

Supreme Court Notes

by Anita Del Medico

Ceric -v- C E Heath Underwriting and Insurance (Aust) Pty Ltd

27.10.94 COA: Gallop ACJ, Angel and Morling JJ

The appellant ("A") was injured at work on 28.09.82. In December 1982, he commenced an action claiming common law damages against his employer. His employer was insured with the respondent ("R"). In October 1985, the employer went into liquidation. In May 1989, A obtained interlocutory judgment for \$600,000 against the employer in the 1982 action being the amount of the assessed damages. On 30.04.92 A commenced proceedings against R (the insurer) seeking to enforce the statutory charge created by s 27(1) of the *Law Reform (Miscellaneous Provisions) Act* to the extent of the unsatisfied liability of the employer to A in the 1982 action. The 1992 action was commenced without leave of the court as required by s 27(3) of the *Act*. On 12.08.92, R applied to strike out the 1992 action or alternatively, for summary judgment. That application was heard by Mildren J together with an application filed by A in the 1992 action for leave to proceed in the 1992 action *nunc pro tunc*. On 16.06.93, A applied by originating motion for leave to commence fresh proceedings against R pursuant to s 27 of the *Act*, at the same time seeking to rely upon the summons in the 1992 action for leave *nunc pro tunc*. On 21.10.93, Mildren J dismissed both applications. Mildren J held that A's 1992 action was barred by the *Limitation Act* because A's cause of action to enforce the statutory charge became statute barred on 29.09.85. He also held he had no power to make an order *nunc pro tunc* in the 1992 action.

A appealed from these decisions.

The appeal raised two questions for decision. The first question was whether the date from which time runs under the *Limitation Act* for the purpose of claims pursuant to s 27 of the *Law Reform (Miscellaneous Provisions) Act* is the date of the occurrence which gives rise to the claim against the insured or, is the date upon which leave to commence an action is granted under s 27(3) of the *Act*. The second question was whether, assuming the first-mentioned date is the date from which time runs, it was competent for Mildren J to make an order *nunc pro tunc* under s 27(3) of the *Act* granting leave to proceed in the 1992 action.

Held, allowing the appeal, and setting aside the orders of Mildren J and remitting the application for leave to proceed nunc pro tunc in the 1992 action to Mildren J or another judge of the court for determination: (1) (*Per* Gallop ACJ and Morling J): (a) Leave is properly regarded as a necessary ingredient in the cause of action which ss 26 & 27 of the *Act* give to a person in the position of A. Until leave is granted to such a person, he does not have a cause of action which he can prosecute therefore time does not commence to run under the *Limitation Act* until leave of the court is granted under s 27(3) of the *Law Reform (Miscellaneous Provisions) Act*. Although this construction of the legislation leads to the result that there is no restriction on a plaintiff seeking leave at any time, and that accordingly, he may by his own act prevent time running against himself, by delaying making an application for leave, a plaintiff exposes himself to the risk that leave will not be granted if his delay is shown to be unreasonable.

NSW Medical Defence Union Ltd -v- Crawford (1993) 31 NSWLR 469 @ 504, *per* Mahoney JA, approved and at 490 *per* Kirby P, approved. *Cambridge Credit Corporation -v- Lissenden* (1987) 8 NSWLR 411; *Ratcliffe -v- V S and B Border Homes Ltd* (1987) 9 NSWLR 390; *Grimson -v- Aviation and General (Underwriting) Agent Pty Ltd* (1991) 25 NSWLR @ 428 - 9 *per* Meagher JA, not followed.

(b) Mildren J had power to make an order granting leave *nunc pro tunc*. Statement of Glass JA (with whom Moffitt P and Samuels J concurred) in *National*

Mutual Fire Insurance Co. Ltd -v- Commonwealth of Australia (1981) 1 NSWLR 400 @ 408 that a failure to obtain leave of the court in advance invalidates the action and renders it incapable of being revived by leave retrospectively given, disapproved.

Ratcliffe (*supra*); *Spautz -v- Kirby* (1989) 21 NSWLR 27 @ 30, which followed *National Mutual* (*supra*), not followed.

