JUDGMENT No. 801/89

CATCHWORDS

Trade Practices Act - s.52 claim - time bar in s.82(2) - rule that time runs when some damage is suffered although damage continues to flow, further damage not constituting a fresh cause of action - applicant's ignorance of his rights does not stop time running - reference to doctrine of fraudulent concealment - analysis of the elements of a claim under s.52 - cases where separate causes of action may arise from a particular misrepresentation.

Pleading - strike out application based on clearly applicable time bar - Court should give effect to the bar, but opportunity to replead allowed.

Trade Practices Act 1974 ss. 52, 82.

DONALD EDGERTON JOBBINS v. CAPEL COURT CORPORATION LIMITED and MAVIS BRAMSTON PRODUCTIONS LTD

QG 95 of 1989

Davies, Burchett & Hill JJ.
Sydney
21 December 1989

IN THE FEDERAL COURT OF AUSTRALIA)
)
QUEENSLAND DISTRICT REGISTRY) No. QG 95 of 1989
)
GENERAL DIVISION)

BETWEEN: DONALD EDGERTON JOBBINS

Applicant

AND: CAPEL COURT CORPORATION LIMITED

First Respondent

AND: MAVIS BRAMSTON PRODUCTIONS LTD

Second Respondent

Judges Making Orders: Davies, Burchett and Hill JJ.
Where Made: Sydney
Date of Orders: 21 December 1989

MINUTE OF ORDERS OF THE COURT

THE COURT ORDERS THAT:

1. The question reserved be answered that paragraphs 1(a), 15 and 16 of the amended statement of claim and paragraph 2 of the prayer for relief therein and paragraph 2 of the prayer for relief in the application should each be struck out as against the first respondent, but reserving leave to the applicant to replead by 4.00pm on 16 February 1990 if so advised.

2. The applicant pay the first respondent's costs of the proceedings in the full court.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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Second Respondent

CORAM: DAVIES, BURCHETT AND HILL JJ.
DATED: 21 DECEMBER 1989

REASONS FOR JUDGMENT

THE COURT:

In this application, Spender J., pursuant to s.25(6) of the Federal Court of Australia Act 1976, reserved for the consideration of a full court of the court the question whether paras. 1(a), 15 and 16 of the applicant's statement of claim, together with para.2 of the prayer for relief therein and para.2 of the prayer for relief in the application, should be struck out as against the first respondent. The grounds on which these paragraphs were sought to be struck out were that, by virtue of s.82(2) of the Trade Practices Act 1974, the claims to which they related could not be maintained, and that persistence in claims barred by the terms of the Act had a tendency to cause prejudice, embarrassment or delay in the proceeding or was an abuse of the process of the court.

The statement of claim appears designed to raise claims under s.52 of the Trade Practices Act, in deceit and in contract. The application to strike out, so far as concerns the question referred to the full court, relates to the claim under the Trade Practices Act. The facts pleaded need only be summarized for the purposes of these reasons. It is alleged that the second respondent proposed to produce a film under the title "Frenchman's Farm", the first respondent having been engaged to promote investment in the film; that the first respondent made representations to the applicant, both orally and in writing, between 8 November 1985 and 24 March 1986; and that these representations included the following, which were made with the knowledge and consent of, or as agent of, the second respondent: that investment in the film carried a guaranteed return of 37.75% of the amount invested, that completion of the film had been guaranteed, that the respondents "guaranteed a distribution of 37.75%", that the film provided an exceptionally safe and profitable investment opportunity, that income from the film was assured, that there were binding contractual arrangements in place which provided a guaranteed level of income to investors in the film, and that there existed facts which justified the making of these representations. The statement of claim also alleged that the statements were made fraudulently; that in reliance on them the applicant, on or about 24 March 1986, entered into an agreement to invest $60,000.00 in the film, which was actually paid on 9 April 1986; that the represented guaranteed return was the subject of a contractual promise; and that "By reason of the Respondent's [sic] conduct aforesaid the Applicant has suffered

loss and damage in that he paid $60,000.00 to the Respondent [sic] on 9 April 1986 and has lost that money."

