Tendering - Recovery of Unsuccessful Tenderers' Fees Application to Stay, Dismiss or Strikeout

State of New South Wales v McCloy Hutcherson Pty Limited, Federal Court of Australia, Beazley J, (1993) 116 ALR 363.

Facts

The New South Wales Public Works Department ("PWD") selectively invited tenders for the construction of Rankin Park Hospital in Newcastle. Six groups were invited to tender, and the tender was let in November 1986 to McCloy Hutcherson Pty Limited, a joint venture company.

After certain evidence came to light in the Royal Commission Into Productivity In The Building Industry In New South Wales, the PWD (the applicant) claimed that the six tenderers had entered into a secret arrangement whereby the successful tenderer would pay $500,000 to each unsuccessful tenderer and that each tenderer would make provision in the calculation of its tender price for this "unsuccessful tenderers' fee".

The PWD commenced proceedings by statement of claim on 3 July 1992. The PWD claimed a total of $2.5 million, less the amounts it recovered from certain of the other tenderers in settlements, based on breach of contract and of sections 45(2), 45A(1) and 52(1) of the Trade Practices Act 1974 (Cth), conspiracy, money had and received, fraud and deceit.

This Application

By interlocutory motion, the respondents sought to stay or dismiss part or all of the proceedings or strike out part or all of the statement of claim, arguing firstly that if the secret arrangement be proved, the tenderers were joint tort-feasors and the PWD's settlements with some released the others; secondly that the claims were statute-barred; and thirdly that certain of the claims sought be stuck out as not revealing a cause of action known to law.

Held

Dismissing the respondents' motion:

(1) the settlements did not release the respondents;
(2) the claims were not statute-barred;
(3) no part of the statement of claim would be struck out.

Were they joint tort-feasors?

The respondents alleged that the tenderers, assuming that they had acted wrongly, were joint tort-feasors and that therefore liability to the PWD was released as a consequence of the PWD having released the other joint tort-feasors. The PWD argued that the tenderers were not joint tort-feasors and denied that it had given a release to the other tenderers and that, in any event, the rule that a joint tort-feasor is released by the release of another joint tort-feasor had been abolished by the operation of Section 5 of the Law Reform (Miscellaneous Provisions) 1946 (NSW).

Beazley J found that the tenderers did act in concert so as to make them joint tort-feasors because the effect of the arrangement was that each would act in an agreed manner depending on who was selected as the successful tenderer.

Also because conspiracy, which was claimed by the PWD, is a joint tort, this was enough to render them joint tort-feasors.

The Release

The PWD had reached agreement with five of the tenderers. The terms of the settlements differed slightly, but basically provided that the PWD was prepared to accept a certain amount of money in full and final settlement of all claims arising out of any past participation of the tenderer in the practice of unsuccessful tenderer's fees in relation to the allegations made at the Royal Commission.

In considering the effect of the settlements, Beazley J drew a distinction between a release and a covenant not to sue. Her Honour said that where a document upon its proper construction reserves the parties' rights against other tort-feasors, it operates, not as a release, but as a covenant not to sue. She then considered the circumstances in which an agreement with one joint tort-feasor will not be construed as a release as opposed to a covenant not to sue and said:

(a) it was not necessary for there to an be express reservation of rights against other tort-feasors;
(b) in construing the agreement the intention of the parties was to be carried out, and if it was clear that the right against the joint tort-feasor was to be preserved, then the agreement would be construed as a covenant not to sue.

Beazley J held that the settlement agreements in question did not constitute a release. The factors which supported this conclusion were:

(i) the term "release" was not used (although this was not considered conclusive);
(ii) the PWD was pursuing individual settlements with each unsuccessful tenderer and only for the amount that each tenderer received. This was only consistent with an

intention not to sue the individual tenderer and inconsistent with an intention to release all others;

(iii) some settlements were not confined to the Hospital project. The terms were such that had it turned out that any of the contractors had participated in such arrangements on other PWD works, the settlement would extend to that project also. If there had been such an arrangement on another project it could have involved tenderers other than the respondents. To construe each settlement as a release would therefore mean that the PWD was releasing unknown joint tort-feasors in respect of unknown and unquantified wrongful acts. This favoured the conclusion that, on its proper construction, the settlement document was a covenant not to sue.

