32/10; [2010] VSC 286

SUPREME COURT OF VICTORIA

BUTCHER v AUSTRALIAN TARTARIC PRODUCTS PTY LTD

Kaye J

18 June 2010

PRACTICE AND PROCEDURE – CIVIL PROCEEDINGS – VENUE – APPLICATION BY PLAINTIFF FOR CHANGE OF VENUE – JURY TRIAL IN MILDURA – VERDICT ON FIRST TRIAL SET ASIDE ON APPEAL – PREPONDERANCE OF WITNESSES IN MELBOURNE – NUMBER OF EXPERT WITNESSES FROM MELBOURNE PROPOSED TO BE CALLED – PROBLEMS IN FIRST TRIAL WITH AUDIO-VISUAL LINK – IMPORTANCE OF COURT'S COUNTRY CIRCUIT JURISDICTION – WHETHER APPLICATION SHOULD BE GRANTED: *SUPREME COURT RULES*, O47.01.

Order 47.01 of the *Supreme Court Rules* provides:

> "Unless a court otherwise orders, the place of trial shall be determined in accordance with Rule 5.08, namely, the place of the trial shall be that nominated in the writ."

B., who had issued proceedings returnable at Mildura sought to transfer the hearing to Melbourne. B. stated that he proposed to call a number of medical witnesses most of whom work and live in Melbourne. On the previous hearing which was conducted by audio-visual link, the hearing was frustrated by problems which constantly interrupted and frustrated the trial thereby causing both difficulties to the jury, the court and the witnesses. Defence counsel opposed the application submitting that the case was a Mildura case and that the audio-visual problems had now been resolved.

HELD: Application granted. Matter to be transferred from sitting in Mildura to Melbourne.
1. The appropriate test is that the proper place of trial should be where the case can be heard most suitably, bearing in mind the interests of the parties, the ends of justice and the efficient disposition of the business of the court.
***National Mutual Holdings Pty Ltd & Anor v Sentry Corporation & Anor* (1988) 19 FCR 155; (1998) 83 ALR 434, applied.**

2. Rule 47.01 is a rule of practice and should be given a practical application. The purpose of it is to ensure that cases are disposed of fairly, justly and as expeditiously as possible.

3. Whilst this matter should be heard in Mildura and a transfer will delay the disposition of the case, these factors do not outweigh the substantial preponderance of convenience in favour of bringing the matter back to Melbourne. It is clear that a very large number of the witnesses in the case, and in particular professional witnesses, will need to be called from Melbourne. Even if the audio-visual link was working satisfactorily, it would be a second best trial for the plaintiff to have it conducted by having most of his professional witnesses give evidence by audio-visual link.

KAYE J:
1. This is an application by the plaintiff for a change of the venue of the trial or the proceeding from Mildura to Melbourne.

2. The proceeding was originally issued in September 2007. In the proceeding, the plaintiff has claimed damages against the defendant, his former employer, for personal injuries to his lower back which were caused on 24 November 2003.

3. The first trial in the proceeding before a jury was held over nine days, from 25 November 2008 until 8 September 2008. On the first day of that trial, the defendant admitted liability and abandoned its defence of contributory negligence.

4. The plaintiff called some 13 witnesses and the defendant called two. The jury delivered a verdict at the completion of the trial, and that resulted in a judgment in favour of the plaintiff for $80,000 for damages for pain and suffering, and $154,050 for pecuniary loss, that being the

amount of the verdict minus accident compensation payments plus interest. It was ordered that the plaintiff pay the defendant's costs.

5. The plaintiff appealed from that judgment and verdict, and on 18 December last, the Court of Appeal allowed the appeal and ordered a retrial.

6. The application on behalf of the plaintiff, which is made on his behalf by Mr Casey QC who appears with Mr Clements, is made on the basis principally that the plaintiff wishes to call a large number of witnesses, who are Melbourne based. On the last occasion, the attempt to call those witnesses in Mildura was frustrated by problems with the audiovisual link facilities which constantly interrupted and frustrated the trial, causing both difficulties to the jury, to the court, and also to the witnesses, most of whom were experts.

7. The plaintiff proposes to call in support of his claim some four Melbourne medico-legal experts, a treating orthopaedic surgeon from Melbourne, an occupational therapist and an actuary from Melbourne, and also will probably call an engineer from Melbourne. He will also be calling his local general practitioner from Mildura and may also be calling his physiotherapist. At the first trial of the proceeding, the defendant also called two medico-legal experts, both of whom were from Melbourne.

8. As I say, the principal basis upon which the application is made by the plaintiff is based on the fact that the witnesses all work and live in Melbourne. The first trial was conducted largely by audiovisual link, and because of the difficulties associated with it, and the prejudice occasioned by the plaintiff in the running of his trial, it is intended to call those witnesses personally at the second trial.

9. The plaintiff's solicitor has provided an affidavit, which sets out the estimated costs of having all the professional witnesses travel to Mildura and give evidence there. Because of the effect of the *Accident Compensation Act*, the plaintiff will not, if he is successful, recover the whole of the costs thereby occasioned to him. The plaintiff is a man of very limited means, and is currently living on a pension.