Re Testro Bros. Consolidated Ltd (1965) VR 18 at 32-5; *Re: Sydney Formworks Ltd* [1965] NSWLR 646 @ 650-1; *Dixon -v- Royal Insurance Aust. Ltd* (1991) 105 ACTR 1; *Smart -v- Stuart* (1992) 83 NTR 1 @ 7, approved.

(2) (*Per* Angel J) (a) A statutory cause of action to enforce the s 26 *Law Reform (Miscellaneous Provisions) Act* charge is created by s 27(1) - which is expressly subject to subs (2) but not subs (3) - and the leave of the court required by s 27(3) is not an ingredient of the statutory cause of action but rather is a procedural prerequisite to its enforcement. Accordingly, the date from which time runs under the *Limitation Act* for the purpose of a claim under the *Law Reform (Miscellaneous Provisions) Act* is the date of the occurrence which gives rise to the claim against the insured, in this case, 28.09.82. A's action was therefore statute barred.

Lissenden (*supra*); *Ratcliffe* (*supra*) and *Grimson* (*supra*), followed. *Crawford* (*supra*), not followed.

(b) Mildren J had power to grant leave to proceed with the 1992 action *nunc pro tunc*.

Re Testro Bros (*supra*), applied.

National Mutual Insurance Co. Ltd (*supra*), disapproved.

J. Waters instructed by Waters James McCormack for the Appellant.

T. Riley QC instructed by Ward Keller for the Respondent.

Llewellyn and Commissioner of Police for the NT of Australia -v- Finn and Collins

2.09.94 Martin CJ

This was an originating motion seeking, inter alia, a declaration that the Court of Summary Jurisdiction established by the *Justices Act* has jurisdiction to set aside any summons issued pursuant to s 23 of the *Act* and that two summonses issued pursuant to s 23 of the *Justices Act* addressed to the plaintiffs be set aside.

The first plaintiff by way of complaint under the *Justices Act* alleged that on 13.05.94 the second defendant drank liquor in a public place namely, the Todd River within two kilometres of licensed

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premises, namely the Todd Tavern, contrary to s 45D of the *Summary Offences Act*. The first defendant issued a summons pursuant to s 23 of the *Justices Act* directed to the Commissioner of Police requiring him to appear before the CSJ and to produce copies of statements made by the police officer who first spoke to the second defendant on the day of the alleged offence, a copy of notes made by the police officer and copy of the original statement made by any other police officer who was present when the second defendant was first spoken to by police. On 12.07.94 a Magistrate entertained argument as to whether the summary court had jurisdiction to set the s 23 *Justices Act* summons aside.

Held, per Martin CJ (1) The CSJ established by the *Justices Act* has no jurisdiction to set aside any summons issued pursuant to s 23 of that *Act*. The position in the NT is different from South Australia where the Magistrates' Court issues subpoenas. Section 23 of the *Justices Act* provides for the action of a

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separate and distinct functionary from the court. The obligation on a justice of the peace or clerk pursuant to that section is to be satisfied that the summons sought is for a prescribed purpose and the obligation is separate from and independent of the court. The CSJ has no power to supervise the acts of the justice or the clerk.

Limbo -v- Little (1989) 65 NTR 19 at 35, followed.

Holland -v- Sammon (1972) 4 SASR 1; *Hunt -v- Wark* (1985) 40 SASR 489; *R -v- Robertson* (1983) 21 NTR 11; *Botany Bay Instrumentation & Control Pty Ltd -v- Stewart* (1984) NSWLR 98, referred to.

(2) There is an onus on an accused seeking production and inspection of witness statements to show that there is an issue or issues in the case to which

the documents relate, otherwise an accused is simply embarking on a fishing expedition and that is not permissible.

R -v- Roberston (supra) followed.

Although the present summons sought documents with sufficient particularity, a purpose falling within the scope of s 23 had not been identified. The summons was an abuse of process and should be set aside. The purpose in seeking to have the specified documents produced was an attempt to identify whether any relevant issue might arise in the prosecution, and further was effectively seeking discovery, which is objectionable.

Sobh -v- Police Force of Victoria [1994] 1 VR 41, approved.

M. Howden instructed by CAALAS for the Appellant

J. Stirk for the respondent.



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