SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

[2004] QSC 311

FRYBERG J

No 2144 of 2004

TERENCE MURRAY LEWIS	Plaintiff
and	
IAN BRUCE HILLHOUSE	First Defendant
and	
DAVID ALAN BURROUGH	Second Defendant
and	
ESTATE OF RICK GLYNN WHITTON (DECEASED)	Third Defendant

BRISBANE

..DATE 17/09/2004

ORDER

HIS HONOUR: The defendant filed an application on 14 September, returnable today 17 September, seeking to strike out the statement of claim pursuant to Rule 171. The application was served 26 minutes inside the time allowed for service under the Rules, that is to say the time prescribed by the Rules was not given but the breach was only 26 minutes. The attempt being made by the applicant was obviously to serve with the minimum amount of time prescribed by the Rules.

The issues raised by the application are complex. They relate to the question whether an action may be brought against solicitors for negligence in the conduct of criminal proceedings when an effect of the proceedings may be to impugn the judgment of another Court.

The statement of claim itself which is the subject of attack was delivered in March this year and has until now remained without any attack and with further pleadings delivered and filed and the parties no doubt have been put to expense since that time.

No explanation for the delay in bringing the attack has been put before me. The plaintiff unsurprisingly has sought an adjournment of the application on the basis that counsel has not had adequate time to prepare proper argument in relation to it. That, having regard to the nature of the issues proposed to be argued, seems to me to be correct. The mere fact of compliance technically with the minimum times

prescribed by the Rules does mean that a complex matter like this ought to be served allowing only the minimum time.

In my view, plainly a longer period should have been allowed, preferably by the matter having been brought on much earlier. It is most undesirable that parties should wait for many months allowing costs to build up before bringing a challenge of this fundamental nature. It seems to me that the application for the adjournment should be granted.

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HIS HONOUR: The defendant's application is adjourned to 4 October.

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HIS HONOUR: I order the defendant to pay the plaintiff's costs thrown away by the adjournment, to be assessed.

...

HIS HONOUR: This is an application by the plaintiff to strike out paragraph 1 of the amended defence. That paragraph pleads that the plaintiff's action is statute barred by reason of the Limitation of Actions Act. I will not endeavour to describe the pleading in detail because the defence to some extent pre-emptively raises matters which more properly ought to have

been raised by the plaintiff in reply and responded to by the defendant by way of rejoinder. But since the parties are not in dispute as to the factual matters raised the sequence of pleading has no impact on the matter.

The plaintiff was charged with certain criminal offences which led him to retain the defendants to act on his behalf in about July of 1989. They continued so to act until about December 1993. The plaintiff alleges that as part of that retainer the defendants instituted and conducted an appeal in the Court of Criminal Appeal against his conviction and sentence (imprisonment for 14 years) which occurred on 5 August 1991.

He alleges that he gave instructions and approved certain grounds of appeal and that contrary to his instructions and negligently the defendants permitted counsel on the argument of the appeal on and between 28 January and 3 February 1992 to abandon a ground which he contends if argued would have led to his having had a chance of the appeal being allowed. Instead, the appeal was dismissed on 3 August 1992. Had the appeal been successful according to the statement of claim, there would have been a new trial and, no doubt, that would have carried with it a chance of acquittal. Therefore, he claims he suffered damage.

It is common ground that under the statement of claim (which is pleaded in both contract and tort) the cause of action arose in contract when the ground of appeal was abandoned and,

as I understand, it is common ground that it arose in tort when the appeal was dismissed.

At the time the appeal was argued the plaintiff was under sentence and was serving a sentence. He was, therefore, at that time a person to whom Part 7 of the Public Trustee Act 1978 applied since the sentence he was serving was in excess of three years.

As a result, by reason of section 91 of the Act, the Public Trustee without further or other order or authority became the manager of his estate and he was rendered incapable except with the consent in writing of the Public Trustee of bringing any action of a property nature or for the recovery of any debt or damage.

...

