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SUPREME COURT OF VICTORIA

JURIC v DIXON SUPPLY CO PTY LTD

Menhennitt J

16 June 1976 — [1976] VicRp 76; [1976] VR 701

CIVIL PROCEEDINGS – STATUTE OF LIMITATIONS – AMENDMENT OF CLAIM – WHETHER CLAIM IN AMENDED FORM FAILED BECAUSE OF STATUTE OF LIMITATIONS – DIFFERENCE BETWEEN THE CAUSE OF ACTION OR A NEW CASE.

Appeal against Master's decision permitting plaintiff to deliver an amended statement of claim arising in a claim for personal injuries in an industrial accident. The Ground of Appeal was that the plaintiff would now be able to rely on claims which were statute barred at the time of the hearing before the Master.

HELD: Appeal allowed in part.

1. The law which is applicable to this issue has been clearly and authoritatively laid down by the High Court which has said that the relevant concept is the cause of action involved as distinct from the case involved, or whether or not a new case is involved. The High Court has also said that in a case where a cause of action sought to be added is statute barred at the time the application to amend the statement of claim is made, the only proper exercise of the discretion is to refuse to permit the amendment to plead a new cause of action. Where there is not a new cause of action sought to be relied upon, but only particularization of facts which constitute the cause of action, it is certainly within the discretion of the Judge to permit the amendment, and that commonly it would be said that the proper exercise of the discretion is to allow the amendment, in that questions of surprise and disadvantage can be met by adjournment and appropriate orders as to costs.

Black v The City of South Melbourne **[1965] ALR 698; (1964) 38 ALJR 309; (1964) 11 LGRA 179; and**

Renowden v McMullin **[1970] HCA 24; 123 CLR 584; [1970] ALR 865, applied.**

2. The cause of action being for negligence, the decision of the High Court in *Black v The City of South Melbourne*, *supra*, leads to the conclusion that it is a proper exercise of the Court's discretion to permit the plaintiff to make all the amendments he desires to make to paras. 2, 3, 4 and 5 of his statement of claim. Those amendments do no more than particularize the facts by which he proposes to sustain his cause of action, and even although the facts are significantly altered they do not change the cause of action. It being within the Court's discretion to allow those amendments, the proper exercise of the discretion is to allow them, because the amendment is being made before trial and therefore there will be no elements of surprise by the time the case comes to trial and there is no evidence before the Court of any other disadvantage. Accordingly, the appeal is dismissed insofar as it relates to paras. 2 to 5 inclusive of the statement of claim.

3. On the other hand, so far as paras 6 to 9 inclusive of the amended statement of claim are concerned, those appear to plead what is clearly a new cause of action based upon alleged breach of a statutory duty to be found in the *Lifts and Cranes Act* 1967. That is clearly a new cause of action within the decision in *Renowden v McMullin*, *supra*, and equally clearly the very kind of new statute barred cause of action which should not be permitted by amendment. Accordingly, the appeal should be allowed in respect of paras. 6 to 9 of the statement of claim because they plead a new cause of action.

O'Grady v Botany Wools (Australia) **(1964) 64 SR (NSW) 359, applied.**

MENHENNITT J: This is an appeal from an order made by Master Collie on 24 May 1976. The Master had before him a proposed amendment to a statement of claim which is also before me, and the Master granted liberty to the plaintiff to deliver that amended statement of claim in the form annexed to the summons, which is in the form in which it has been before me.

The defendant objected to the amended statement of claim and pursues that objection on this appeal. The substance of the objection is that the plaintiff, by the amended statement of claim, except in so far as he desires to plead additional particulars of injury, is seeking to rely upon claims which are and were at the time the matter was before the Master statute barred.

The statement of claim endorsed on the writ reveals that the plaintiff is claiming damages for personal injuries arising out of an industrial accident which happened on 22 October 1968, so that the three year period of the *Statute of Limitations* expired on 22 October 1971. That is, over four years ago.

