IN THE SUPREME COURT OF QUEENSLAND No. 86 of 1986

CIVIL JURISDICTION

BEFORE MR. JUSTICE DEMACK

ROCKHAMPTON, 22 NOVEMBER 1989

BETWEEN:

HOPE GARDSO Plaintiff

-and-

THOMAS BORTHWICK & SONS (AUSTRALASIA) LIMITED Defendant

JUDGMENT

HIS HONOUR: In this application I have reduced my reasons to writing, which I now publish.

In the circumstances I am satisfied that there is a proper basis on which to allow the defendant to amend his defence by inserting "clause 4A, Insofar as it is alleged that the plaintiff has sustained injury in the period prior to 11 November, 1981 by reason of the defendant's system of work, which is denied, then the defendant says her action is statute barred by reason of the provisions of the Statute of Limitations".

In the circumstances, I will make no order as to costs.

IN THE SUPREME COURT OF QUEENSLAND No. 86 of 1986

MACKAY DISTRICT REGISTRY

BETWEEN:

HOPE GARDSO Plaintiff

AND:

HOMAS BORTHWICK & SONS (AUSTRALASIA) LIMITED Defendant

JUDGMENT - DEMACK J.

Delivered the Twenty-second day of November 1989

This is an application on the part of the defendant for an order that the defendant be granted leave to amend its defence by inserting:— "4A In so far as it is alleged that the plaintiff has sustained injury in the period prior to 23rd July, 1983 by reason of the defendant's system of work (which is denied), than the defendant says her action is statute barred by reason of the provisions of the Limitation of Actions Act 1974".

The Writ of Summons in this action was issued on 23rd July, 1986. These Statement of Claim was delivered on 14th October, 1987. The relevant parts of the Statement of Claim are as follows:—

"2. At all material times the plaintiff was employed by the Defendant as a meat packer;

4. Between 1979 and the 6th January, 1984 the Plaintiff was employed at the Defendant's works at Bakers Creek near Mackay in the State of Queensland. In the Plaintiff's employment the Plaintiff was engaged in a permanent basis in the boning room wrapping and packing heavy cuts of meat as it came from the slicers and packing the same into cardboard cartons and in the cryvac area where packed meat was taken from cartons and placed into cryvac machines for

processing and then after being processed was removed from the cryvac machine and placed back into cartons.

5. During the course of her employment with the Defendant whilst the Plaintiff was working in the boning room the Plaintiff suffered injury to her back namely a posterier herniation of the disc at the L5/S1.

6. The plaintiff's injury was caused by the negligence and/or breach of statutory duty of the Defendant, its servants or agents, particulars whereof are as follows:

(i) failing to provide a safe system of work;

(ii) failing to provide a safe place of work;

(iii) failing to give the Plaintiff any or any adequate instructions as to how to carry out her tasks

(iv) failing to warn the Plaintiff of the dangers associated with her work;

(v) failing to provide for rotation of staff for the carrying out of tasks which by reason of its repetitive nature was dangerous to employees;

(vi) requiring the Plaintiff to twist constantly whilst handling heavy cuts of meat and placing undue strain on her back;

(v) in breach of Rule 1 Clause 25 of the Factories and Shops Act as amended requiring the Plaintiff to lift weights of more than 16 kilograms."

It will be noted from this Statement of Claim that the defendant does not allege that she sustained an injury on a particular date. On the other hand there is reference in paragraph 6(v) to tasks of a repetitive nature and in

paragraph 6(vi) to twisting constantly whilst handling heavy cuts of meat. Paragraph 5 alleges that it was in the course of her employment that the plaintiff suffered injury to her back. The employment is said to have been between 1979 and 6th January, 1984.

The defence was delivered on 11th November, 1987. It did not raise any question of the Limitation of Actions Act. Neither did the defendant seek any particulars from the plaintiff about the circumstances of any specific incident which caused injury to her back. Thus when the pleadings closed, the plaintiff clearly alleged an injury sustained over a period of time between the beginning of 1979 and 6th January, 1984. The defence had not put in issue the fact that most of this period was outside the period prescribed by the Limitation of Actions Act.

