SUPREME COURT OF QUEENSLAND

CITATION:	*Sullivan & Anor v Oil Company of Australia Ltd & Anor* [2001] QCA 252
PARTIES:	**KENNETH KEVIN SULLIVAN** (plaintiff/respondent) **SYLVIA MARGARET SULLIVAN** (plaintiff/respondent) **v** **OIL COMPANY OF AUSTRALIA LIMITED** ACN 001 646 331 (first defendant/first appellant) **SANTOS PETROLEUM OPERATIONS PTY LTD** ACN 010 829 017 (second defendant/second appellant)
FILE NOS:	Appeal No 1680 of 2001 PGX 80001 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Land and Resources Tribunal
DELIVERED ON:	29 June 2001
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2001
JUDGES:	McPherson JA, Muir and Atkinson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal allowed, decision of the Tribunal set aside. Order that:** **(a) within 21 days of today's date, the respondents serve on the appellants an amended statement of claim which in respect of each sum claimed by way of compensation states precisely –** **(i) the amount claimed and its basis of calculation;** **(ii) the authority to prospect petroleum lease or other title in respect of which the claim is made;** **(iii) the sub-section of the *Petroleum Act* under which the claim is made;** **(iv) the nature and extent of the alleged damage;** **(v) where applicable, the location of the place where the damage is alleged to have occurred;**

(vi) the date on which, and where applicable, the dates during which the damage is alleged to have occurred;

(b) the appellants deliver any request for further and better particulars of the allegations in the amended statement of claim within 7 days of its delivery;

(c) the respondents deliver a reply to any such request within 7 days of its delivery;

(d) the appellants deliver a defence to the amended statement of claim within 21 days of delivery of the amended statement of claim; and

(e) within 14 days of delivery of the defence, the respondents deliver a reply.

No order as to costs

CATCHWORDS: LIMITATION OF ACTIONS – LAND – whether s 10(1)(d) *Limitation of Actions Act* 1974 (Qld) applicable to claims for compensation under *Petroleum Act* 1923 (Qld) – whether oil companies' failure to comply with provisions of *Petroleum Act* in relation to authorities to prospect and permits affects compensation claims in respect of petroleum leases – whether appropriate case to grant declaratory relief sought

Acts Interpretation Act 1954 (Qld), s 38(4)
Appeal Costs Fund Act 1973 (Qld), s 15 (1)
Criminal Code (Qld), s 663B
Land and Resources Tribunal Act 1999, s 67(2)(b), s 83, s 86
Limitation of Actions Act 1974 (Qld), s 10(1)(d)
Petroleum Act 1923 (Qld) s 2, s 18, s 35, s 36, s 88, s 97, s 98, s 99,
State of Frauds and Limitations of Actions Act 1867 (Qld), s 22

Bailey v Federal Commission of Taxation (1977) 136 CLR 214, referred to
Bass v Permanent Trustee Co Limited (1999) 198 CLR 334, referred to
Chong v Chong [1999] QCA 314; Appeal No 11658 of 1998, 13 August 1999, referred to
Darley Main Colliery Co v Mitchell (1886) 11 App Cas 127, cited
Do Carmo v Ford Excavations Pty Ltd (1983-1984) 154 CLR 234, referred to
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited
Hillingdon London Borough Council v A R C Ltd [1999] Ch 139, cited
Koon Wing Lau v Calwell (1949) 80 CLR 533, cited

Letang v Cooper [1965] 1 QB 232, referred to
Lumley Life Limited v IOOF of Victoria Friendly Society (1991) 36 FCR 590, cited
MacMahon v Minister for Public Works (1995) 86 LGERA 344, referred to
Pegler v Railway Executive [1948] AC 332, cited
Re Farmizer (Products) Ltd, Moore v Gadd (1997) 1 BCLC 589, cited
Read v Brown (1888) 22 QBD 128, referred to
University of New South Wales v Moorhouse (1975) 133 CLR 1, cited
West Riding County Council v Huddersfield Corporation [1957] 1 QB 540, cited

COUNSEL: H B Fraser QC, for the appellants
D R Gore QC, for the respondents

SOLICITORS: Clayton Utz for the appellants
Rees R & Sydney Jones for the respondents

[1] **McPHERSON JA**: I have read and agree with the reasons of Muir J for allowing this appeal and with the orders which are proposed by him.

