[2002] QCA 236

COURT OF APPEAL

DAVIES JA
WILLIAMS JA
JERRARD JA

Appeal No 3460 of 2002

JOHN BERNARD SILVEY — Applicant

and

MAX CAREY NOMINEES PTY LTD (ACN 005 235 334) — Respondent

BRISBANE

..DATE 28/06/2002

JUDGMENT

WILLIAMS JA: This is an application pursuant to section 118, subsection (3) of the District Court Act 1967, for leave to appeal against an order made by a District Court Judge on the first morning of trial, giving the respondent/plaintiff leave to amend the plaint.

The respondent sustained personal injuries on 10 March 1998 when a pergola on which he was working collapsed. He was a builder who had been engaged to carry out work on that structure. The pergola was attached to a house which had been constructed in about 1995 by the applicant.

The original allegation of negligence was essentially that the defendant failed to construct the house, specifically the soffit framing, in a proper and workman-like manner. There was also allegation that the applicant had failed to comply with the requirements of the Building Act 1975 in the construction of the soffit framing.

The defence denied negligence and alleged the soffit was constructed in a proper and workman-like manner. It also alleged the respondent's own negligence, as particularised, was the cause of his fall.

The amendments were made on the first day of trial, 25 March 2002, by which time the three year limitation period had expired. In broad terms by the amendment the respondent asserted that the applicant made available contractual

documents relating to the house to the financier of the original owner, that that financier provided those documents to the respondent and that those documents contained a representation that the applicant had caused the fascia area to be structurally strengthened.

It was then pleaded that in reliance on that representation the respondent accepted that the fascias were structurally able to take the load of the pergola and that he was injured when the pergola collapsed. It was then said that the collapse was due to the failure of the applicant to structurally strengthen the areas in question.

The applicant opposed the amendment on three grounds:

(1) the lateness of the application;

(2) that the pleaded case could not be sustained as a matter of law; and

(3) that the new course of action was time barred and did not fall within the terms of Rule 376(4) of the Uniform Civil Procedure Rules.

For a variety of reasons, which need not be expanded upon now, this Court is always reluctant to give leave to appeal against an interlocutory order, particularly one involving practice and procedure.

It is sufficient to say that ordinarily an applicant for leave in such circumstances would have to demonstrate at least

serious doubt as to the correctness of the interlocutory ruling and also demonstrate that substantial injustice would result if leave were refused.

The fact that on an appeal against a final judgment it is open to the appellant to challenge the correctness of any interlocutory order made as a step in the proceeding is a factor militating against the granting of leave to appeal from an interlocutory order before final determination (Pioneer Industries Pty Ltd v. Baker [1997] 1 Queensland Reports 514).

The learned Judge at first instance appears to have accepted that the amendments raised a new cause of action. That may or may not be so. Representations by the applicant as to the work originally performed could well have been admissible as part of the case in negligence originally pleaded.

It is at least arguable that the amendments effectively go no further than alleging additional particulars of the original cause of action in negligence. But on the assumption that a new cause of action was added, the learned Judge at first instance concluded that such new cause of action arose out of substantially the same facts as the cause of action originally pleaded.

Cases such as Allanor Pty Ltd v. Doran, CA 5210 of 1998, 17 November 1998, Draney v. Barry, [1999] QCA 491 and Thomas v. State of Queensland [2001] QCA 336 demonstrate that a broad

approach is permissible when determining whether or not the new cause of action arises out of substantially the same facts as the original cause of action.

The decision of the learned Judge at first instance in concluding that the new cause of action arose out of substantially the same facts as the original is not attended with sufficient doubt to warrant it being reconsidered at this stage by this Court.

Once that conclusion is reached the problem created by the fact that the limitation period had expired is overcome.

The applicant also contends that the amendments cannot be sustained as a matter of law for a variety of reasons. It is said, for example, that a representation that the applicant had caused the fascia to be "structurally strengthened" did not support the meaning attributed to it in paragraph 7A.8 of the amended pleadings wherein it is said that in "reliance on the said representation the plaintiff accepted that the fascias on either side of the courtyard were structurally able to take the load of the pole plate and rafters as part of the covered pergola constructed".

That may or may not be so, but the answer will be dependent on evidence led at the trial. It cannot be said that as a

matter of law the representation could not convey the meaning attributed to it subsequently in the pleading.

The same response can be made to the other submissions made on behalf of the applicant with respect of sustainability in law of the pleading.

It is true that the trial on the amended pleading will take place over six and a half years after the incident, but that would be the situation if the trial were to proceed on the original pleading and the respondent led evidence as to representations made by the applicant as to work performed in order to establish that original cause of action.

In all the circumstances, the application for leave should be refused with costs.

DAVIES JA: I agree.

JERRARD JA: I agree.

DAVIES JA: The application is refused with costs.

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DAVIES JA: That costs order we have made will be stayed until trial or earlier order by a District Court Judge.