It is in this setting that the statement of claim also includes paras. 1(a), 15 and 16, which (as amended, in the case of para.15) read as follows:

> "1. At all material times the First Respondent:
>
> (a) was a corporation within the meaning of the Trade Practices Act 1974 ...
>
> 15. By making the statements referred to in paragraphs 5 to 12 hereof [the representations summarized above] the Respondents:
>
> (a) engaged in trade or commerce; and
>
> (b) engaged in conduct which was misleading or deceptive or likely to mislead or deceive;
>
> PARTICULARS
>
> [Here particulars were set out of the alleged falsity of the various representations.]
>
> 16. Further or alternatively, in the premises the Second Respondent was knowingly concerned in the conduct aforesaid."

In the prayers, set out both in the application and in the statement of claim, there was included a claim for "2. Damages pursuant to section 82 of the Trade Practices Act".

According to the first respondent (who is the applicant in the notice of motion to strike out, but will continue to be referred to in these reasons as the first respondent), the claim of the applicant, so pleaded, cannot be maintained, because it is

squarely caught by the terms of subsec.(2) of s.82 of the Trade Practices Act. It is convenient to set out s.82 subsecs.(1) and (2):

> "(1). A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.
>
> (2). An action under sub-section (1) may be commenced at any time within 3 years after the date on which the cause of action accrued."

Although subsec.(2) is phrased permissively, it is pregnant with a negative, and its effect was referred to in the joint judgment of the High Court in Sent v. Jet Corporation of Australia Proprietary Limited (1986) 160 CLR 540 at 542 as "the time limitation prescribed by s.82(2)".

The first respondent's contention is that the cause of action pleaded must have accrued at latest by 9 April 1986, the date of the applicant's investment of $60,000.00 pursuant to the agreement into which he had entered on or about 24 March 1986; when, therefore, the application was filed on 14 September 1989, it was out of time by some five months. The applicant seeks to repel this proposition upon the basis that no loss had been suffered, and therefore the cause of action remained incomplete, until October 1986, that is, less than three years before the filing of the application; damage was said to have occurred in October because it was then a payment (the first instalment of the guaranteed return) was not made, the non-payment of which, it

was claimed, falsified one of the representations, and also demonstrated that the representation of a guaranteed return lacked the justification of any guarantee to which the respondents could point.

Section 82(2), by being expressed to turn on "the date on which the cause of action accrued", echoes familiar concepts of the law in respect of the limitation of actions. See Halsbury's Laws of England 4th edition, volume 28, para.622 and see Hawkins v. Clayton (1988) 164 CLR 539 at 561-562, 587-588, 599. There is every reason to understand this language in the sense in which it has come to be understood in statutes of limitations. For the purposes of those statutes, a number of principles have been worked out. In the first place, where the incurring of damage is an essential element of a cause of action, the suffering of some damage (the other elements of the cause of action having already occurred) will, in general, start time running even although the damage continues to grow. The running of time is not suspended until all the damage which will be suffered has ceased to flow, nor does further damage constitute a fresh cause of action. See Cartledge v. E. Jopling & Sons Ltd [1963] AC 758; Pirelli General Cable Works Ltd v. Oscar Faber & Partners (a firm) [1983] 2 AC 1; Forster v. Outred & Co. [1982] 1 WLR 86; D.W. Moore & Co. Ltd v. Ferrier [1988] 1 WLR 267; Hawkins v. Clayton (supra). In Forster v. Outred & Co. at 99 Dunn L.J. (in the context of a claim against a solicitor that he had given negligent advice in relation to the plaintiff's entry into a mortgage under which a demand was subsequently made) said:

> "I approach this case on the basis that it is sufficient that it is financial loss that should be foreseen, and I would hold that in cases of financial or economic loss the damage crystallises and the cause of action is complete at the date when the plaintiff, in reliance on negligent advice, acts to his detriment. ...
>
> In this case, as soon as she executed the mortgage the plaintiff not only became liable under its express terms but also - and more importantly - the value of the equity of redemption of her property was reduced. ... That, in my view, was a quantifiable loss and as from that date her cause of action against her solicitor was complete, because at that date she had suffered damage. The actual quantum of damages would, of course, depend on events between that date and the date when the damages had finally to be assessed, but the cause of action was complete when she executed the mortgage, without proof of special damage."

