[2002] QSC 075

State Reporting Bureau

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Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DOUGLAS J

No 4610 of 1998

JOHN DAVID HUNT — Plaintiff

and

RICHERS TRANSPORT PTY LTD
ACN 009 721 788 — First Defendant

and

MMI GENERAL INSURANCE LIMITED
ACN 000 122 850 — Second Defendant

BRISBANE

..DATE 07/03/2002

JUDGMENT

HIS HONOUR: The plaintiff was injured in a motor accident involving a trailer loaded with timber on the 26th of May 1995. He issued proceedings in this Court on the 22nd of May 1998, just within time. He had previously, on the 14th of June 1996, lodged a notice of claim pursuant to section 37 of the Motor Accident Insurance Act 1994.

Things proceeded at a fairly leisurely pace. By the 7th of March, or thereabouts, of the year 2000 the solicitors for the defendants had advised the solicitors for the plaintiff by letter of the fact that there were existing loss adjuster's reports, copies of which were given at that time to the solicitors for the plaintiff, one of which included a report from Warren Lee & Associates dated the 23rd of March 1999 which, in precis form, contained the following:

> "We believe the two parties could be joined into this litigation."

Hine & Sons

> "On the day of the subject accident, an employee of the mill was responsible for the actual loading via forklift of the semi-trailer..."

The employee of the mill there referred to must have been an employee of Hine & Sons.

By the time that material came to the plaintiff's solicitors attention they were already out of time to join Hine & Sons in the action. However, they did seek to progress that matter by what is described as considerable activity on their part, including delivering further and

better particulars of the statement of claim on 21 June 1999, a list of documents on 26 August 1999, a supplementary statement of loss and damage on 18 May 2000, a mediation between the existing parties on 21 June 2000, and the plaintiff's application that the defendants make further and better disclosure on the 16th of August 2001.

It was after that that the plaintiffs obtained the evidence which supported the assertion made by the loss adjuster that Hine & Company may well have been involved. Yet again there was no application at that time to join Hine & Company as a defendant in the action, but there was a lot of correspondence between September 1999 and July 2001 which had the effect of seeking full and proper disclosure.

Ultimately an application was made before Moynihan J which resulted in an order that Hine & Company be joined as a third party in the action. This application is made pursuant to rule 69(2)(g) of the UCPR, which in its terms allows a discretion to order a joinder of a party out of time to be not as constrained as it formerly was under the repealed RSCO.3r.11.

In particular it is not necessary to show "peculiar" or "special" circumstances. See Jerome and Another v Hill and Others (2001) Queensland Reports 496, and in particular the extracts of the principles explained by that case by the authors of Civil Procedure Queensland Butterworth's in the paragraph numbered rule 69.15.

Taking into account all of those factors and taking into account the fact that, as Mr Justice Chesterman said in Bates v Queensland Newspapers Pty Ltd, where his Honour said:

> "The rule confers a wider general discretion on the Court that it can only be exercised where the reason, which makes the destruction of the defence just, can be clearly identified and is seen to be sufficient. An explanation for the failure to join the party within time would always be relevant though lack of such an explanation is not a pre-condition to the power."

The only explanation which is proffered here is the seeking of information from the defendants over a long period of time from 1999 to 2001. As against that there is no evidence that the plaintiff made any inquiry before the limitation period expired as to the involvement of Hine & Company in circumstances where I think I'm entitled to infer the fact of their loading the truck was something which must have been contemplated at the time.

That in itself is not an end to the matter and the third party also raises the question of prejudice. It says that due to the effluxion of time and the fact that there is no detail of any investigations conducted on the part of the plaintiff prior to the commencement of proceedings, and let alone after the expiration period, to ascertain the full circumstances of the loading of the loading of the truck prejudice has occurred.

They say in addition to the ordinary prejudice they no longer hold in their possession any loading or dispatch records for any load packed in May 1995, and preliminary inquiries indicate that no servant or agent of the third party has any recollection of the loading of this trailer on 26 May 1995.

At the hearing this morning Mr Grant-Taylor produced copies of the loading and dispatch records which have been obtained by the plaintiff on discovery from the defendants. They are now in the possession of the solicitors for the proposed third party and I would expect they could be used to jog the memory of any servant or agent of the third party as to his or her recollection of the loading of the trailer on the 26th of May 1995.

The applicant seeks to draw an analogy between an application made under section 31 of the Limitation of Actions Act 1974, stating that the material fact of a decisive nature which was not known to the plaintiff was the fact of Hine & Co's involvement. That is not strictly correct because they had an indication of Hine & Co's involvement, as I said, much earlier, but the detail of that was not available to them until August last year, which is within 12 months.

That analogy, which I am prepared to accept as one which applies here, is a matter which can be used in the exercise of my discretion in coming to the conclusion I will

ultimately come to. I am of the view that it is just that an order be made joining the third party as a defendant in the action.

The prejudice to the third party now appears to be somewhat limited. Furthermore, the exact nature of the connection between Hine & Co, the proposed third party, and the accident which occurred was not really known until the relevant documents were obtained within the last year.

There is of course a delay since then but it must be remembered that the joinder of the third party as a defendant did not occur until January of this year, which may have, of course, precipitated the application to join that party as a defendant.

The second part of the application deals with an application to amend the proceedings to add a claim against the first and second defendants for breach of contract and breach of statutory duty. They obviously arise out of the same facts and circumstances already pleaded between the plaintiff and the defendants.

I cannot see any reason why such an order should not be made. I therefore order that Hine & Son Pty Ltd ACN 009 660 995 be joined as a defendant in the action. I further order that the plaintiff have liberty to amend the proceedings to plead causes of action against the first and

second defendants in breach of contract and breach of statutory duty.

...

HIS HONOUR: I order that the applicant/plaintiff pay the respondent's - that is all three respondents - costs of and incidental to the application, to be assessed on the ordinary basis.