It appears to me that the law which is applicable to this issue has been clearly and authoritatively laid down by the High Court in decisions which are binding on me. Those decisions are: *Black v The City of South Melbourne* [1965] ALR 698; (1964) 38 ALJR 309; (1964) 11 LGRA 179 and *Renowden v McMullin* [1970] HCA 24; 123 CLR 584; [1970] ALR 865; 44 ALJR 283. In those cases it appears to me that the High Court has said that the relevant concept is the cause of action involved as distinct from the case involved, or whether or not a new case is involved. In *Renowden v McMullin*, *supra*, the High Court has also, it appears to me, said that in a case where a cause of action sought to be added is statute barred at the time the application to amend the statement of claim is made, the only proper exercise of the discretion is to refuse to permit the amendment to plead a new cause of action. In *Black v The City of South Melbourne*, *supra*, it appears to me that the High Court has said that where there is not a new cause of action sought to be relied upon, but only particularization of facts which constitute the cause of action, it is certainly within the discretion of the Judge to permit the amendment, and that commonly it would be said that the proper exercise of the discretion is to allow the amendment, in that questions of surprise and disadvantage can be met by adjournment and appropriate orders as to costs.

In *Black v The City of South Melbourne*, Barwick CJ, with whose judgment Kitto and Taylor JJ agreed said, *inter alia*, at p700:

> "It seems to me quite plain that, throughout, the plaintiff's cause of action did not change, though his particularizing of the facts by which he proposed to sustain that cause of action did significantly alter."

It is significant that his Honour twice referred to the "cause of action" as being the relevant concept. He continued:

> "It would, in my opinion, have been an improper exercise of judicial discretion for the trial judge in this case to have refused the plaintiff the opportunity to present his proofs of that cause of action differently to the manner in which he had originally proposed. Questions of surprise and disadvantage because of a change of course in proof can almost always be met by adjournment and appropriate orders as to costs. It would certainly have been so in this case. As there was, in my opinion, no new cause of action involved in the changed particulars, no question of the statute of limitations fell for consideration."

I draw attention again to the fact that his Honour again referred to "cause of action" as the relevant concept.

In *Renowden v McMullin*, *supra*, the actual decision of the majority of the High Court was that the statement of claim rather than the general endorsement on the writ was to be looked at in deciding whether an amendment should be allowed, and that because the amendment would have pleaded a new cause of action which was statute barred, the amendment should have been refused and was rightly refused by the Full Court of this Court. That the concept of the "cause of action" was the relevant concept is clear from what Owen J said in giving the judgment which was concurred in by the other majority members of the Court when he said at (CLR) p611 in referring to the decision of *Hall v Meyrick* [1957] 2 QB 455; [1957] 2 All ER 722,

> "On appeal" (that is to the Court of Appeal), "it was held that the amendment should not have been allowed since the amended cause of action was one which would have been statute-barred had a writ been issued at the time when the amendment was sought."

And in citing with approval passages from the judgments in the Court of Appeal, Owen J cited passages where Hodson LJ and Ormerod LJ had both referred to "cause of action" as the relevant concept. In the High Court case the additional cause of action sought to be relied upon was one in contract, in addition to a cause of action based upon breach of statutory duty of care. It is not without significance, in my view, that the statutory duty of care could have arisen only if there had been a contractual relationship between solicitor and accountants, because the accountants were engaged to audit books, which must inevitably have involved a contract

of some kind. Nonetheless it was held by the High Court that the cause of action in contract, being statute barred, should not be permitted to be pleaded by an amendment to the pleadings. Equally significant is the fact that in the course of his reasons for judgment Owen J referred to and said he agreed entirely with the decision of the Full Court of New South Wales in *O'Grady v Botany Wools (Australia)* (1964) 64 SR (NSW) 359. That case is very close to the present case in one aspect, because in the New South Wales case, the plaintiff having declared in negligence, after the elapse of a period of three years sought to amend his declaration by adding a count based upon a breach of statutory duty. As Owen J said at (CLR) p613:

> "If a writ had been issued at the date of the application for amendment, the cause of action sought to be added would have been statute barred by certain provisions of the Workers' Compensation Act."