The defendant now seeks to amend its defence to raise the Limitation of Actions Act. Specifically, Mr McMeekin, who appeared for the defendant, relied on the provisions of O. 32, r. 13 which reads:

> "The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real questions in controversy between the parties."

It is obvious enough that this power is very broad indeed and may be exercised at any time. Surprisingly, there is very little accessible authority dealing with the issue that the defendant raises. In Halsbury's Laws of England, 4th ed. Vol. 28 para. 656, it is said,

> "If a defendant to whom a defence of the Statute of Limitation is open omits through inadvertence to plead it, then if the court is of opinion that the plea of the Statute is in the circumstances not improper and that costs will be an entire compensation to the plaintiff for the default which necessitated the amendment, it may allow an amendment of the pleadings so that the defendant may avail himself of the defence."

This paragraph is in identical terms to that contained in the third edition of Halsbury Vol. 24, para. 379. The cases cited in support of it are identical. Words to the same effect but slightly differently arranged, appear in the second edition of Halsbury, Vol. 20, para. 1084. Again the cases cited are the same as those in the fourth edition. As the most recent of these cases is the decision in Harnett -v- Fisher (1927) A.C. 573, it does not appear that the consecutive authors of this part of Halsbury have been troubled by recent court decisions on this point.

The principal decision cited in support of the paragraph is Aronson -v- Liverpool Corporation (1913) 29 T.L.R. 325, a decision of Pickford J. That particular case involved a very late application by the defendant to amend its defence to plead the provisions of the Public Authorities Protection Act. It is apparent that at the time when His Lordship considered the application, the jury had returned a verdict in favour of the plaintiff. It is apparent that, when the writ was issued, the defendant was made aware of the availability of the limitation. It is apparent from the reasons for judgment that His Lordship believed that simply to grant the plaintiff the whole costs of the trial would not give him entire compensation so that in the circumstances he refused the amendment. It is also apparent from the judgment that His Lordship referred to the often cited remark of Bramwell L.J. in Tildesley -v- Harper 10 Ch.D. 393, at pp. 396, 397.

It appears that Aronson -v- Liverpool Corporation is one of the few illustrations of the refusal to allow an amendment to plead a statute of limitations on the ground that to do so would be to work an injustice which could not be dealt with by the ordering of costs. On the other hand, in Harnett -v- Fisher (supra), a "formal amendment" to plead the Statute of Limitations was made three years after the delivery of the defence (at p. 579) and a further amendment to plead a different Statute was allowed during the hearing of the appeal by the House of Lords (at p. 577).

Mr McMeekin referred to the decision of the High Court in Clouoh and Rogers -v- Frog (1974) 4 A.L.R. 615. In the course of that judgment in that case, reference is made to the other often cited judgment of Bowen L.J. in Cropper -v- Smith (1884) 26 Ch.D. 700, at pp. 710, 711. That passage may be conveniently requoted:

> "The object of courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases....I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. As soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."

Mr McMeekin submitted that the effect of the authorities is that the essential question for me on this application is whether the amendment would work an injustice which could not be cured by an order for costs.

Mr Jones on the other hand referred me to Shannon -v- Lee Chun (1912) 15 C.L.R. 257, and, particularly at p. 266, where Isaacs J. referred the observations of Sir Francis Jeune in The Alert 72 L.T. 124, at p. 126. Specifically Mr Jones relied on the second proposition quoted, namely,

> "The second proposition appears to me to be equally clear, viz., but if the judge finds that owing to the mistake, or whatever it may have been, of the plaintiff, in not having put his pleadings right originally, there has been such an injury to the defendant, or such a change in the position of the defendant that he cannot get justice done, then, of course, it is equally clear that such an amendment ought not to be allowed."

