[2002] QSC 226

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 10426 of 1999

STEPHEN JOHN KLEASE — First Plaintiff/Respondent

and

JANINE MARIA MARLENE KLEASE — Second Plaintiff/Respondent

and

BROWNBUILT PTY LTD ACN 002 558 894 — Defendant/Applicant

BRISBANE

..DATE 22/05/2002

ORDER

HIS HONOUR: This is an application by the defendant to strike out four sub-paragraphs of the statement of claim. The four paragraphs in question raise a claim under the Trade Practices Act on behalf of the first plaintiff.

The first plaintiff claims that he was injured at work when he sat on a chair which broke. He claims that it broke because it was defectively manufactured and the defendant is the manufacturer of that chair. His claim against the defendant is brought in negligence and pursuant to the Trade Practices Act and no attack is mounted against so much of the claim as is brought in negligence.

The claim under the Trade Practices Act is brought under section 75AD which on its face would entitle the plaintiff to recover at least for any loss which he has suffered as a result of his injuries. It is unnecessary for present purposes to determine whether that term "loss" is sufficiently wide to include all of the heads of damage claimed in respect of the plaintiff's injury but I note in passing that the term contrasts with "loss and damage" in section 82. Whether the term is wide enough to include for example a claim for damages for pain and suffering is a matter which might one day fall for decision.

The defendant applies to strike out these paragraphs on the basis that section 75AD does not apply on the face of the statement of claim. It argues that result follows by

reason of section 75AI of the Act. The latter provides so far as material "section 75AD ... does not apply to a loss in respect of which an amount has been or could be recovered under a law of the Commonwealth, a State or a Territory that: (a) relates to workers' compensation."

It is common ground between the parties that at the time of the proceeding there was an Act in Queensland which answered that description in the sense that damages could be recovered under it and it related to workers' compensation. For that matter compensation as well as damages could be recovered under it.

On its face the section would seem to apply to the present circumstances. That prima facie view was the view adopted by Wood J in Lanza v Codemo Management Pty Ltd [2001] NSWSC 845. In the present case the plaintiff seeks to uphold the pleading on slightly different grounds. First he argues a procedural point. He submits that the matter is one which ought to be raised by way of defence and points out that it has not been so raised. He submits that the terms of section 75AI are analogous of the Limitation of Actions Act where (it is trite law) the provisions do not extinguish a cause of action but rather impose a procedural bar upon an action after a certain time and are capable of waiver by non-pleader. It is submitted that it is at least arguable that the terms of section 75AI can be construed in this way and that consequently in accordance with the doctrine in

General Steel Industrial Incorporated v. Commissioner of Railways (New South Wales) 112 CLR 125, the interlocutory application should be dismissed.

In my judgment the terms of the section are fairly clear. They operate to disapply section 75AI. That is the section which creates the cause of action and which the plaintiff must show as part of its cause of action applies to the case. On the face of the statute the section is not applicable. In my view that means that the structure is not analogous to the provisions of the Limitation of Actions Act. It simply means that there is no right of action under section 75AD in the circumstances postulated by section 75AI.

It does not seem to me that this is a matter attended by any reasonable doubt and I see no gain in allowing the matter to go to trial. The level of clarity and satisfaction required by the General Steel case exists.

The plaintiff argued that the word "recovered" in section 75AI suggested that what was envisaged was a situation where the amount in question could be sued for and submitted that in the present case, the existence of legislation, providing only for compensation under a scheme of payment with a statutory right of appeal from the decision of the insurer to an Industrial Magistrate, did not answer that description.

In this context, I do not think that "recovered" ought to be given the limited meaning suggested on behalf of the first plaintiff. It is a term which is not inherently limited in that way and although it is commonly used by reference to recovery by litigation, I do not think, given the contextual references to workers' compensation legislation, that it ought to be given such a restricted meaning.

Counsel for the first plaintiff, also referred to the second reading speech of the Minister introducing the amendments which included section 75AI and particularly to the passage in paragraph 40 of that speech. He argued that the intent was to apply the exclusion in section 75AI only to State regimes which comprehensively regulated the field of work related injuries.

He submitted that whatever might be the position in Queensland since 1996, prior to that time - and I should interpolate that the action, the subject of the present claim, is one which was covered by legislation, prior to 1996 - the Queensland legislation did not comprehensively cover the field of work related injuries. In my view, the Queensland legislation was intended to be the whole of the law relating to compensation for work related injuries, to the extent that it specified within its terms, what proceedings could be brought and could not be brought.

It is true that it did permit common law actions to proceed, as indeed the current legislation does and it is true that

it was less comprehensive than the current legislation is. However, I do not think that the degree of comprehensiveness is a relevant ground for distinction.

The fact that a State makes no provision for certain topics in its workers' compensation legislation may be a deliberate omission and it can still be said that the legislation covers the field, despite inclusion of an intended omission. The Queensland legislation, in my view, was the sort of legislation envisaged by section 75AI.

It follows that, in my view, the applicant has made out its case. The matter is one which is appropriate for summary resolution. I have a clear view of it. That view is that the paragraphs which are challenged do not disclose a cause of action and the consequence is that the application should be granted.

I will hear the parties on the question of costs, particularly in relation to the fact that there has been substantial delay in the bringing of this application.

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HIS HONOUR: I order that paragraphs 1.4, 1.6, 7 and 12.2 of the statement of claim be struck out. I order that the first plaintiff pay the defendant's costs of and incidental to the application to be assessed. I order the execution on that costs order be stayed until the determination of the action.

ORDER