His Honour continued:

> "The amendment was allowed by the judge to whom the application was made and an appeal was successfully brought to the Full Court where the principal judgment was delivered by Walsh J His Honour summed up the position in a passage with which, with respect, I entirely agree. He said:
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> > "For the purposes of deciding whether an amendment should be refused because at the time it is sought the statutory time limit has expired, then the plaintiff is treated as having already commenced his action in respect of the claims contained in the declaration, and those claims only, and he is not permitted to introduce new claims by amendment, for this would be regarded as being in substance, although not in form, the bringing of a new action for claims which are already barred by statute.'
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> I would only add that I do not find any injustice in applying what Lord Esher described as 'the settled rule of practice'."

The High Court applied that decision, relating to pleadings in New South Wales at the time, to pleadings in a Victorian action where the pleadings were in accordance with the *Supreme Court Rules*. The settled rule of practice as stated by Lord Esher comes from the classical judgment of Lord Esher in *Weldon v Neal* (1887) 19 QBD 394, at p395; 56 LJQB 621 where his Lordship said:

> "We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the *Statute of Limitations*, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so."

And it is to be noted that Lord Esher also referred to the concept of a cause of action.

Owen J concluded his judgment in *Renowden v McMullin* at (CLR) p613, in this way:

> "A statement of claim or, in New South Wales, the plaintiff's declaration, identifies the case that the defendant is called upon to answer. He is entitled to assume that any other and different claim which is not included in the plaintiff's pleading but which the writ is wide enough to cover has been dropped from the action and if, at some later date, the plaintiff seeks to re-introduce it he ought not in fairness to the defendant be allowed to do so if by that time the claim would have been statute barred had an action then been begun to enforce that cause of action."

It is to be noted that the High Court have not stated the reservation which was stated by Lord Esher at the end of the passage which the High Court cited, and in my view it was said, as I have earlier said, that the only proper exercise of the discretion is to refuse to permit an amendment which introduces a statute barred cause of action."

Insofar as the decision of Lush J in *Christodoulopoulos v Rowntree and Co (Australia) Pty Ltd* [1971] VicRp 46; [1971] VR 378, reaches a different conclusion, in my respectful opinion it is contrary to the two decisions of the High Court which I have referred to and is one which I should not follow.

I apply those principles of law to the amended statement of claim sought to be relied upon

by the plaintiff. It appears to me that in the original statement of claim the cause of action relied upon by the plaintiff is to be found in paras. 4 and 5 thereof, and indeed in only part of para. 4, because para. 5 reads:

> "The plaintiff's injuries aforesaid were caused by the negligence of the Defendant and by the negligence of its servants or agents."

That appears to me to be pleading a cause of action in negligence on the part of both the defendant and its servants and agents thereby imposing vicarious responsibility on it.

The recitation in paras. 2 and 3, and indeed 4, about the circumstances appear to me to be narrative only and to fall squarely within the language used by Barwick, CJ in *Black v The City of South Melbourne*, *supra*, as being language which particularized the facts by which the plaintiff proposed to sustain his cause of action.

The cause of action being for negligence, it appears to me that the decision of the High Court in *Black v The City of South Melbourne*, *supra*, leads to the conclusion that it is a proper exercise of my discretion to permit the plaintiff to make all the amendments he desires to make to paras. 2, 3, 4 and 5 of his statement of claim. In my view those amendments do no more than particularize the facts by which he proposes to sustain his cause of action, and even although the facts are significantly altered, as Barwick CJ said in *Black v The City of South Melbourne*, *supra*, they do not change the cause of action. It being, in my view, within my discretion to allow those amendments, I think the proper exercise of the discretion is to allow them, because the amendment is being made before trial and therefore there will be no elements of surprise by the time the case comes to trial and there is no evidence before me of any other disadvantage. Accordingly, I propose to dismiss the appeal insofar as it relates to paras. 2 to 5 inclusive of the statement of claim.