[2] **MUIR J:** The appellants, Oil Company of Australia Limited and Santos Petroleum Operations Pty Ltd appeal pursuant to s 67(2)(b) of the *Land and Resources Tribunal Act* 1999 against a decision of the learned Deputy President of the Land and Resources Tribunal made on 13 February 2001 in which he refused declarations sought by the appellants that all claims made by the respondents "for losses incurred and damages suffered by the Respondents prior to 16 August 1993 or 26 January 1993 have not been commenced within the relevant time periods prescribed by the *Limitation of Actions Act* 1974".

The relevant proceedings

[3] On 16 August 1999 the respondents, by plaint issued in the Wardens Court, claimed against the appellants $367,299.13 compensation pursuant to the *Petroleum Act* 1923, as amended ("The Act"). A statement of claim accompanying the plaint alleged that: the respondents each held a half interest in an authority to prospect and two petroleum leases over the respondents' land; other authorities to prospect and two petroleum leases ("the petroleum titles") had been granted over the respondents' land "since prior to 1960"; that the respondents were the successors in title to and permitted assigns of the holders of the petroleum titles and, as such, had the obligations of such holders in respect of compensation under the Act.

[4] In paragraph 7 of the statement of claim, the respondents claimed compensation pursuant to the provisions of the Act for –

(a) deprivation of possession of a portion of the surface of the land;
(b) damage to the surface of the land;
(c) severance;
(d) use of, loss of and damage to private surface rights of way;

(e) consequential damage in respect of matters including reduction in crop yield, damage to pastures, rehabilitation, loss of cattle production and use of water.

[5] The claims were in respect of damage allegedly sustained at times both specified and unspecified. Some of the alleged damage extended back to 1960.

[6] The claims for compensation were particularised in the statement of claim under the following headings –

8.1. EXPLORATION
8.2 DEVELOPMENT AND OPERATION PHASE
8.3 SURFACE RIGHTS OF WAY
8.4 DAMAGE TO SURFACE
8.5 PROPOSED EASEMENTS
8.6 CONSEQUENTIAL LOSSES

[7] It is not clear whether the heading to paragraph 8.2 is intended to relate also to paragraphs 8.3 to 8.6 and, in the case of many of the claims, it is impossible to tell whether they are in respect of authorities to prospect or petroleum leases. Nor does the statement of claim identify the actual authority to prospect or lease under which it is alleged that the holder for the time being has entered on the land and done acts giving rise to a claim.

[8] The appellants delivered no defence but filed an application in the Wardens Court on 3 February 2000 seeking the relief subsequently sought in the application before the Deputy President. The practice of the Wardens Court in compensation cases, according to Mr Fraser QC who appeared for the appellants, was that a defence was not required to be delivered unless specifically ordered. The warden heard the application on 12 April 2000 but, before judgment was delivered, the warden's jurisdiction was abolished and jurisdiction in respect of the matter was conferred on the Tribunal.[1]

[9] The appellants contended before the warden and subsequently before the Tribunal that section 10(1)(d) of the *Limitation of Actions Act* 1974 catches compensation claims under the Act. It relevantly provides –

> "**10.(1)** The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose –
>
> …
>
> (d) an action to recover a sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of a penalty or forfeiture."

[10] The Deputy President held a directions hearing in the proceedings on 26 September 2000 at the conclusion of which he directed that the parties provide the Tribunal with "a chronology of material relating to these proceedings" and adjourned the matter for further directions to 6 October 2000.

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1 *Land and Resources Tribunal Act* 1999, s 83(1) – (3).

[11] In the course of the hearing on 6 October 2000, there was discussion about how the matter should proceed in the future. It was directed that the matter be adjourned to Monday, 23 October 2000 for further directions.

[12] On 19 October 2000 it was ordered that –

> "1. The interlocutory proceedings heard before the Mining Wardens Court on 12 April 2000 are discontinued.
> 2. The Application of the First and Second Defendant filed on 3 February 2000 is still current."

It was also ordered that certificates under the appeal costs fund be granted in respect of the discontinued interlocutory proceedings in the Wardens Court.

[13] In the 23 October 2000 hearing, it was argued on behalf of the respondents that there should be no separate hearing of the appellants' limitation point but that the respondents' claim should proceed to trial. It was submitted on behalf of the appellants that: the Deputy President had already decided that there should be a separate hearing of the limitation point; it would be wrong for there to be determination of factual matters on the hearing and the question for determination was simply the application of the *Limitation of Actions Act* to the matters alleged in the statement of claim. It was ordered that the respondents deliver a "statement of facts" in affidavit form and that the appellants deliver one in response.

