28/75

SUPREME COURT OF VICTORIA — FULL COURT

McMANAMNY v HADLEY

Young CJ, Starke and Menhennitt JJ

13, 17 March, 30 April 1975 — [1975] VicRp 70; [1975] VR 705

STATUTE OF LIMITATIONS – CAUSE OF ACTION FOR DAMAGES FOR PERSONAL INJURIES – LIMITATION ON COMMENCEMENT OF ACTIONS – "NO ACTION SHALL BE BROUGHT AFTER THE EXPIRATION OF THREE YEARS AFTER THE CAUSE OF ACTION ACCRUED" – APPLICATION FOR EXTENSION OF TIME – GRANTED BY SUPREME COURT JUDGE – PROCEEDINGS INSTITUTED IN THE COUNTY COURT – WHETHER PROPER – WHETHER JUDGE IN ERROR IN GRANTING EXTENSION OF TIME: *LIMITATION OF ACTIONS ACT* 1958, S23A.

HELD: Appeal dismissed.

1. An application for an extension of time can only be made before the proceedings are instituted and must be made to the court in which it is proposed to bring the proceedings.

2. In order to enable an extension of time to be granted, the applicant must show that a material fact or facts relating to the cause of action claimed by the applicant was not known to the applicant until a date later than two years after the cause of action accrued and less than one year before the application was made. The expression used is not "material facts constituting the cause of action" but "material facts relating to the cause of action."

3. In the present case significant aspects of the extent of personal injury caused to the applicant by the operation performed by the respondent were not known to her until after the operation performed on 29 October 1973. The applicant established a *prima facie* case that the operation was made necessary by the respondent's operation on 20 March 1971 and that accordingly the plaintiff had established a *prima facie* case that the disabilities suffered by her subsequent to the operation were also caused by the respondent's operation on 20 March 1971. The disabilities suffered since the operation on her first, second and third toes were, on the evidence, not known to her after the original operation and they were significant disabilities. Accordingly, until they occurred she did not know the extent of the personal injury caused to her by the respondent's operation and that knowledge first came to her more than two years after the date of the respondent's operation and less than one year before she made her application for an extension of time.

4. Accordingly, the applicant established that the extent of the personal injuries caused by the operation would not have been known to her if she had taken all reasonable steps in the circumstances of the case to ascertain all the material facts.

5. It had not been shown that the judge exercised his discretion on any erroneous basis or that it was not reasonably open to him to exercise his discretion in the manner he did. Accordingly, it was concluded that it had not been established that the order made by his Honour should have been set aside.

THE COURT: This is an appeal from an order made by Gillard J in chambers on 31 October 1974. It may well be that the appeal cannot be brought except by leave, but if leave be necessary, we think it should be granted. The order was made on a summons taken out by Nicole Rebecca McManamny (to whom we shall refer as "the applicant") pursuant to the provisions of s23A of the *Limitations of Actions Act* 1958 (which was inserted by Act No. 8300 of 1972) whereby she sought "an order that the Court order that the period within which the cause of action herein (sic) of the abovenamed Applicant against the abovenamed Respondent may be brought be extended pursuant to the provisions of s23A of the *Limitation of Actions (Personal Injuries) Act* 1972 as may be appropriate in the circumstances and for such further and other orders and directions as may be appropriate, including an order as to costs of this Application."

The applicant wishes to institute legal proceedings against Hugh Hadley (to whom we shall refer as "the respondent") for damages for alleged negligence on the part of the respondent. On 20

March 1971 the respondent, who is a surgeon, performed an operation on the applicant's right foot. The applicant contends that the operation was performed negligently and that as a result she has suffered injury and loss. The applicant's claim for damages consists of or includes damages in respect of personal injuries and accordingly, apart from the provisions of s23A of the *Limitation of Actions Act* 1958, the applicant's claim would, by s5(6) of that Act, have become statute barred after the expiration of three years after the cause of action accrued. Any cause of action would have accrued upon the performance of the operation and therefore, apart from the provisions of s23A, the applicant's cause of action would have been statute barred after 20 March 1974.

