

WORKERS COMPENSATION & LIMITATION OF ACTIONS - Statutory Interpretation - s 23 Workers Compensation Act and ss 3, 5, 9, 12 & 44 Limitation Act - Whether a payment of compensation has been "received" by a worker - Consequential effect on applicable limitation periods under s 23 Workers Compensation Act and s 12 Limitation Act - Applicability of s 44 Limitation Act in either case.

DD Vershuuren v Toms' Tyres Corporation Ltd (22/10/92) Court of Appeal (Angel, Mildren & Morling JJ)

On 13/12/84, the appellant (A) was allegedly injured at his workplace. His employers (the managers of the respondent company (R)) attended with him at a doctor's surgery on 13 and 14/12/84 and personally paid the accounts for medical treatment administered on both days. They were later reimbursed by R. A was paid an ordinary salary by R on 14/12/84, although absent from work for most of 13/12/84 and all of 14/12/84. On 19/7/89, A issued a writ claiming damages from R arising from injured allegedly sustained whilst employed by R on 13/12/84. The action was based on breach of duty of care. The writ was endorsed with an application for extension of time pursuant to s 44 of the Limitation Act. By way of defence, R claimed the action was statute barred by virtue of s 23(3A)(a) of the Workers Compensation Act, in that proceedings were commenced by writ filed more than three years after the date upon which A first received payment or the first payment of compensation pursuant to the Workers Compensation Act arising out of an injury. R also put in issue whether or not A was entitled to an extension of time pursuant to s 44 of the Limitation Act. It was held, on a preliminary finding by the trial judge, that A had received compensation under the Workers Compensation Act as contemplated by s 23(3A) pursuant to s 44(1) of the Limitation Act. On appeal it was submitted that the trial judge had erred in finding that "workers compensation" payments had been received by A for 13 and 14/12/84 and that A was statute barred from suing for damages.

Supreme Court Notes

by Anita Del Medico

Held, per curiam, setting aside Martin J's answers to the preliminary questions tried before trial, and finding that: (i) A had not received compensation under the Workers Compensation Act as contemplated by s 23(3); (ii) A's causes of action not subject to the limitation period prescribed by s 23(3A) of the Workers Compensation Act; and (iii) A's causes of action were subject to the limitation periods prescribed by s 12 of the Limitation Act:

1. Section 23(1) of the Workers Compensation Act draws a distinction between "compensation" and "any payment by way of compensation." The effect of s 23(1) is that, where a worker has not received a payment of compensation under the Act, s 23(1) does not preclude him from commencing an action for damages at common law. Section 23(3A) does not apply because s 23(3) relates to the situation where the worker has received compensation under the Act. It follows that where the worker has not received any compensation under the Act, the relevant limitation provision is s 12 of the Limitation Act (ie three years from the date cause of action first accrued). Where the worker has received compensation under the Act, the s 23(3A) limitation period operates (ie three years after the date upon which he received payment or the first payment of compensation under the Act). The payment of medical expenses on 13 and 14/12/84 by R were not caught by s 23(3A), if for no other reason than that they were not payment which A "received." For it to be established that a worker has "received" payment of compensation under the Act, it must first be shown that there is an entitlement to such payment, and second that the payment was received by the worker with knowledge that it was being paid in respect of that entitlement. As to the payment of A's wages on 14/12/84 being compensation, their

Honours found that the evidence did not establish that upon receipt of his wages, A did so knowing it to be in part, at least, payment of compensation under the Act.

The burden of proof is upon R to prove the character of the payments.

Hansen v Totalizator Agency Board [1965] VR 721; *Sokolowski v Colda Refrigeration Co Ltd* [1960] NSWLR 468, applied.

2. As to whether A was entitled to an extension of time to commence proceedings pursuant to s 44(1) of the Limitation Act, held that ss 3 and 5 of this Act did not operate to exclude the Workers Compensation Act from the ambit of s 44. S 44(1) of the Limitation Act, on its face, gives power to the Court to extend a time limitation prescribed in "this or any other Act..." This broadly expressed power should only be confined within narrow limits if there is a plain and unambiguous provision elsewhere in the Act which requires this to be done.

Section 5 is not such a provision; it is concerned with the preservation of special limitation periods prescribed by enactments other than those referred to in s 3.

Section 5 operates to preserve those limitation periods; it does not deprive s 44 of its efficacy to permit the making of orders for extensions of periods of time which are prescribed by the Limitation Act or any other Act. Since all the acts referred to in s 3 are repealed or amended, it is unlikely in the extreme that they are the acts referred to in s 44(1).

The reference in s 44(1) to "any other Act, or an instrument of a legislative or administrative character..." cannot properly be confined so as to apply only to the transitional provisions (s 9 Limitation Act), which refer to actions and the bringing of proceedings. The Limitation Act was plainly intended to codify the law on the limitation of actions and to make

provision for extensions of limitation periods in appropriate cases.