On the other hand, so far as paras 6 to 9 inclusive of the amended statement of claim are concerned, those appear to me to plead what is clearly a new cause of action based upon alleged breach of a statutory duty to be found in the *Lifts and Cranes Act* 1967. That is in my view clearly a new cause of action within the decision in *Renowden v McMullin*, *supra*, and equally clearly the very kind of new statute barred cause of action which should not be permitted by amendment, as decided by the Full Court of the Supreme Court of New South Wales in *O'Grady v Botany Wools (Australia), supra*, the decision in which and the reasoning in which were approved by the High Court in *Renowden v McMullin*, *supra*. For that reason, in my view the appeal should be allowed in respect of paras. 6 to 9 of the statement of claim because they plead a new cause of action.

I would add, however, that if the test were the test which had previously been laid down by the Full Court of this Court, namely whether or not the amended pleading introduces a new case, in my view paras. 6 to 9 should not be allowed because they do introduce a new case. They are based entirely on allegations relating to breach of statutory provisions concerning a crane. One looks in vain in the original statement of claim for any reference to a crane. The reference there is to the work being supported on a metal frame, and it was matters associated with that which are relied upon, and to have a case based upon alleged breach of statutory duty relating to a crane is in my view an instance of a new case which on the other line of authority, which in my view has been rejected by the High Court, would also not be permissible. So that applying either the test which in my view is the apposite one, or the alternative test, which is a less stringent one but has been in my view rejected by the High Court, on either basis paras. 6 to 9 inclusive should not have been permitted, to be pleaded and those amendments should not have been allowed.

The effect of what I have decided is that the plaintiff is permitted to rely upon para. 5 which includes under the particulars reference in particulars (f) and (g) to non-compliance with the provisions of the *Lifts and Cranes Act* and the regulations made thereunder in establishing negligence. In my view, those are no more than particulars of negligence, and as the cause of action is not new, it being still based on negligence in para. 5, just as in a motor collision case, it is permissible to rely upon breach of a road traffic regulation as evidence of negligence, but not as establishing negligence as a separate cause of action, so here, in my view, as the cause of action is not new, it is permissible for the plaintiff to rely on breach of the Act and regulations, if that can be made out, as evidence of negligence whilst not establishing negligence and not establishing an independent cause of action.

I accordingly make the following order:

I allow the appeal from the order of Master Collie made 24 May 1976. I order that that order be varied by substituting for para. 1 thereof the following, namely, that the plaintiff be at liberty within seven days to deliver to the defendant an amended statement of claim in the form of paras. 1 to 5 inclusive and 10 of the amended statement of claim in the form annexed to the summons, but not in the form of paras. 6 to 9 of that amended statement of claim. On the question of costs of this appeal, the defendant has succeeded in part and failed in part. On the other hand, the plaintiff has pursued both the portions of the statement of claim that I have allowed and the portions which I have not allowed. In those circumstances, it appears to me that both parties have succeeded on a substantial point and failed on a substantial point, and the just order as to costs is that there should be no order as to costs of this appeal. When the Master ordered that the question of costs be reserved, I took that to mean reserved, presumably, for the trial Judge, and I see no reason for varying that order. He presumably had in mind questions as to what would happen on the trial and to what extent the plaintiff might succeed on the trial. It may be that that will not be so clear now, because if the cause of action based upon the statute were still in the statement of claim, the jury would presumably be asked separate questions, and that may not now happen. However, that may not have been all that the Master had in mind, and I see no reason for me varying that order, so I vary the order only to the extent that I have done and I make no order as to the costs of the appeal; and I certify for counsel. Order accordingly.

Solicitors for the plaintiff: Williams, Winter and Higgs.
Solicitors for the defendant: Hedderwick, Fookes and Alston.