The summons before Gillard J was supported by the affidavit of the applicant and the affidavit of Mr HV Crock and in addition the applicant was examined *viva voce*. Nowhere, however, was the precise form of the action which it was desired to institute formulated before his Honour and this was, we think, a defect in the procedure adopted. We shall refer to it again later. His Honour ordered "that the period within which an action by the Applicant against the Respondent for damages for negligence may be brought be extended to expire on 1 December 1974." His Honour further ordered "that the costs of this Application be reserved to the trial judge at the hearing of the said action."

When the appeal came on for hearing, we were informed that no Writ had been issued out of the Supreme Court by the applicant against the respondent pursuant to the leave so granted by Gillard J but that a County Court summons claiming damages for personal injuries had been issued shortly before 1 December 1974. However, we do not think that Gillard J's order should be construed as authorizing the institution of an action in the County Court. An order made by a judge of this Court extending the time within which an action may be brought would ordinarily be understood as referring to an action in this Court and, assuming for the moment that a judge of this Court had power to authorize the institution of an action in the County Court, some express reference to that Court or at least to the power would be necessary before the order could be construed as authorizing the institution of an action in that Court. There is no such reference in Gillard J's order and, moreover, his Honour's reservation of the costs of the application to the trial Judge at the hearing of the action further confirms the conclusion that his Honour did not intend by his order to authorize the institution of an action in the County Court.

The fact that no writ has been issued out of the Supreme Court pursuant to the leave granted by Gillard J provides a sufficient ground for his Court to dispose of the appeal, for in strictness his Honour's order, construed as we have construed it, is spent and there is nothing for this Court to do. However, both parties to the appeal were anxious to have the principal subject of the appeal dealt with and the Court, in order to avoid the incurring of unnecessary expense, proceeded to hear the appeal without then deciding whether it would ultimately deal with the substance of the matter.

Having now heard the appeal fully argued and the questions raised being of general importance we think that we should express our views upon the questions which arise and the parties were prepared to take steps designed to facilitate the disposal of the appeal otherwise than upon the narrow ground of the construction of Gillard J's order to which we have already referred.

The failure of the applicant to issue a writ out of the Supreme Court within the time limited by Gillard J's order also gave rise to a debate as to whether his Honour could have, pursuant to s23A, extended the period within which an action might be brought in the County Court and we think that we should express our views on this question also.

Subs(2) of s23A provides in substance that where, on an application to a court by a claimant claiming to have a cause of action for damages for negligence, nuisance or breach of duty the damages claimed consist of or include damages in respect of personal injuries and certain express matters are established the court may in its discretion order that the period within which an action on the cause of action may be brought be extended in a specified way. Subs(4) of the section provides that an application under the section to a court shall be made by summons to be served on each person against whom the claimant claims to have a cause of action. By s3(1) of the Act, action is defined to include any proceeding in a court of law, so that a court in s23A comprehends not only the Supreme Court and the County Court but also a Magistrates' Court. If

no order is made under the section any action of the kind covered by the section would be subject to s5(6) of the Act which provides that no such action "shall be brought after the expiration of three years after the cause of action accrued."

For the applicant (the proposed plaintiff) it was submitted that the language of s23A(2) on its literal construction authorizes an application for extension of time to be made to any court, the Supreme Court, the County Court or a Magistrates' Court, and that any of those Courts may extend the time for the institution of proceedings in any other of them. Alternatively it was suggested that the court to which application was made could not only grant an extension of time for the institution of proceedings that would fall within the jurisdiction of that court but also extend the time within which an action might be brought in a lower court. Upon this argument the Supreme Court might authorize the bringing of an action in the County Court and the latter Court might grant an extension of time for the bringing of an action in a Magistrates' Court.

For the appellant (the intended defendant) it was submitted that a court can only order an extension of time within which an action may be brought in the court making the order.

Section 23A(2) certainly speaks of an application to a court. The word "court" is not defined and is spelt throughout the section without a capital letter. In these circumstances the context must be examined to see which of the possible meanings is intended. The court to which the application is made may order that the period within which an action may be brought be extended. The word "brought" is significant. In the context it means, we think, "commenced or instituted". See *Oxford English Dictionary*, s.v "bring" v, 6. where this meaning is given; "to institute, set on foot (an action at law)", quoting Blackstone, *Comm.* II 197 "If he... puts in his claim and brings his action within a reasonable time." Of. RSC O11, r1(g), *Knight v Lee* [1893] 1 QB 41; *Instruments Act* 1958, s126, s127, s128 and s130 in each of which sections the phrase used is "No action shall be brought..." See also s5 of the *Limitation of Actions Act*, and especially subs(6) which deals with the same class of action as s23A.