Another fundamental principle is that, generally, a plaintiff's unawareness of the existence of his cause of action does not prevent it accruing; time runs during his ignorance: Cartledge; Pirelli; Hawkins v. Clayton; Gillespie v. Elliott [1987] 2 Qd.R. 509. As Lord Reid said in Cartledge at 771-772:

> "(A) cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer, and ... further injury arising from the same act at a later date does not give rise to a further cause of action."

Lord Reid expressed concern about the consequences of the application of his conclusion to the limitation statute he was construing, but he had no hesitation concerning the correctness of the conclusion itself. At 772, he said:

> "It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action."

Both statements were quoted by Lord Fraser of Tullybelton in Pirelli at 13. In that case, at 19, Lord Scarman said this result was "no matter for pride", and added that the law was, in this respect, "harsh and absurd". In Hawkins v. Clayton at 560-561 Brennan J. accepted these views, while Deane J. at 588-590 discussed the proposition that the injustice in particular cases was "an unavoidable cost of the benefits involved in ensuring that plaintiffs act promptly and that defendants are not subjected to the litigation of stale claims". Deane J., however, thought there was "an anomalous category" of cases in which the plaintiff's ignorance would exclude the running of time because "the wrongful act itself effectively precluded the institution of proceedings". The third member of the majority in Hawkins v. Clayton, Gaudron J., found it unnecessary to come to a conclusion on the question under discussion.

In cases under s.52 of the Trade Practices Act, the problem may arise in an acute form, since the limitation period is only three years and the victim of misleading conduct might remain deceived for the whole of that period. Pincus J. has expressed (in Keen Mar Corporation Pty Ltd v. Labrador Park Shopping Centre Pty Ltd (1988) 10 ATPR 49,185 at 49,195-49,196)

the view that the existence of the statutory time bar is not affected by the doctrine of fraudulent concealment. Particularly if this is correct, and the point was not argued in the present case which is not of a kind that could attract the doctrine, the injustice lamented by Lord Reid will inevitably be found in some s.52 claims. Nor is there any escape from s.82(2) such as is provided in modern general statutes of limitations, which specify exceptions and confer discretionary powers to alleviate the problem for at least some plaintiffs. Carter J. said of the situation which arose in Gillespie v. Elliott (supra) at 522: "The matter should engage the attention of the legislature." Perhaps consideration should be given to the operation of s.82(2) in cases where the injured party is unaware of the truth until it is too late for him to claim his remedy.

In Arcadi v. Colonial Mutual Life Assurance Society Ltd (1984) 6 ATPR 45,450 at 45,454, Toohey J. drew attention to the fact that a cause of action for the purposes of s.82 of the Trade Practices Act is perfected by the suffering of loss or damage, the amount of which is what the complaining party may recover. He commented:

> "There may be several distinct losses, flowing from conduct in contravention of the Act and the cause of action is not complete until those losses have occurred."

In James v. Australia and New Zealand Banking Group Ltd (1986) 64 ALR 347 at 392, his Honour added a footnote to his own dictum. He said:

> "This statement was not meant to suggest that a cause of action is kept alive so long as any loss or damage is being suffered. Once an applicant has suffered loss or damage relevant to his claim, time begins to run."

(See also the comments of Gummow J. in Elna Australia Pty Ltd v. International Computers (Aust) Pty Ltd (No.2) (1987) 16 FCR 410 at 420-421.) Nevertheless, there is no doubt that Pincus J. was correct when he said in Calmao Pty Limited v. Stradbroke Waters Co-owners Co-operative Society Limited [1989] ATPR 50,737 at 50,740:

> "The tendency has been to construe statutes of limitation as not contemplating that a new cause of action will arise every time there is a fresh loss from the same basic wrong."

The reason for this, and the exception where a fresh breach of a continuing duty causes loss beyond the loss resulting from a barred cause of action, are explained by Glass J.A. in Hawkins v. Clayton (1986) 5 NSWLR 109 at 124-125.

