appears that his Honour committed the error of principal which was identified in Sptifire Nominees Pty. Ltd. v Ducco of “gross[ing] up the period of delay as elapsed

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time instead of, as was the judicial obligation, considering what the net delay occasioned was and what prejudice, if any, was sustained as a consequence of that, rather than the general elapsing of time.”

IMPACT

This case emphasises the principle that delay in itself is not enough to show that a case should be struck out on the basis that the parties have failed to do as required by the court.

A case should only be struck out for want of prosecution where the court has found that the delay was caused by the party without good reason and is such that it is inordinate and inexcusable.

The court must consider what the net delay was and what prejudice was sustained as a result.

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