In *Tung v Augustine* [1973] VicRp 60; [1973] VR 616, Little J observed (at pp624-5):

> "The section enacts a procedure which enables a claimant to make application to a court to obtain an order extending the time within which he may commence an action. The power given to the court on an application under the section is to order that the period within which an action may be brought be extended. The language is language of futurity. It contemplates an action to be commenced in the future and commenced pursuant to an order made under the section. The court is empowered to order that the period within which an action may be brought be extended, so that it expires at the end of one year after the date referred to in par.(a). This language, in my opinion, requires that the order extending the period (and accordingly the application) be made before the expiration of that 'one year'. The order precedes the bringing of the action and the action is to be commenced within the 'one year'."

As Little J said in that passage the language is language of futurity and although it is language which is capable of meaning that any court may order that the period within which an action may be brought in another court be extended, that is not the natural construction to be placed upon it. The natural meaning to be given to the words is that where an application is made to a court, the court may in its discretion order that the period within which an action on the cause of action may be brought in that court be extended.

This conclusion is reinforced by the consideration that an extension of time pursuant to s23A is in the nature of an anticipatory reply to a defence which may be taken in the proceedings when instituted. The statute of limitations must be pleaded as a defence for reliance to be placed upon it and an extension of time within which proceedings might be brought, if granted, would be an answer to that defence. It would be unusual, to say the least, for one court to be dealing with an answer to a defence which may possibly be taken in a court of different jurisdiction.

In its practical application the contention for the applicant would have some very surprising consequences. It would mean that an extension of time granted in a Magistrates' Court would authorize the institution of proceedings in the Supreme Court or the County Court and that an extension of time granted in the County Court would authorize the institution of proceedings in the Supreme Court. It is not to be expected, without very clear language, that Parliament intended an

inferior court to be able to extend the time for bringing proceedings in the Supreme Court. If s79 of the *Judiciary Act* makes s23A of the *Limitation of Actions Act* applicable to proceedings instituted in Victoria in the High Court of Australia, it would mean that an extension of time granted in the Supreme Court or even the County Court would authorize the institution of proceedings in the High Court.

Faced with these difficulties, counsel for the applicant advanced an alternative argument, namely, that the section should be construed to mean that an extension of time granted in a court which had jurisdiction to deal with the subject matter of the proposed action would be an effective extension of time in any court which had jurisdiction to deal with the subject matter of the action when instituted.

The construction so contended for would however produce the result that even if the applicant specified the amount of his claim and an extension of time were granted in a lower court, an order made might still permit the institution of proceedings in a higher court. If, for example, a claimant obtained an extension of time in a Magistrates' Court and then decided for some reason, such as, for example, to have a jury trial, to proceed in a court of higher jurisdiction either the County Court or the Supreme Court, the surprising result would still remain that the Magistrates' Court would be entitled to authorize the institution of proceedings in both the Supreme Court and the County Court.

However, it is even more difficult as a matter of the construction of s23A, to read into the section a limitation of the kind suggested in the alternative submission for the applicant than to read it as authorizing any court to extend the time for the bringing of proceedings in any other court.

The expression "a court" is used in s23A to permit an application for extension of time to be made to any court whether the Supreme, County or Magistrates' Court, but this does not lead to the conclusion that an extension of time granted in one court authorizes the institution of proceedings in another court of different jurisdiction.

Counsel for the applicant referred to the possible situation which might arise of leave being obtained in this Court and it then being desired to proceed in a court of limited jurisdiction, but this situation can be readily dealt with under the existing provisions for transfer from one court to another after proceedings have been instituted.

For these reasons we think that an application for an extension of time must be made to the court in which it is proposed to bring the proceedings.