The relevant provisions of the *Petroleum Act*

[14] It will be useful to now set out the provisions of the Act which bear directly on rights to compensation. By operation of section 86 of the *Land and Resources Tribunal Act* 1999 a reference to "warden" or "Wardens Court" is taken to be a reference to the Tribunal.

> "**18.(1)** Any person may apply to the Minister for an authority to prospect on any land and the Minister may grant such authority.
> …
> **(4)** Such authority shall entitle the holder, upon payment in advance of the rent fixed as aforesaid, and survey fee if necessary, to undertake exploration or prospecting, or geological or geological and geophysical investigation or testing, of favourable geological structures, or generally to do all things in respect of the search for and discovery of petroleum or for the due development of the industry during the term of such authority.
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> **(5) Compensation under this Act shall be payable by the holder of an authority to prospect on any private land or improved land before the holder enters thereon,** and for the purpose of determining such compensation all of the provisions of this Act relating to the determination (whether by agreement or by the Wardens Court) of the compensation payable by a permittee or lessee shall, mutatis mutandis, apply and extend." (emphasis supplied)
>
> **"Private land - compensation before commencement of drilling**

36.(1) If the permittee determines to drill on any portion of private land or improved land covered by the permit the permittee shall, before commencing such drilling, apply to the nearest Wardens Court to determine the amount of compensation payable by the permittee in respect of operations during the first year of the period of the permit.

(2) At the end of such first year the warden shall determine what further compensation (if any) should be paid in respect of operations during such first year, and shall also determine the amount of compensation payable for the balance of the period of the permit.
…". (emphasis supplied)

"Conduct of operations on land

88.(1) The holder of an authority to prospect, permittee or lessee shall so conduct operations under the authority, permit, or lease as not to interfere with the existing use of the land covered or demised by the authority, permit, or lease to a greater extent than may be necessary.

(2) …

(3) The holder of an authority to prospect, permittee, or lessee shall make compensation in accordance with this Act to the owner of any private land or holder under the Crown of any unallocated State land or, in the case of either private land or unallocated State land, to any person in lawful occupation thereof in respect of all damage caused by the holder, permittee or lessee to crops and improvements on such land, including any permanent artificial water supply.

(4) Such compensation shall include reimbursement for the occupation of that portion of the land occupied by the holder, permittee, or lessee for mining and construction works during the period of such occupation.

(5) In respect of any land so occupied the holder, permittee, or lessee shall do such things and take such precautions as may be prescribed to prevent any injury to such land or any property of the owner, holder or occupier of such land as aforementioned situated upon such land, and shall promptly repair any damage resulting from improper methods of mining or from any failure to do the things and take the precautions as aforesaid."

"**Power to agree as to compensation**

98.(1) The permittee or lessee or holder of an authority to prospect or licensee or other person by whom compensation is payable under this Act may agree with the persons severally entitled to compensation as to the amount of such compensation.

(2) No such agreement shall be valid unless the same is in writing and signed by the parties thereto or their agents, and filed in the warden's office.

(3) If within such time as may be prescribed the parties are unable to agree upon the amount of compensation to be paid, then either party may, upon a plaint in that behalf, have the amount determined in the Wardens Court."

"**Measure of compensation**

99.(1) Save as is by this Act otherwise provided, the compensation to be made under this Act shall be compensation for -

(a) deprivation of the possession of the surface or of any part of the surface; and

(b) damage to the surface or any part thereof, and to any improvements thereon, which may arise from the carrying on of operations by the Minister or the permittee or lessee thereon or thereunder; and

(c) severance of the land from other land of the owner or occupier; and

(d) surface rights of way; and

(e) all consequential damages.

(2) However, in determining the amount of compensation no allowance shall be made for any petroleum known or supposed to be in or under the land.

(3) In determining the amount of compensation, the Wardens Court shall take into consideration the amount of any compensation which the owner and occupier or either of them or their predecessors in title have or has already received for or in respect of the damage or loss for which compensation is being determined, and shall deduct the amount already so received from the amount which they or either of them would otherwise be entitled to for such damage."

[15] Section 18, which applies only to authorities to prospect, makes the compensation prescribed by the Act payable before the holder of an authority to prospect enters on the land subject to the authority to prospect. In default of agreement between such holder and the land owner or occupier the amount of compensation is to be determined by the Wardens Court.[2]

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[2] See paragraph [14] hereof for the position since the coming into force of the *Land and Resources Tribunal Act* 1999.

