State Reporting Bureau

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Department of Justice and Attorney-General

Transcript of Proceedings

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Date 18/4/02

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HOLMES J

No 7992 of 2001

LEAH MAREE TWIDALE	First Plaintiff
and	
KADISON MICHAEL HOME BY HIS NEXT FRIEND LEAH MAREE TWIDALE	Second Plaintiff
and	
BRENT LESLEY HOME BY HIS NEXT FRIEND LEAH MAREE TWIDALE	Third Plaintiff
and	
SIMON PTY LTD (ACN 009 667 728)	Defendant

BRISBANE

..DATE 12/04/2002

JUDGMENT

HER HONOUR: The plaintiff seeks a case appraisal. If that application were made without the complicating factor of the application for third party joinder which has now been made, I would have been minded to grant the application. It seems to me that the matter was a relatively suitable one for case appraisal: quantum was relatively simple, it was a dependency action involving questions of support, and liability would not have involved, I think, extensive questions of evidence. I am not sure that I would have granted it as soon as a week away, but it seems to me it was a proper application.

What complicates the matter is that the defendant seeks to join as third party the employer of the deceased but, because of the effect of Bonser v. Melnacis [2002] 1 QdR page 1, not in that capacity but in respect of contractual obligations under a contract of carriage so that it will seek damages for economic loss. That proceeding seems to me, without expressing any concluded opinion, to be viable.

The real issue is whether the inconvenience to the plaintiffs outweighs the desirability of resolving all the issues at once. It undoubtedly is inconvenient to the plaintiff: the pleadings have closed, a statement of loss and damage has been delivered, disclosure has taken place, the plaintiffs are ready to proceed. It is inevitable that they will be held up and that there will be some addition to the trial length, although I would have thought not substantial, and I would have thought that the sorts of

issues likely to be raised in the third party proceedings will not add greatly to the complexity of the matter.

The claim will be that it was a condition of the contract of carriage that it would be carried out with reasonable skill and that that extended to proper training of drivers. In effect, those matters which are presently pleaded as contributory negligence in the defence, matters such as the deceased standing too close to the unloading process, will be the alleged breaches of contract. So there is a very considerable mutuality of issues.

There has been a question of whether there was a common insurer between the defendant and the proposed third party has delayed the application. Mr Feely raises the prospect of further problems if there is an indemnity claim against that insurer, but that seems to me speculative and not something that can be of much weight here.

It is clear that at issue in both proceedings are the respective contributions to the resulting tragedy of the unloader and the deceased. There is the complication of the existence of the contract and the implication of the term that the defendant contends for, but I do not think it adds significantly.

It is not yet a year since the accident. It is seven months since the commencement of proceedings. The plaintiffs have been receiving their entitlements as dependants under the

WorkCover Act. On balance in all the circumstances, I think that convenience points to allowing the joinder. That means, in my view, that the case appraisal cannot practically proceed in the near future, as was proposed.

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HER HONOUR: I think this is an unusual case in which the unsuccessful plaintiffs should have their costs of both applications. The reasons for that are that the application for a case appraisal was properly brought and it is only for the other application that it has not been granted.

It was brought in a timely way and it is really only because of the last minute nature, I suppose, of the third party joinder application that the plaintiff has been forced into resisting it in order to preserve what it hoped to achieve by way of the case appraisal. It does come about, I think, because of the very late application. I understand the reasons for that but I do not think they are to be visited on the plaintiff which has had its original application rendered untenable and then, in order to try and preserve that application, had to resist this one.

I am satisfied that the proper order is that the plaintiff should have the costs of both application to be paid by the defendant.

...

HER HONOUR: I will make the order as you have amended it and I will initial it and place it with the papers.