HIS HONOUR: The effect then was that while the prisoner's estate remained vested in him, management of it lay with the Public Trustee. Although there does not seem to be an explicit provision that the estate should include after acquired property, section 91 seems clearly to contemplate that it applies to the estate of the prisoner from time to time. That is compatible with the prohibition in section 95(b).

It is - I think - now accepted that a cause of action of the type presently the subject of the plaintiff's claim, fell

within the scope of section 95(b). In other words, there is no doubt that the plaintiff was not in a position to bring any action at the time the cause of action accrued without the permission of the Public Trustee. That imposed a disability as is clear from the decision of the Court of Appeal in Tyler v. Krause [2003] 1 QdR 453.

It followed that on any view, under section 29 of the Limitation of Actions Act 1974, the right to bring an action was limited to a time before the expiration of six years from the date when he ceased to be under the disability. The question for the present proceedings is whether the plaintiff ceased to be under a disability at a date which was more than six years prior to the commencement of the present action on the 4th of March 2004? The defendant pleads that he ceased to be under a disability no later than 4 October 1993 or alternatively 9 April 1996.

By far the more important of the submissions of the defendant in relation to that related to the first of those dates. The significance of the first of those dates is that on 4 October 1993 the Public Trustee pursuant to section 92 of the Public Trustee Act 1978 discontinued management of the plaintiff's estate. At the time that occurred the plaintiff was still in prison.

He remained in prison until the second of those dates - 9 April 1996 - when he was transferred to a community corrective centre known as the St Vincent De Paul Community

Corrections Centre pursuant to leave of absence granted to enable him to undertake a work to release program. That is the significance of the second date which is pleaded.

The Limitation of Actions Act provides that for the purposes of that Act, "A person shall be taken to be under a disability while the person is ... a convict who after conviction is undergoing a sentence of imprisonment." There is no doubt that at all material times, the plaintiff was a convict. The question is whether, in October 1993 or April 1996, he ceased to be undergoing a sentence of imprisonment within the meaning of the Limitation of Actions Act 1974. The defendant submits that he did.

The basis of that submission is essentially that the Limitation of Actions Act, and particularly the definition in section 5(2) which I have just quoted, must be given a purposive construction.

The defendant submits that once the management of the estate was discontinued by the Public Trustee not only did management revert to the plaintiff but also the incapacity referred to in section 95 ceased. That seems to be so. That being so, the defendant submits, it would be absurd if the Limitation of Actions Act were construed to mean that he was still under a disability.

The justification for a purposive approach is taken from the decision of the High Court in Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541.

The defendant submits that if such an approach is not taken absurd consequences flow. For example, if a person is under a disability while the term of imprisonment has not reached full term then it follows that even now the limitation period has not yet started to run. Even more absurdly if a prisoner were sentenced to life imprisonment the period would never start to run.

That would mean that a person released on parole who had no reason or who had no obstacle to beginning an action could delay proceedings indefinitely.

The defendant points to other consequences in the present case which render this, as the submission puts it, absurd although it might be thought that some of these matters are simply matters which the defendant thinks are unfair: one of the defendants is dead, the barrister who acted is dead, much time has passed, and so on.

It is submitted that such an interpretation also would place a prisoner in a better position than ordinary members of the community.

The difficulty with the defendant's submission is two-fold. The first is that the plain words of the section seem to

indicate that it is wrong. In other words the plain words "undergoing a sentence of imprisonment" seem to cover the situation where a prisoner is subject to a term of imprisonment. The second is that the provisions of the Corrective Services Act 1988 seem also to suppose that during the term of the sentence the prisoner is still to be regarded as being under sentence (see section 184) and any period for which the prisoner is lawfully released on leave of absence must count as part of the prisoner's term of imprisonment (see section 61(6).

In addition the right to apply for parole under section 165 was conditioned on the prisoner "serving" a term of imprisonment. There is not much difference between serving and undergoing. If regard is had to the Corrective Services Act 2000 a similar philosophy seems to be established (see section 153 of that Act).