[16] Section 36 is in Part 5 of the Act which relates only to prospecting petroleum permits. Section 2 of the Act, however, provides that "permit" means "a prospecting petroleum permit under this Act, and, in sections 35 and 36, includes an authority to prospect under this Act".

[17] Section 36 requires, for present purposes, the holder of an authority to prospect, before commencing drilling, to apply to the Wardens Court to determine compensation "payable by the permittee in respect of operations during the first year of the period of" the authority to prospect. Section 36(2) requires the warden, at the end of the first year of the term of the authority to prospect, to make a further determination of the compensation (if any) which should be paid in respect of operations during the first year and also of compensation payable for the balance of the period of the permit.

[18] Section 88, 97 and 99 apply to authorities to prospect, permits and petroleum leases. It is convenient to defer further consideration of these provisions until after discussion of the Tribunal's reasons.

The Tribunal's reasons

[19] The Deputy President ordered that the parties deliver statements of facts and set the matter down for hearing on 24 November 2000. A hearing then took place and in reasons for judgment delivered on 13 February 2001, the Deputy President declined to determine whether section 10(1)(d) of the *Limitation of Actions Act* applied to claims for compensation under the Act. He found, however, that assuming the application of section 10(1)(d), any cause of action accruing to the respondents had not arisen because the appellants or their predecessors in title had failed to comply with sections 18 and 36 of the Act. He observed that –

> "The unlawful activities by the oil companies thus operate to negate any trigger that might otherwise commence a cause of action and thus the running of the limitation period under the LA Act."

[20] As I have noted earlier, section 18 of the Act applies only to authorities to prospect, whilst section 36 applies to compensation for operations under prospecting petroleum permits and authorities to prospect. Neither section applies to compensation in respect of petroleum leases.

[21] The statement of claim makes claims for compensation in respect of petroleum leases as well as authorities to prospect. The "unlawful conduct" which the Deputy President found to exist would therefore seem to have no bearing on claims for compensation relating to petroleum leases or arising from acts done by the appellants as lessees.

[22] On one possible construction of that part of the reasons now under consideration, it addresses only claims made under the authorities to prospect. Paragraphs 30 and 32 are couched in general terms, however, and nowhere is it suggested that the findings of breaches of the Act are not applicable to all claims. The Deputy President thus appears to have concluded that his findings in respect of sections 18 and 36 are sufficient to prevent causes of action arising in respect of petroleum leases. I can see no basis for that conclusion in the provisions of the Act.

[23] It is implicit in the reasons that the respondents' causes of action can arise only if the appellants have complied with the requirements of sections 18 and 36 of the Act in relation to compensation. The Deputy President, however, found that the respondents did not so comply. Logically it must follow from the reasons that the respondents' claims, which are for compensation under the Act, are ill-founded and that if the respondents have claims they are for damages for trespass (but not necessarily against the appellants in all cases). It would also follow that the appellants are entitled to have the respondents' proceedings dismissed. Obviously, a conclusion that the respondents have no cause of action is quite inconsistent with the respondents' pleaded claims for compensation under the Act pleaded and pursued by the respondents.

[24] In paragraph 34, the Deputy President surmises that once all "relevant evidence" is led "issues may yet arise (such as compliance with the *Petroleum Act* by the oil companies) which bring into question limitation periods under the LA Act". He then expresses the view that –

> "However, without relevant evidence currently before me, it would be quite improper of me to further consider those aspects of the matter without the benefit of facts determined at a trial or agreed between the parties."

[25] It was pointed out by Mr Fraser that the acknowledgment that the respondents may be able to show compliance with the provisions of the Act is inconsistent with unqualified finding of breaches of the Act.

[26] There then follow lengthy quotations from the reasons in *Bass v Permanent Trustee Co Limited* [3] and *Declaratory Judgments* by Professor Borchard,[4] in which passages the jurisprudential basis of judicial determinations are discussed and warnings given about the undesirability of courts deciding matters on a hypothetical basis.

[27] The discussion in paragraph 34 of the reasons suggests that the Deputy President may have overlooked the role played by pleadings and particulars in stating and refining the issues for determination with a view to ensuring that legal proceedings are conducted both fairly and efficiently. It is implicit in the reasons and in the orders made on 23 October that issues for determination may emerge from the evidence led on trial irrespective of the allegations in the pleadings.