If the settlement did constitute a release, what was the effect of Section 5 of the Law Reform (Miscellaneous Provisions) Act?

Because of her conclusion that the documents in question constituted covenants not to sue and not releases, it was not necessary for Beazley J to decide this point. However, Her Honour considered, by way of obiter, the effect of Section 5 of the Law Reform (Miscellaneous Provisions) Act.

The PWD argued that should the settlement document be construed as a release, the rule in *Duck v Mayeu* [1892] 2 QB 511 - that a release of one joint tort-feasor discharges the others - had not survived the enactment of Section 5.

Section 5 provides:

"(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) -

(a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage ... "

In considering the effect of Section 5, Beazley J examined various texts and looked particularly at the comments of the High Court in *XL Petroleum (NSW) Pty Limited v Caltex Oil (Australia) Pty Limited* (1985) 155 CLR 448, where Brennan J stated:

> "... as section 5(1)(a) confers on a plaintiff the right to recover judgments in successive actions against respective tort-feasors, the unity of the common law cause of action against all joint tort-feasors is severed".

The rule that a release of one joint tort-feasor effects a total release of all other joint tort-feasors was based on the principle of "one cause of action". This principle was also the foundation of the rule that a judgment obtained against one joint tort-feasor was a bar to an action against others.

Beazley J then concluded that it would be illogical that certain aspects of a rule be abrogated by a statute which does away with the foundation upon which the rule is based, while other aspects of the rule remain and that this would be the result of holding that the rule as to the release of joint tort-feasors survived the enactment of Section 5. Beazley J stated that if she had to decide the point, she would find that the rule as to release had also been abrogated by Section 5.

Statute of Limitations

The respondent's argued that the claim for damages under s. 82(1) for breaches of Parts IV and V of the Trade Practices Act and the claim in deceit were statute barred. The former because the proceedings were commenced more than three years after the cause of action accrued; the latter because the claim was first introduced into the pleadings more than six years after the cause of action accrued by the amendment in February 1993.

The PWD relied on the High Court's decision in *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, that in a claim for damages under s. 82(1), the limitation period under s. 82(2) does not begin to run until damage is sustained.

The respondents alleged that the damage was sustained at the time of entering the contract on 2 November 1986, that is, when the PWD became liable for the inflated contract price. Alternatively, if time did not commence to run until some later date, it was no later than the time damage occurred which was the date of the first progress payment on 28 November 1986.

The PWD's first response was that this issue should not be dealt with in an interlocutory application. But it also disputed that time began to run either at the time of entering the contract or when the first progress payment was made. The PWD offered three reasons for this:

1. that it could not be ascertained, from the evidence at the time, which of the progress payments contained a component of the $2.5 million, so that it could not be said when damage was sustained;
2. that the principle of fraudulent concealment applies to claims under s. 82(1); and
3. that, as to the claim in deceit, it was protected by the provisions of s. 55 of the Limitation Act 1969 (NSW).

The first point was not supported by the pleadings at the time of the application, and the PWD sought to amend the statement of claim to reflect this submission. Despite having already amended four times, and the respondent's resistance, Beazley J was prepared to allow the amendment subject to an appropriate order for costs. Her Honour's reasons were that the proceedings were still at an early stage, and that other steps necessary for the hearing were yet to be undertaken.

The second reason, it was argued, operated to delay the commencement of the limitation period until at least 1991 when evidence was given before the Royal Commission. Although there was authority that the principle of conceal-

ment did not apply to claims under the Trade Practices Act, the PWD sought to rely on Toohey J in *Arcadi v Colonial Mutual Life Assurance Society Ltd* (1984) ATPR 40-743 and *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 347. Her Honour found that neither of these cases supported the PWD's argument. Nor was it appropriate to rely upon the Judgment of Deane J in *Hawkins v Clayton* (1988) 164 CLR 539 in an interlocutory application where there may be factual issues yet to be determined, pertinent to the application of the principles.