Furthermore, we think that the power given in s23A to order an extension of time applies only to particular contemplated proceedings. An extension can only be granted for "an action on the cause of action" and it will generally be necessary for the proposed action to be precisely formulated before leave is sought. This will usually be done by exhibiting to the affidavit in support of the application a draft of the statement of claim or particulars of demand which it is desired to issue. Although it is not necessary to decide the matter finally for the purposes of the present appeal, it appears to us, at present advised, that an application under s23A for an extension of time within which to bring an action on the cause of action claimed by an applicant can only be made before proceedings are instituted and not as was done in *Tung v Augustine*, *supra*, during the course of the proceedings. However, it might be argued that since an extension of time pursuant to the section is in the nature of an anticipatory reply to a defence of the *Statute of Limitations*, leave may be obtained even after the writ has been issued. In these circumstances we prefer to leave open that question and also the question whether an order could be made *nunc pro tunc*: cf. *Re Testro Bros Consolidated Ltd* [1965] VicRp 4; [1965] VR 18 at pp32-34.

Counsel for the applicant, in reliance upon the provisions of O58, r10 of the *Supreme Court Rules* that no notice of cross appeal is necessary, cross appealed on behalf of the applicant for an order that, if the provisions of s23A and the order of Gillard J did not authorize the institution of proceedings in the County Court, the time in which the applicant may institute proceedings against the respondent be extended to a date subsequent to the date on which judgment is given on this appeal and submitted a proposed statement of claim for proceedings in the Supreme Court.

Counsel for the respondent informed us that his client desired to have the matters of substance determined and that, if the appeal otherwise failed, his client did not object to this Court extending time in the manner sought by the applicant in her cross appeal. We accordingly deal with the substance of the matter.

In his reasons for judgment given on 31 October 1974 Gillard J decided the following three matters expressly in favour of the applicant, namely:

> (1) that material facts relating to the cause of action which the applicant claimed to have against the respondent were not known to the claimant until a date later than two years after the cause of action accrued and less than one year before the applicant made her application for extension of time on 25 September 1974, such material facts being the nature or extent of the personal injury caused to her;
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> (2) that there was evidence to establish the applicant's cause of action, apart from any defence founded on the expiration of the period of three years after the cause of action accrued; and
>
> (3) that the Court's discretion be exercised in favour of the applicant.

Although he did not expressly so state, in granting the extension of time which he did grant, his Honour must also have been satisfied that the material facts not known to the applicant would not have been known to her if she had taken all reasonable steps in the circumstances of the case to ascertain all the material facts.

On the appeal it was not disputed for the respondent that there was evidence to establish the cause of action apart from any defence founded on the expiration of the period of three years after the cause of action accrued, but it was submitted that the applicant had not established the other matters necessary to permit the Court to exercise its discretion in her favour under s23A and that there had been a wrongful exercise of discretion by Gillard J.

In order to deal with these matters it is necessary to set out the facts. The applicant relied upon affidavits by herself and by a surgeon, Mr HV Crock, and she was cross-examined on her affidavit and re-examined by her counsel. Gillard J in his reasons made it clear that he accepted the applicant's evidence and we proceed on the same basis. The evidence establishes the following facts:

In February 1971 the applicant consulted her general practitioner concerning a painful bunion on her right foot. Her general practitioner pointed out that she had a slight hammer toe condition on the fourth toe of the same foot and suggested to her that it would be just as well to have that corrected at the same time as the bunion was attended to. Her general practitioner gave her a letter of referral to the respondent who is a surgeon, and she first consulted him on 1 March 1971. The applicant's evidence is that the respondent informed her that what was involved in the hammer toe condition was simply a matter of straightening the toe, that about six months would be involved before the foot would be in good condition and before she would cease to be conscious of any soreness or discomfort in the foot and that the respondent did not suggest that there was any possibility that the operation might not be successful or that there would be any difficulties about the condition of the toe after six months, and did not suggest that the operation would involve the removal of any part of the bone structure of the toe. The respondent operated on the applicant's toe on 20 March 1971 and in fact removed the joint of the toe nearest to the foot so that the remainder of the toe was joined to the foot by flesh and skin, although the applicant, according to her evidence, was not aware of this fact until she consulted Mr Crock on 19 November 1971. After the operation by the respondent on 20 March 1971 the applicant's fourth toe was a constant cause of embarrassment, pain and inconvenience to her. It pointed upwards at an angle of about 30 degrees, it would not stay in position between the adjoining toes even when she attempted to keep it in position by using band-aids or bandages, it caused her considerable pain when she wore shoes and other inconvenience and it was unsightly in appearance and caused her embarrassment when in bare feet.