[28] Gibbs J said of particulars in *Bailey v Federal Commissioner of Taxation* [5] -

> "They define the issues to be tried and enable the parties to know what evidence it will be necessary to have available and to avoid taking up time with questions that are not in dispute. On the one hand they prevent the injustice that may occur when a party is taken by surprise; on the other they save expense by keeping the conduct of the case within due bounds."

[29] The respondents have made the allegations on which they intend to rely in the statement of claim. Until those allegations are amended, the appellants are entitled to proceed on the basis that the case they have to meet is set out in the statement of

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3 (1999) 198 CLR 334.

4 1934, Banks-Baldwin Law Publ., Cleveland.

5 (1977) 136 CLR 214 at 219.

claim. In making these observations, I have not ignored section 49 of the *Land and Resources Tribunal Act* 1999 which relevantly provides –

> "**49.(1)** When conducting a proceeding, the tribunal must –
>
> (a) observe natural justice; and
>
> (b) act as quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before it.
>
> **(2)** For the proceeding, the tribunal –
>
> (a) is not bound by the rules of evidence; and
>
> (b) may inform itself of anything in the way it considers appropriate; and
>
> (c) may decide the procedures to be followed for the proceeding."

[30] In a case such as this, a requirement that a claim be properly formulated and particularised is not imposed in order to encrust the claim with unnecessary and expensive formalities but to protect the interests of both parties in the manner identified above. Obviously, I do not suggest that in all matters before the Tribunal, it will be necessary for allegations to be pleaded and particularised in a formal way. The Tribunal must have regard to section 49 in determining the appropriate manner in which a proceeding ought be conducted.

[31] It is apparent why the appellants are anxious to avoid a trial on the merits of claims involving damage allegedly sustained more than 6 years prior to the commencement of proceedings. The evidence discloses that the appellants were not directly involved in activities under relevant mining tenements before 1980, and that imperfect records exist in respect of matters prior to that time. Furthermore, it is not to be expected that the records kept by the appellants or their predecessors in title are of such a nature as to enable the appellants to make an effective factual challenge to many of the respondents' allegations of injurious affectation, loss and damage.

[32] The time and expense involved in preparing for a trial of claims which may be statute barred and in the trial of such claims are considerations relevant to the exercise of discretion to grant or refuse declaratory relief. If such considerations weighed with the Deputy President, they were not mentioned in the reasons.

[33] In the Deputy President's concluding observations he said –

> "… the conclusions I have reached in this matter have some analogy with the right to negotiate granted to indigenous Australians under the *Native Title Act* 1993 (Cth)…in much the same way as Native Title parties have received the valuable statutory right to negotiate before the creation of a right to mine, so too, by the *Petroleum Act*, have landholders received valuable statutory rights under sections 18 and 36. Those rights may not be treated lightly or ignored."

It is not clear what use is made of the Native Title analogy. If the reasoning is that claimants for compensation have a right to bring and prosecute to finality by trial all claims formulated by them no matter how deficient in form or lacking in merit it is erroneous. To dismiss a claim because it is statute-barred or because it fails to meet

the test in *General Steel Industries*[6] is not to deny a right to claim compensation under the Act. Rather, it is to a determine the rights of the parties according to law.

[34] The analogy is also erroneous if what is meant is that the protection afforded land owners or occupiers by the provision of sections 18 and 36 preventing activity under authorities to prospect or permits, as the case may be, without the prior payment of compensation produces the result that a limitation period which might otherwise have applied does not apply.[7]

[35] If there has been a breach or breaches of sections 18 and 36, the claims in respect of the leases will be unaffected. Furthermore, as has been pointed out, the respondents' claims assume and depend on the existence of an obligation on the part of the appellants to pay the compensation claimed. Whether the *Limitation of Actions Act* applies to the respondents' claims and, if so, how, is to be resolved by an analysis of section 10(1)(d) of that Act and, with reference to the provisions of the Act, by a determination of the circumstances in which, if at all, a claim for compensation under the Act gives rise to a cause of action.

[36] The appellants have thus succeeded in establishing errors of law which affected the exercise of the Tribunal's discretion. Under section 67 of the *Land and Resources Tribunal Act* 1999 this Court may, if it allows an appeal, set aside the decision appealed against and substitute the decision it considers should have been made. Consideration of the appropriate order or orders necessitates some discussion of the merits of the appellants' limitation of actions argument and it is to that matter I now turn.

A consideration of the Limitation of Action point.