10. The other basis relied on by the plaintiff arises from an article that was published in the local newspaper shortly after the appeal. However, I do not consider that that basis has any merit in it. By the time the trial comes on for hearing, it is highly likely the jury will have forgotten about the matters stated in the newspaper article, and as the High Court has recently said in *Dupas*[1], juries are historically susceptible to appropriate judicial direction in relation to previous publicity.

11. Mr O'Meara of counsel, who appears for the defendant, has opposed the application. He submits that the case is a Mildura case. He has told me that the audiovisual link problems, which plagued the first trial, apparently are now not causing difficulties at Mildura. The plaintiff chose to engage Melbourne based medico-legal experts to assist him in his case, and has made the choice to call those witnesses.

12. Mr O'Meara submits that the main item of prejudice to the defendant is that the case is likely to be reached in the next sittings in Mildura in July and August, and if the case were transferred to Melbourne, there would be unfair delay occasioned by such a disposition.

13. The application is made under Order 47.01, which provides that:

> "Unless a court otherwise orders, the place of trial shall be determined in accordance with Rule 5.08, namely, the place of the trial shall be that nominated in the writ."

14. In this case, the place of trial nominated in the writ was of course Mildura, hence the application now made by the plaintiff.

15. Rule 47.01 invests in the court a discretion. There are some older authorities that suggest that in order to justify change of venue, the plaintiff must show a manifest preponderance of convenience in his or her favour. See for example, *Ryan v Harrison*.[2]

16. On the other hand, a more flexible view was espoused by the Full Court of the Federal Court in *National Mutual Holdings Pty Ltd & Anor v Sentry Corporation & Anor.*[3] In that case, the court considered that the appropriate test is that the proper place of trial should be where the case can be heard most suitably, bearing in mind the interests of the parties, the ends of justice and the efficient disposition of the business of the court.

17. Rule 47.01 is a rule of practice. In my view, it should be given a practical application. The purpose of it is to ensure that cases are disposed of fairly, justly and as expeditiously as possible.

18. In this case, nevertheless, I am satisfied that there is a substantial preponderance of convenience in favour of the application made by the plaintiff to bring the case to Melbourne. It is clear that a very large number of the witnesses in the case, and in particular professional witnesses, will need to be called from Melbourne. Even if the audiovisual link was working satisfactorily, it would be a second best trial for the plaintiff to have it conducted by having most of his professional witnesses give evidence by audiovisual link.

19. It is quite true as Mr O'Meara has correctly pointed out, that evidence by audiovisual link is becoming quite common in this court. However, certainly my experience is that it is unusual, to say the least, for such a large number of witnesses in a case to be called in that way.

20. In this case, the trial has already been the subject of one successful appeal, and it is important, in the interests of both parties, and particularly the plaintiff, that the plaintiff have the opportunity to present their cases in the more orthodox manner, namely, by calling the witnesses in person.

21. I also consider that Mr Casey is fully justified in making the forensic decision on behalf of the plaintiff that wherever the case proceeds, the witnesses will be called in person and not by audio visual link, bearing in mind the difficulties that were occasioned with the technology on the last trial, and also the remarks I have just made about the preferability of witnesses being called of witnesses being called in question in person.

22. That being so, a trial in Mildura would not only occasion substantial expense to the plaintiff, which could not be recouped even if he is successful, but would cause substantial inconvenience to a large number of professional witnesses, and particularly doctors, who would be disrupted in their day to day work.

23. On the other hand, I do take into account the fact that the change of venue will postpone the trial date, and that is unfortunate, particularly given that the incident in question occurred in November 2003. I would certainly direct that Associate Justice Daly give the matter such priority as she is able to give the proceeding. Even with such a direction, the case would not be able to be heard as expeditiously as if it remained in Mildura. However, I do not consider that the additional delays are of such moment as to outweigh the preponderance of convenience which otherwise lies in favour of bringing the matter back to Melbourne.

24. The other matter which does weigh on me is that this is a Mildura case. Such a case should ordinarily be heard in that locality. This court is the Supreme Court of Victoria, it is not the Supreme Court of Melbourne. Our circuit work is a very important and highly significant part of the work of this court. That is even more so where a case involves a jury. Circuit work involving juries enables the people of Victoria, and particularly country people, to have a proper contact with, and participation in, our civil and criminal justice system.

25. Thus, in my view a judge on an application like this should be very slow indeed to transfer a case from any country circuit to Melbourne. That factor is a consideration of some weight and moment in this application, and indeed in all applications involving country work. However, that factor combined with the delay in the case, still does not outweigh the substantial preponderance of convenience in favour of bringing the matter back to Melbourne.

26. For those reasons, I accede to the application of the plaintiff that the matter be transferred from sitting in Mildura to Melbourne, and I will give a direction that the matter be referred to Associate Justice Daly for listing with such priority as Her Honour is able to give the case.

[1] *Dupas v R* [2010] HCA 20; (2010) 241 CLR 237; (2010) 267 ALR 1; (2010) 84 ALJR 488.
[2] [1957] VicRp 29; [1957] VR 210; [1957] ALR 572.
[3] (1988) 19 FCR 155; (1988) 83 ALR 434, 442.

APPEARANCES: For the plaintiff Butcher: Mr T Casey QC with Mr A Clements, counsel. Ryan Legal, solicitors. For the defendant Australian Tartaric Products Pty Ltd: Mr S O'Meara, counsel. Hall & Wilcox, solicitors.