The applicant saw the respondent in April or May 1971 and again on 4 October 1971 by which time the appearance of the toe had not improved and she was suffering pain in the metatarsal heads of the right foot whenever she walked. The respondent suggested that she have a second operation either to shorten all the toes of the right foot or scrape the metatarsal heads of the

right foot. The applicant was very upset by this information and did not agree to the respondent carrying out either procedure. She consulted a chiropractor and then an orthopaedic chiropodist who prescribed orthopaedic sandals with a hard plastic screen which the applicant used only for a trial for an hour because the screen was very uncomfortable. On 19 November 1971 the applicant consulted Mr Crock who advised that a further operation was necessary and that the best thing to do was to amputate the fourth toe. A plastic surgeon to whom Mr Crock referred the applicant gave the same advice. For a variety of reasons including a dread of the thought of a second operation and a hope that the condition of the foot would improve the applicant put off having a second operation. After the first operation the second toe in her right foot elongated and by July or August 1973 this toe had elongated much more and was calloused on the end and was causing her bad pains particularly at night and she could not wear a shoe. This decided her to hurry things up and she had a second operation on 20 October 1973 when Mr Crock amputated the fourth toe remnant and trimmed the metatarsal head and at the same time shortened the second toe by arthrodesing the proximal interphalangeal joint.

Since that operation the second metatarsal head is still hurting, her small toe tends to push towards the big toe because of the gap caused by the removal of the fourth toe, the third toe is getting calloused on the end and the second toe is uncomfortable because of the shortening and it is stiffer than it was before.

In the course of his findings Gillard J said, "Nowhere did it appear clearly that Mrs McManamny, even at this moment, knew the nature or extent of the injury suffered by her."

For the respondent it was submitted on the appeal that, within the meaning of s23A(2) and s23A(3)(f) and s23A(3)(g) of the *Limitation of Actions Act* 1958, both the nature and the extent of the personal injury caused to the applicant by the operation performed by the respondent on 20 March 1971 were known to the applicant within two years of the date of that operation and more than twelve months before the applicant made her application for extension of time by the summons dated 25 September 1974. It was submitted that within the meaning of paragraphs (f) and (g) of s23(3) of the Act, the nature and extent of the personal injury meant the substantial nature and extent of the injury and that these were known to the applicant at the latest when she consulted Mr Crock on 19 November 1971 and learned from him that the proximal phalanx of the fourth toe had been removed by the respondent in the operation on 20 March 1971 and that this was the cause of the trouble she was having in her right foot.

In order to enable an extension of time to be granted to her, the applicant must show that a material fact or facts relating to the cause of action claimed by her was not known to her until a date later than two years after the cause of action accrued and less than one year before she makes her application. It is to be noted that the expression used is not "material facts constituting the cause of action" but "material facts relating to the cause of action." In the decision in *Harris v Gas and Fuel Corporation of Victoria* [1975] VicRp 60; [1975] VR 619, the Full Court decided that, in s23A, cause of action means all the facts which are material to be proved to entitle a plaintiff to succeed. If the provision had been that any of the material facts constituting the cause of action was not known to that claimant, the material fact, so far as injury was concerned, would have been the removal of the joint of the fourth toe and this was known to the applicant when she saw Mr Crock on 19 November 1971. However, in the reference to material facts, the expression "relating to the cause of action" is wider than the expression "constituting the cause of action" and comprehends not merely the actual injury done in the operation but any injury relating thereto. It follows we think that other injuries caused by or consequential on the initial injury are comprehended. However the applicant knew by the time she saw Mr Crock that she was having other injuries caused by or consequential upon the injury caused by the operation performed by the respondent.

By s23A(3) it is provided that for the purposes of subs(2) "material facts" in relation to a cause of action include—

"(f) the nature of the personal injury so caused; and

"(g) the extent of the personal injury so caused."

In the context the expression "so caused" is, we think, a reference back to the cause referred to in par. (e), that is, caused by the negligence, nuisance or breach of duty.