[37] The words "an action to recover a sum recoverable by virtue of any enactment" which appear in section 10(1)(d) of the *Limitation of Actions Act* are broad. Given a literal construction they apply to claims for compensation under sections 18, 36, 88 and 99 of the Act.

[38] Section 18(5) of the Act provides that the compensation prescribed by the Act is payable by the holder of an authority to prospect before entering onto the subject land. Section 36(1) requires the holder of an authority to prospect in prescribed circumstances to apply to the warden for compensation. Section 98 provides that if the compensation payable under the Act is not agreed "within such time as may the prescribed" either party may apply to the Wardens Court to have the amount determined. No time has been prescribed with the result that if agreement is not reached "as soon as possible"[8] or, if section 38(4) of the *Acts Interpretation Act* 1954 does not apply, within a reasonable time[9] application may be made to the Wardens Court to fix the amount of compensation. Section 99 contemplates that where compensation is to be paid under the Act, it may be agreed.

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6 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129.

7 The appellants submit that under neither section 18 nor section 36 is the determination and payment of compensation a pre-condition to entry on the land or drilling as the case may be. It is unnecessary to determine the point for the purposes of this appeal.

8 *Acts Interpretation Act* 1954, s 38(4).

9 *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 573-4.

[39] Section 99 sets out heads of compensation or matters by reference to which compensation is to be assessed.

[40] Sections 88, 98 and 99 apply also to the petroleum leases. The circumstance that the amount of compensation to which a claimant may be entitled will not be known unless agreed or determined does not prevent the claim as agreed or assessed being recoverable "by virtue of" the Act. The Act is the source of a claimant's right of recovery. Another pre-requisite to the application of section 10(1)(d) is that a cause of action must have arisen.

[41] In *Do Carmo v Ford Excavations Pty Ltd*,[10] Wilson J said –

> "The concept of a 'cause of action' would seem to be clear. It is simply the fact or combination of facts which gives rise to a right to sue. In an action for negligence, it consists of the wrongful act or omission and the consequent damage: cf. *Cooke v. Gill* …; *Read v. Brown* (1888) 22 Q.B.D. 128, at 131."

[42] Lord Diplock gave this explanation in *Letang v Cooper*[11]

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

[43] In *Read v Brown*, Lord Esher MR, discussing the meaning of "cause of action" he observed –[12]

> "It has been defined in *Cooke v Gill* Law. Rep. 8 C.P. 107 to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove every fact, but every fact which is necessary to be proved."

[44] De Jersey CJ in *Chong v Chong*[13] referred to the same passage from Lord Esher's reasons with approval.

[45] It has been held that an "action to recover any sum recoverable by virtue of any enactment" is apt to include: claims for compensation for compulsory acquisition of land";[14] proceedings brought by liquidators under corporations legislation for a declaration that directors make a contribution to the assets of a company;[15] claims by a local authority for compensation under the *Local Government Act* 1933 (UK) for a financial adjustment consequent upon part of the area of the local authority having been transferred to another local authority[16] and a claim for compensation by a railway company employee pursuant to the *Railways Act* 1921 (UK) arising from an alleged disparity between his post and pre-amalgamation remuneration

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10 (1983-1984) 154 CLR 234 at 245.
11 [1965] 1 QB 232 at 242-243.
12 (1888) 22 QBD 128 at 131.
13 [1999] QCA 314; Appeal No 11658 of 1998, 13 August 1999.
14 *Hillingdon London Borough Council v A R C Ltd* [1999] Ch 139.
15 *Re Farmizer (Products) Ltd, Moore v Gadd* (1997) 1 BCLC 589.
16 *West Riding County Council v Huddersfield Corporation* [1957] 1 QB 540.

which compensation was to be determined by arbitration in the event of a failure to agree.[17]

[46] In *Hillingdon London Borough Council v ARC Ltd* it was contended that the cause of action of a claimant for compensation for the compulsory acquisition of the claimant's land accrued only after agreement or assessment by the relevant authority. In rejecting that contention, Potter LJ said[18] -

> "I would adopt the approach of Lord Goddard C.J. in *West Riding County Council v. Huddersfield Corporation* [1957] 1 Q.B. 540. I consider that, when the realities of the position are looked at in a case of this kind, the right to compensation which arises as at the date of entry of the acquiring authority is an immediate right which, in the absence of agreement (as to which there is no obligation upon the parties), can only be enforced at the suit of the claimant by initiating proceedings to quantify the sum due; that, in turn, can only be done by the Lands Tribunal, just as it must be done by an arbitrator in other statutory contexts. While the exercise may be simply one of quantification, it is in reality an action to recover a sum of money, namely the amount of the compensation due as assessed by the Lands Tribunal.
>
> In substance and effect the proceedings do not differ in any essential manner from any other kind of proceedings in which a claim is made on the party liable, liability is admitted or otherwise established, and proceedings follow when quantum cannot be agreed. Thus, the right or cause of action which arises on entry by the authority may properly be characterised as a right to be paid such compensation as may be agreed or assessed by the Lands Tribunal."