Fersch v Power & Water Authority (unreported per Martin J, 14/8/89), not followed.

3. In the event that s 23(3A) of the *Workers Compensation Act* did apply to the circumstances of this case, their Honours would have held that A was entitled to apply for an extension of time limited by s 23(3A) of that Act, pursuant to s 44(1) of the *Limitation Act*.

[The matter was remitted to Martin J for reconsideration as to the preliminary question of whether A was entitled to an extension of time limited to him by s 12 of the *Limitation Act* pursuant to s 44 of that Act.]

Appeal from decision of the Court as to preliminary questions to be tried before trial in relation to the operation of s 23 *Workers Compensation Act* and ss 12 and 44 of *Limitation Act*.

J Waters, instructed by Cridlands, for the Appellant; *S Southwood*, instructed by Ward Keller, for the Respondent.

CORPORATIONS - Liquidator - Corporations Act 1990 (Cth) ss 473, 532(2) - grounds to be established for removal of liquidator

Aboriginal & Torres Strait Island Commission v Jurnkurakurr Aboriginal Resource Centre Aboriginal Corporation (In Liquidation) (16/6/93) Asche CJ.

J, a partner of the firm Pannell Kerr Forster ("PKF") was appointed provisional liquidator of the Jurnkurakurr Corporation ("Corporation") in November 1991 and subsequently became liquidator. Section 532 of the Corporations Act requires the court's leave for such appointment; this issue not being addressed in November 1991, an application was made in May 1992 for it to be rectified. This application was opposed on behalf of one

of the creditors (Spice Cake Pty Ltd) on the basis that K, also a partner at PKF, was appointed receiver and manager of the Corporation's property in November 1991, pursuant to the powers contained in a debenture executed by the Corporation as mortgagor in favour of the Aboriginal Development Commission as mortgagee. As a result of such appointment, K became an officer of the Corporation pursuant to s 82A and J became "a partner of an officer of the company" pursuant to s 532(2)(c)(v). Had this been the only objection to the appointment or continuance in office of J raised by the creditor, his Honour would have been prepared to grant leave to J pursuant to s 532 to hold office as provisional liquidator.

Further objections by the creditor Spice Cake Pty Ltd to the appointment or continuance in office of J were, however, raised in light of further material placed before the court. It was submitted that the court was impelled to remove the liquidator pursuant to its powers under s 473. It was not disputed that PKF and ATSIC (another creditor in the liquidation) had an established business association: PKF had conducted a number of "investigations" of the Corporation on behalf of ATSIC ("acquittals") which involved examining whether the Corporation had complied with the conditions of grants made by ATSIC to the Corporation. ATSIC had lodged a claim in the liquidation of the Corporation of the order of \$900,000; a substantial part of this claim comprised amounts granted by ATSIC to the Defendant, which ATSIC asserted were debts owed to it because of the Defendant's alleged breaches of conditions of the grant.

Held: (i) declaration that previous appointment of J as provisional liquidator and liquidator and his acting and continuing to so act, not invalid by reason of any contravention of s 532

of Corporations Law; (ii) order pursuant to s 473(1) that J be removed by the court as provisional liquidator; (iii) costs (including J's costs) be paid out of the litigation.

1. In conducting "acquittal" assignments upon the affairs of the Corporation at the request of ATSIC, PKF had not, strictly speaking, acted as "auditors" within the sense intended by Bowen CJ in Equity in *Re Stewden Nominees No 4 Pty Ltd* (1975) 1 ACLR 185 at 187.

Counsel for the creditor argued that the volume of work undertaken by PKF in its investigation of the corporation at the request of ATSIC, as well as the large proportion of total debt claimed by ATSIC, entitled any creditor to hold doubts as to J's independence. Furthermore, should J continue to act as liquidator, he may well be placed in a conflict of interest: he may be required to investigate whether his own firm had been negligent in advice given to ATSIC as to whether the Corporation had breached any of the conditions of the grant.

2. It would not be proper that the liquidator be placed in such a position of potential conflict, nor would this be in the interest of the other creditors. Although his Honour was perfectly satisfied that J had most competently and properly discharged his functions as liquidator "...in performing his functions the liquidator must both be and appear to be independent and impartial of the creditors." There was sufficient suspicion of appearance of partiality or conflict of duty which would make it proper that another liquidator be appointed.

Shanks Byrne Industries Pty Ltd (1979) 880 at 888; *Re: Queensland Stations* (1991) 9 ACLC 1341; *Re: Adam Eyton* (1887) 36 Ch D 299; *Re: Intercontinental Properties 2* ACLR 488 at 491-2, considered.

Application by creditor pursuant to s 473 *Corporations Act* 1990 (Cth) for removal of liquidator appointed by court.

N Henwood, instructed by Cridlands, for the liquidator; *T Riley QC*, instructed by McBride & Stirk, for the creditor Spice Cake Pty Ltd; *S Ridgeway*, instructed by Australian Government Solicitor, for ATSIC.