Of course in this case Mr Jones was relying on those words as applying equally to an application by the defendant for an amendment. In effect his submission was that because the defendant has not previously pleaded the

Statute of Limitations, the plaintiff is in the position where if the amendment is now allowed, she cannot get justice done.

The relevant facts on which Mr Jones relies can be stated quite briefly. The plaintiff's solicitor on learning that there was a medical opinion to the effect that the injury was sustained over a period of time, ascertained that the defendant is a company registered in New South Wales. There the relevant limitation period is six years. The plaintiff did not commence proceedings in New South Wales until the defence was delivered. When the defence did not plead the Statute of Limitations the plaintiff did not proceed to commence proceedings in New South Wales. An amendment at this stage effectively means that the part of the injury that the plaintiff suffered during the three years prior to the 23rd July, 1983 is now out of reach of the plaintiff in New South Wales as well as in Queensland. Consequently, the plaintiff says she cannot obtain justice in respect of injury she sustained during that period. This loss is something which goes beyond the mere question of costs and is a reason why the amendment should not be allowed at this stage.

It is not suggested that the plaintiff alerted the defendant to the situation in any way. The defendant seems, to some extent, to have mislead itself, by referring to a Form 4 Application to the Workers' Compensation Board lodged by the plaintiff, rather than by reading the plain words of the Statement of Claim. As I have said, the plain words of the Statement of Claim make it clear that the plaintiff is alleging an injury sustained over a period of time, a greater part of which was outside the period prescribed by the Limitation of Actions Act. In those circumstances the plaintiff might well have expected that a plea that the greater part of the period was so affected would be contained in the defence. Apparently, because the defendant was concentrating on the relevant Form 4 Application, it acted on the assumption that the plaintiff was really alleging a specific incident on 21st October,

1983. The defendant's application for the amendment seems largely to have been brought about because of the way in which the plaintiff answered interrogatories. It is clear enough that, over the many centuries that have passed since the Statute of. Limitations was first introduced, the courts have recognised that the plea of the Statute is a proper one to be made in any litigation. The Courts have never equated it with a plea under the Statute of Frauds. While it has been recognised that the plea does not go to the merits of the particular case, nonetheless it is one that is properly taken.

This application seems to me to be particularly finely balanced. I am satisfied that the plaintiff did not commence proceedings in New South Wales because the defendant did not plead the Statute of Limitations in this action. However, she did not tell the defendant this. I am also satisfied that the defendant has been unawares of what was going on during the relevant period having focused all of its attention, not on the pleadings, but on the Workers' Compensation file.

On the other hand, the plaintiff did nothing to protect her rights in New South Wales by issuing a writ in that State. Mr Jones submitted that it was not open to the plaintiff to do that, so long as the defendant did not plead the Statute of Limitations in Queensland. However, if the writ had been filed the defendant would have been made fully aware of the actual issues and being confronted by proceedings in New South Wales would have been forced to consider the actual nature of the plaintiff's claim.

As I have said this seems to me to be a particularly finely balanced, but all things considered, I am satisfied that the plaintiff has indeed lost a right because of this late application by the defendant, and this right is something far more significant than a claim for costs. In those circumstances I am satisfied to allow the amendment as it is claimed would be to work an injustice on the plaintiff.

Mr Jones recognised that even the six year period of limitation in New South Wales meant that part of the period of the plaintiff's employment was beyond that Statute of Limitations. Consequently he indicated that he could not resist an application for an amendment that allowed the defendant to plead a six year period of limitation from the date of its defence. In the circumstances here I am satisfied that that is a proper basis on which to allow the amendment and I will allow the amendment on those terms, namely that the defendant be granted leave to amend its defence by inserting "clause 4A In so far as it is alleged that the plaintiff has sustained injury in the period prior to 11th November, 1981 by reason on the defendant's system of work which is denied, then the defendant says her action is statute barred by reason of the provisions of the Statute of Limitations". In the circumstances I will make no order as to costs.