Determining the meaning of "undergoing a sentence of imprisonment" in section 5(2) of the Limitation of Actions Act requires some reference to the history of that Act.

As originally enacted in 1974 it contained, in addition to the words which it now contains, the further words "and whose estate is not vested in the Public Curator pursuant to Part 4 of the Public Curator Act 1915".

The history of the Public Curator Act and more recently the Public Trustee Act in this regard has been set out in the

judgment of McPherson JA in Taylor v Krause and I shall not repeat it. It is enough to observe that the regime which was established from 1915 onwards in Queensland provided for the property of a convict who was sentenced to imprisonment for three years or more to vest in the Public Curator and for such a convict to be disabled from bringing action of the type presently brought.

That condition persisted until the full term of the prisoner's sentence or his death or bankruptcy or pardon. So the law continued until the enactment of the Public Trustee Act 1978. It seems to me that when the Limitation Act was enacted in 1974 (and I have not been referred to its predecessor but I suppose it is likely that the same may have applied under it), the expression "undergoing a sentence of imprisonment" must have been contemplated to mean or to refer to the full term of the sentence imposed.

The purpose of the provision was it seems to me to prevent time from running against a prisoner who was disabled from bringing a proceeding. That would have been almost all prisoners although it is possible to imagine a case which did not fall within the expression. It does not mean that the second limb of subsection 5(2) was redundant because it is possible to imagine a case where, while a prisoner remained under sentence, his estate ceased to be bound by the provisions of Part 4 of the Public Curator Act. The example is the case where a prisoner became bankrupt yet had an action for personal injuries. No doubt others could be thought of.

When the Public Trustee Act 1978 was enacted, the disability regime changed. First, the prisoner's estate was no longer vested in the Public Trustee, successor to the Public Curator; the latter merely had management of the estate. Second, the prohibition on bringing any action was limited to the duration of the period of management, not to the duration of the sentence or earlier death of bankruptcy or pardon. Third, an exception was introduced to permit the Public Trustee to consent to the bringing of an action.

One might have thought that these changes would have required consequential changes to the definition of a disability in the Limitations of Actions Act. However, no such consequential changes were made. The definition was, as has already been observed, amended but not in a way which supports the position of the defendants in this case.

The defendants' submission essentially means that I must construe the critical words in subsection 5(2) as having undergone a change of meaning in 1978. No authority has been cited to me which would support the view that such an implied change of meaning should be found merely because another act is amended and the statutory scheme changed. I do not think it is enough that I am of the opinion that consequential changes to the Limitation of Actions Act ought to have been made. The mere fact that a Judge thinks that something would be sensible does not mean that he is entitled to change the meaning of the words which the legislature has used.

This is particularly so when the very section with which he is concerned was amended at the material time without making the changes which, it is thought, would have made sense. It maybe that there were reasons, not apparent to me now, why it was thought that the disability should be retained for the purposes of the Limitation of Actions Act.

It might, for example, have been thought that a person was still under a practical disability in bringing a proceeding while incarcerated. That was the reason why the defendants raised the alternative date of the date when leave was granted on 9 April 1996. But it is even more difficult to argue that the Parliament envisaged a change of meaning of the expression, "Undergoing a sentence of imprisonment" to reflect a change in the manner in which the prisoner serves his sentence.

Whatever view one may have as to the desirability of a change to the definition of disability for this purpose, the fact is that the Parliament did not change it. The plaintiff was undergoing a sentence of imprisonment and still is. If there are absurd consequences which flow from that, then the defendants must, in my view, take it up with the Parliament. In my judgment, the application should be allowed and paragraph 1 of the amended defence should be struck out.

...

HIS HONOUR: The argument has been conducted on the basis that the proposed amendment, Exhibit 1, is made. In the light of my reasons such an amendment would be futile and I presume the intention to make it will not now be pursued. I will order that paragraphs 1 and 2 of the existing defence be struck out and will assume that the proposed amendment will not now be made.

The orders are order that paragraphs 1 and 2 of the defence be struck out; order that the defendants pay the applicant's costs of the application to be assessed.

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