But there may be situations, arising under s.52 of the Trade Practices Act, where more is involved than simply the incurring of a further loss flowing from the same cause of action, and thus, in Toohey J's words, "relevant to" the original claim. A claim under s.52, given the other circumstances which attract that section, involves (as any pleading of it demonstrates) three basic elements: (1) the misleading conduct; (2) the reliance of the injured party on that misleading conduct;

and (3) damage suffered by the conduct (it will be suffered 'by' the conduct where the injured party acts in reliance on - or perhaps influenced by - a misrepresentation conveyed by that conduct). If, after the injured party has so acted and incurred some loss, being still deceived, he again acts on the faith of the misrepresentation so that there is a distinct and separate act of reliance, it cannot be said that further damage subsequently flowing from the second act of reliance merely exemplifies "a fresh loss from the same basic wrong". For an element of the wrong with which s.52 is concerned is the act of reliance induced by the misrepresentation, and the new damage flows from a new basic wrong constituted by the new occasion upon which the injured party was induced to act to his detriment by the misrepresentation. Any pleading of the claim would make this clear by alleging distinctly the further act done in reliance on the original inducement. A simple example would be a false statement about the merits of a subdivision leading, first, to the purchase of a particular block of land in the subdivision, and, subsequently, to a separate purchase of another block of land in the same subdivision. If the first purchase occurred more than three years before the institution of proceedings, but the second purchase occurred within that period, there is no reason why a claim in respect of damage suffered by the second purchase should be held to be barred.

The present case, as pleaded, is not of that kind. The amended statement of claim alleges misrepresentations which induced the applicant to agree to invest $60,000.00 in a dubious scheme, and then to fulfil his agreement. Whatever view be taken

as to whether losses continued to flow, the applicant suffered damage immediately upon his entry into the agreement and the making of the payment thereunder, both of which occurred outside the three year period. According to the pleading, the investment lacked the represented qualities; as a consequence it was from the outset less valuable than it should have been. Counsel for the applicant sought to say loss or damage was not suffered until October when the representations proved false, but it is really beyond dispute that what happened then was merely a reaping of the tares sown with the crop. The case is analogous to Keen Mar Corporation Pty Ltd v. Labrador Park Shopping Centre Pty Ltd (supra) where Pincus J. held misrepresentations, leading to the acceptance of a lease, resulted in loss at a time no later than the execution of the lease. On appeal (see [1989] ATPR 53,143 at 53,156), Spender J. said:

> "In my opinion, the relevant date is the date of execution of the lease, not the date of entering into possession pursuant to the lease."

The other Judges on the appeal found it unnecessary to discuss this point because of the view they took on a different aspect of the case.

The matter comes before the court as a question reserved upon an application to strike out paragraphs of the amended statement of claim. In a number of cases, of which Famel Pty Limited v. Burswood Management Limited [1989] ATPR 50,500 at 50,510-50,511 is an example, courts have been reluctant to strike

out a statement of claim as untenable because it appears s.82(2) affords a bar to its maintenance. However, where it is clear that an applicant cannot succeed upon the case pleaded because s.82(2) will be a complete answer to the claim, the court should not merely defer the inevitable. As the action must fail, the court should not hesitate to say so: Riches v. Director of Public Prosecutions [1973] 1 WLR 1019. The paragraphs referred to at the commencement of these reasons should be struck out as against the first respondent. But the applicant should have liberty to amend in the event that he is advised he may be able to replead his case so as not to fall outside the bar raised by s.82(2). (Cf. Lyons v. Kern Konstructions (Townsville) Pty Ltd (1983) 47 ALR 114 at 131.) The applicant must pay the costs of the proceedings in the full court.

I certify that this and the preceding eleven (11) pages are a true copy of the Reasons for Judgment herein of the Court.

Associate

Dated: 21 December 1989

Counsel for the Applicant:	Mr R Bain with Ms J H Dalton
Solicitors for the Applicant:	Messrs Clarke and Kann
Counsel for the First Respondent:	Mr D Russell QC with Mr D Jackson
Solicitors for the First Respondent:	Messrs Byrne Nosworthy & Doyle
Date of hearing:	5 December 1989