[47] I respectfully adopt the above analysis as being of general application to claims for compensation under the Act. In *Hillingdon* as well as in *West Riding County Council v Huddersfield Corporation*,[19] it was held that a cause of action may accrue for "any sum recoverable by virtue of any enactment" although provision was made in the subject enactment for determination of the sum in default of quantification by agreement.

[48] In this country, it has been held that each of the following give rise to a cause of action on the part of the claimant: a statutory right to compensation in respect of the compulsory acquisition of land where in default of agreement compensation is to be assessed by a court;[20] a claim for compensation pursuant to an undertaking as to damages given at the time of the granting of an interlocutory injunction;[21] a right to compensation pursuant to section 663B of the *Criminal Code* for injury suffered by the claimant by reason of the offence of which the respondent is convicted.[22]

[49] In *Chong v Chong* it was held that the cause of action for compensation based on section 663B arose on the conviction of the respondent to the application. Section

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17 *Pegler v Railway Executive* [1948] AC 332.
18 At 153.
19 [1957] 1 QB 540.
20 *MacMahon v Minister for Public Works* (1995) 86 LGERA 344.
21 *Lumley Life Limited v IOOF of Victoria Friendly Society* (1991) 36 FCR 590.
22 *Chong v Chong* [1999] QCA 314; Appeal No. 11658 of 1998, 13 August 1999.

663 B is cast in discretionary terms, providing that "… the court … may … order … compensation ..." and the amount of compensation is only ascertainable by being fixed by a court. In *McMahon v Minister for Public Works*, consistently with the English authorities referred to earlier, the cause of action was found, by implication, to arise on notification of the resumption in the Government Gazette.

[50] Mr Gore for the respondent, argued that, because compensation was payable under section 18(5) before the holder of an authority to prospect could enter on the land subject to the authority to prospect and because the sub-section was otherwise silent as to when compensation was payable, there was no "triggering event" which would permit a cause of action to arise.

[51] Sub-section (5) of section 18 may well give rise to difficulties in determining the point at which a cause of action arises unless, in the case of an authority to prospect, it is the grant which creates the entitlement to compensation. It would perhaps be curious if the Act contemplated a situation in which a person could be granted an authority to prospect, and thus create a blot on the affected landowner's title but not be liable to pay compensation until the holder decided, at its discretion, to enter on the land. It is clear however, that a right to compensation has arisen if the holder of the authority to prospect has entered on the land within the meaning of the sub-section. As compensation is expressed to be payable before entry, failure to pay before entry can hardly produce the result that compensation ceases to be payable and the claimant is left to pursue common law remedies.

[52] Other arguments advanced by Mr Gore were –

(a) The Act has its own scheme for fixing compensation and the more general provisions of the *Limitation of Actions Act* do not apply by application of the principle *generalia specialibus non derogant*.

(b) When the Act was passed in 1923, there was no provision corresponding to section 10(1)(d) in the then applicable *Statute of Frauds and Limitations of Actions Act* 1867. It is thus likely that the legislature intended in 1923 that the compensation had to be fixed "so as to create a debt, to trigger the limitation period in s 22 of the 1867 Act".

(c) Some of the respondents' claims are in respect of continuing damage or relate to acts which have caused damage at a time subsequent to the acts of the respondents referred to in the statement of claim. Consequently, limitation periods do not run.

[53] I am not persuaded by any of these points. The *Act* creates rights of compensation. It does not expressly or impliedly prescribe limitation periods. The *Limitation of Actions Act* is an act, the purpose of which is to set time limits for the bringing of proceedings. Section 10(1)(d) expressly legislates in respect of actions to recover moneys recoverable "by virtue of any enactment".

[54] Contrary to the submission, the specific legislation is the *Limitation of Actions Act* and it is later in time than the Act. There is thus no reason why full effect should not be given to section 10(1)(d). Those reasons are also sufficient to dispose of argument (b). The intent of the Legislature in 1923, whatever it may have been, cannot operate to confine the operation of a later statute.