It is unnecessary and undesirable for us to attempt to state exhaustively what is comprehended in the expressions the nature and extent of the personal injury. As with the Full Court in *Harris v Gas and Fuel Corporation of Victoria*, *supra*, we consider that because of differences between the English legislation and our own, no great assistance is to be derived from the decisions on the English Act. We are of the opinion that in the present case significant aspects of the extent of personal injury caused to the applicant by the operation performed by the respondent were not known to her until after the operation performed by Mr Crock on 29 October 1973. We consider that the applicant has established a *prima facie* case that Mr Crock's operation was made necessary by the respondent's operation on 20 March 1971 and that accordingly the plaintiff has established a *prima facie* case that the disabilities suffered by her subsequent to Mr Crock's operation were also caused by the respondent's operation on 20 March 1971. The disabilities suffered since Mr Crock's operation on her first, second and third toes were, on the evidence, not known to her after Mr Crock's operation and they are significant disabilities. Accordingly, until they occurred she did not know the extent of the personal injury caused to her by the respondent's operation and that knowledge first came to her more than two years after the date of the respondent's operation and less than one year before she made her application for an extension of time.

In so deciding we are not to be taken as deciding that every further development of a condition or every sign thereof which may be manifested is comprehended by the expression "the extent of the personal injury". Questions of degree and significance are doubtless involved. However, the applicant has we think established that she was ignorant of the extent of the injury caused to her until the developments which took place after Mr Crock's operation had actually occurred.

The next question is whether the applicant has established that the extent of her injuries which first became known to her when developments occurred after Mr Crock's operation would not have been known to her if she had taken all reasonable steps in the circumstances of the case to ascertain all the material facts. The test to be applied is we think an objective one to be applied to a person in the position of the plaintiff and with her background and understanding. This test we think accords with the view of Starke J in *Anisiena v H Crane Haulage Pty Ltd* [1974] VicRp 81; [1974] VR 670 at p674 but is not a wholly subjective test as suggested by Kaye J in *Smith v Browne* [1974] VicRp 99; [1974] VR 842 at p846.

It was submitted for the respondent that the applicant should have enquired from Mr Crock what consequences could follow after the operation he proposed and that, if she had done so, she would have learned the substance of what in fact developed thereafter. There is no evidence from which we think it can be concluded that Mr Crock would have known and been able to inform the applicant of all the consequences which might occur to her first, second and third toes following the operation he performed. Further, since it became necessary for the applicant to have the operations which Mr Crock performed to relieve conditions which had developed, we are not satisfied that it was a reasonable step for her to enquire of Mr Crock as to all the possible further developments and the extent thereof. Accordingly, we are of the view that material facts, namely the extent of the personal injuries caused to the applicant by the respondent's operation, would not have been known to the applicant if she had taken all reasonable steps in the circumstances of the case to ascertain all the material facts.

Finally, it was submitted for the respondent that the learned judge had wrongly exercised his discretion in granting to the applicant an extension of time. In her affidavit the applicant said that she was not aware until she consulted her solicitor in this matter on 10 May 1974 that the period within which she may bring proceedings against the respondent was limited to three years. This ignorance of the law was not ignorance of a material fact (*Harris v Gas and Fuel Corporation*, *supra*). However, she also said that in addition she was not aware of the full nature or extent of any disabilities until some months after the operation by Mr Crock in 1973 nor was she aware of the extent to which personal injury had been caused to her by the original operation until the same time. We have held that this ignorance of the extent of her injury until some time subsequent to Mr Crock's operation was ignorance of a material fact. His Honour was influenced by this consideration and also by the considerations that there had been no inordinate delay and that,

so far as he could see and in the absence of any facts placed before the Court by the respondent, no injustice should have been done to the respondent by the passage of time but grave injustice might be done to the applicant if an extension of time were not granted. In our opinion it has not been shown that the learned judge exercised his discretion on any erroneous basis or that it was not reasonably open to him to exercise his discretion in the manner he did. We accordingly conclude that it has not been established that the order made by his Honour should be set aside.

However, the applicant has not availed herself of that order by instituting proceedings in the Supreme Court within the extended time allowed by his Honour. Having regard to the fact that the respondent does not oppose an extension of time being granted by us if the appeal otherwise fails, we consider that the applicant's cross-appeal should be allowed and that we should extend the time in which the applicant may institute the proceedings embraced by the draft statement of claim with which we have been supplied until a date one month after the date of this judgment.

Appeal dismissed with costs. Cross-appeal allowed with costs. Order that the period within which the applicant may bring an action upon the cause of action set forth in the draft statement of claim contained in the schedule to this order be extended to expire on a date one month after the making of this order. It is directed that this order be passed and entered forthwith.

Solicitors for the appellant: Henderson and Ball.
Solicitor for the respondent: Thomas Burke.