The third reason offered by the PWD was s.55 of the Limitation Act. That section effectively discounts the time which elapses between the commencement of the limitation period and the date on which the person having the cause of action first discovers, or may with reasonable diligence discover, the fraud, deceit or concealment. Her Honour referred to *Hamilton v Kaljo* (1989) 17 NSWLR 381 and found that it was necessary to prove some form of "dishonesty or moral turpitude" in order to obtain the benefit of s. 55. Her Honour found that in circumstances where it was alleged that the arrangement between the tenderers provided that the unsuccessful tenderer's fees not be disclosed to the PWD, the PWD had established sufficient grounds to argue that the provisions of s. 55 operated in its favour.

Accordingly, the application to strike out the claims on the grounds that they are statute barred was rejected.

Application to strike out portions of the statement of claim

The respondents sought also to strike out specific portions of the statement of claim.

Money had and received - Unjust enrichment

The respondents argued that a count for money had and received cannot apply to a valid and subsisting contract as was the case here; such a claim must be based (inter alia) in mistake which was not alleged in the statement of claim. The PWD argued that it is not limited to these traditional categories and referred to a number of recent High Court decisions in relation to unjust enrichment, unconscionable conduct and estoppel. Beazley J, although not of the opinion that a precise formulation of the proposed common money count was necessary, allowed the PWD to amend its pleadings with an appropriate order for costs.

Claim in conspiracy

The respondents argued that the conspiracy alleged by the PWD is no more than making the agreement itself, and that in such circumstances the conspiracy merges in the substantive claim. Beazley J referred to both *Trade Practices Commission v Allied Mills Industries Pty Ltd* (1980) 32 ALR 570 and *Ward v Lewis* [1955] 1 WLR 9 and found that these cases expounded rules of practice, not substantive rules of law. Her Honour found it was not appropriate to apply such a rule in the circumstances where the PWD was faced with a limitations defence to the substantive claim. If that defence were to succeed, the PWD would be left with only the conspiracy claim.

Claim pursuant to Part IV of the Trade Practices Act

S. 45A(1) requires that an offending arrangement have the purpose or likely effect of "fixing, controlling or maintaining" the price for, or allowance in relation to, goods or services to be supplied by the parties to the arrangement in competition with each other. The respondents argued that the PWD failed to allege a purpose or effect in contravention of O 11, r 2 of the Federal Court Rules. Beazley J agreed with this assertion, but gave leave to amend.

Claim in deceit/fraud

The respondents argued that a claim in deceit and fraud cannot be made out by silence, there being no duty to disclose the matters in the pleadings. In the absence of any evidence, and at such an early stage in the proceedings, her Honour declined to find that a claim for deceit and fraud could not be made out.

Contract/implied terms

The respondents also alleged that the implied terms pleaded by the PWD would never be implied by a court as they were neither necessary for business efficacy nor obvious. Beazley J considered the particulars provided to support the implied terms and decided that it was not possible to say that the terms alleged could not, as a matter of law, be implied.

Accordingly, the notice of motion was dismissed, and the applicant was granted leave to amend the statement of claim.

Comments

This case illustrates the dangers in bringing a notice of motion to strike out a statement of claim, particularly at an early stage in the proceedings. Even where the statement of claim was deficient, Beazley J was prepared to grant leave to amend the statement of claim and correct the deficiencies. The reluctance to strike out pleadings on the basis that they either failed to disclose a cause of action or are otherwise embarrassing is evident in other recent cases: *Nauru Phosphate Royalties Trust v Matthew Hall Mechanical & Electrical Engineers Pty Ltd* (Unreported - Supreme Court of Victoria 1992) and *Ralph M Lee Pty Ltd v Gardner & Naylor Industries Pty Ltd* (Supreme Court of Queensland, 1991) are but two examples. In both those cases the claim was presented globally with little, if any, particulars bridging the hiatus between the breaches of contract alleged, the resulting delay and the damages sustained. In both instances the application failed, largely on the basis that their deficiency could be rectified by appropriate orders for particulars.

- **Lisa Jones and Andrew Mansour, solicitors, Allen Allen & Hemsley.**