[55] The third of these contentions is one which has application only to some of the respondents' claims. Even in the case of those claims it will not be the case that limitation periods are incapable of application. In some circumstances, where there has been a continuance of damage, and the cause of action arises in the event of damage, a fresh cause of action arises from time to time, as often as the damage is caused.[23] Fresh events of damage, for example, subsidence causing damage, may give rise to a fresh causes of action.[24] If some of the claims are of this nature that should be apparent from the statement of claim, not from extrinsic evidence.

[56] The only causes of action under consideration are created by provisions of the Act. It may be conceded that the provision of the Act in relation to compensation are not entirely clear but there should be no great difficulty in applying section 10(1)(d) of the *Limitation of Actions Act* to the general run of claims for compensation.

[57] Mr Gore submitted that in some cases the time at which damage is suffered may be long after an act or acts of the appellant causing the damage. Where section 36 or 88 applies that may well be so but it does not necessarily follow that the application of the limitation period cannot be determined until after trial. The point though is not without relevance to the desirability of granting declaratory relief.

[58] As questions of construction of the Act are not central to the issues raised on the appeal and were not addressed in detail in argument, it is inappropriate that I attempt any further analysis of them.

The appropriateness of declaratory relief

[59] Notwithstanding the above discussion of the construction and possible application of section 10(1)(d), I do not consider it appropriate that the declaratory relief sought be granted. Until the respondents' case is more clearly articulated and particularised, any declaration as to the application of section 10(1)(d) will tend to be of the nature of an advisory opinion. That appears from page 13 of the reasons to have been of concern to the Deputy President.

[60] Apart from the general undesirability of determining proceedings in a piecemeal way (unless the resolution of the matter for early determination may lead to the resolution of the whole dispute or substantially reduce the cost and/or duration of the trial of the remaining matters in dispute) it is rarely appropriate to fashion declaratory relief unless the facts in issue are clearly identified.[25] It is only then that it is possible to gauge the possible consequences of any proposed declaration. The fact that causes of action may arise at various times and in various ways under the relevant provisions of the Act, and the possibility that a claim may be able to be supported by more than one provision of the Act, further suggests that the application for declaratory relief is premature.

[61] Once the applicant's claim is put in proper form, it will be possible to make a more informed assessment of the utility and desirability of granting declaratory relief and of the extent to which potentially statute-barred claims may increase the cost,

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23 *28 Halsbury's Laws of England*, 4th ed para 623.

24 *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127.

25 See, for example the discussion in *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 9-10; *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334.

complexity and duration of any preparation for trial and of the trial itself. The contentions to be raised by the appellants in response to the claim may also be relevant as may be the respondents' responses to those contentions.

[62] Management of these proceedings in a way calculated to ensure procedural fairness and an efficiently conducted hearing requires a precise particularisation of the respondents' claim. It also requires that the respondents be appraised of the case the appellants propose to mount. It is desirable therefore that the pleadings encompass a defence and also a reply. It is in the reply that the respondent will be required to set out any facts which might lead to the defeat or avoidance of limitation periods which might otherwise apply.

[63] I would allow the appeal, set aside the decision of the Tribunal and order that –

(a) within 21 days of today's date, the respondents serve on the appellants an amended statement of claim which in respect of each sum claimed by way of compensation states precisely –

(i) the amount claimed and its basis of calculation;

(ii) the authority to prospect petroleum lease or other title in respect of which the claim is made;

(iii) the sub-section of the *Petroleum Act* under which the claim is made;

(iv) the nature and extent of the alleged damage;

(v) where applicable, the location of the place where the damage is alleged to have occurred;

(vi) the date on which, and where applicable, the dates during which the damage is alleged to have occurred;

(b) the appellants deliver any request for further and better particulars of the allegations in the amended statement of claim within 7 days of its delivery;

(c) the respondents deliver a reply to any such request within 7 days of its delivery;

(d) the appellants deliver a defence to the amended statement of claim within 21 days of delivery of the amended statement of claim; and

(e) within 14 days of delivery of the defence, the respondents deliver a reply.

[64] As neither side has succeeded substantially more than the other, I would make no order as to costs. The respondents made application under section 15(1) of the *Appeal Costs Fund Act* 1973 for the grant of a certificate in respect of the appeal. I do not consider it appropriate, in the circumstances discussed, to exercise a discretion under section 15 in favour of the respondents.

[65] **ATKINSON J:** I agre with the order proposed by and the reasons of Muir J.