IN THE SUPREME COURT OF QUEENSLAND O.S. No. 325 of 1984

FULL COURT

BEFORE:

The Chief Justice (Sir Walter Campbell)

Mr. Justice Sheahan

Mr. Justice McPherson

BRISBANE, 10 OCTOBER 1984

IN THE MATTER OF the Magistrates Court Act 1921-1976

- and -

IN THE MATTER OF an application by Vince Adam under the said Act seeking transfer of his action pending in the Magistrates Court

BETWEEN:

VINCE ADAM (Plaintiff) Respondent

- and -

ANTONIO ALESANDRA SHIAVON

- and -

STATE GOVERNMENT INSURANCE OFFICE (QUEENSLAND) (Respondents) Appellants

JUDGMENT

THE CHIEF JUSTICE: In this matter I would dismiss the appeal with costs. I publish my reasons.

MR. JUSTICE SHEAHAN: I agree that the appeal should be dismissed with costs. I agree with the reasons just published by the Chief Justice.

MR. JUSTICE McPHERSON: I agree that the appeal should be dismissed with costs and with the reason of the Chief Justice.

THE CHIEF JUSTICE: The order of the court is: appeal dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND O.S. NO. 325 of 1984

IN THE MATTER of the "Magistrates Courts Act 1921 - 1976"

and

IN THE MATTER of an application by VINCE ADAM under the said Act seeking in the Magistrates Court of Queensland.

BETWEEN

VINCE ADAM (Applicant) Respondent

and

ANTONIO ALESANDRA SHIAVON

and

STATE GOVERNMENT INSURANCE OFFICE (QUEENSLAND) (Respondents) Appellants

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THE CHIEF JUSTICE

SHEAHAN J.

McPHERSON J.

Judgment delivered by The Chief Justice on the 10th October, 1984. Sheahan J. and McPherson J. consurring.

"APPEAL DISMISSED WITH COSTS"

IN THE SUPREME COURT OF QUEENSLAND O.S. No. 325 of 1984

FULL COURT

IN THE MATTER of the "Magistrates Courts Act 1921 - 1976"

- and -

IN THE MATTER of an application by VINCE ADAM under the said Act seeking in the Magistrates Court of Queensland.

BETWEEN:

VINCE ADAM (Applicant) Respondent

- and -

ANTONIO ALESANDRA SHIAVON

- and -

STATE GOVERNMENT INSURANCE OFFICE (QUEENSLAND) (Respondents) Appellants

JUDGMENT - THE CHIEF JUSTICE

Delivered the day of 1984.

On 22nd March, 1980 the respondent was involved in a motor vehicle accident in which he received personal injuries and incurred property damage. On or about 1st April, 1980 he gave instructions to his former solicitors that he had suffered personal injuries in the accident and it appears that he instructed those solicitors to institute proceedings to recover damages both in respect of his personal injuries and property loss. Indeed, in response to a letter dated 14th April, 1980 from the solicitors the Medical Superintendent of the Royal Brisbane Hospital replied setting out the details of the injuries which the respondent had received. The solicitors also obtained a report dated 13th July, 1981 from a medical specialist who examined the respondent. However, on 14th January, 1981 the solicitors caused a plaint on the respondent's behalf to be issued in the Magistrates Court in Brisbane, claiming from the appellant Shiavon the sum of $1,305.00 in respect only of property damaged suffered by him.

During the months of August to October, inclusive, 1980, it appears that settlement negotiations took place between the respondent's solicitors and the solicitors for Shiavon's insurer but these were limited to the property damage; in the result no settlement was arrived at. On 16th February, 1981 a notice of defence was filed in the Magistrates Court by the solicitors for Shiavon. By letter dated 13th March, 1981 the solicitors for Shiavon asked the respondent's solicitors if they would consent to the jurisdiction of the Magistrates Court being raised in order that that Court could deal with the matter as the damages sustained by Shiavon's vehicle in the collision amounted to $2,660.00, a sum then in excess of the jurisdiction of that Court. That letter advised the respondent's solicitors that, if they were not prepared so to do, Shiavon would have to give consideration to transferring the proceedings to the District Court.

From time to time the respondent advised his solicitors as to the condition of his personal injuries and enquired from them as to the progress of his claim. He

deposed that, as the matter had not progressed satisfactorily, he instructed them on 1st October, 1982 to hand over his file to his present solicitors, and it appears that the file was ultimately delivered to them in January, 1983. It appears that a solicitor employed by the respondent's present solicitors believed that proceedings in respect of the personal injury claim should be commenced before the month of August, 1983 and he is unable to account for his mistaken belief. However, it was not until 20th October, 1983 that an amended statement of particulars of claim was filed in the Magistrates Court incorporating a claim for personal injuries whereby the respondent claimed the sum of $5,000.00 by way of damages for personal injury together with property damage. On 14th December, 1983 a notice of election by the appellant, State Government Insurance Office (Queensland), electing to be joined as a defendant in the action, together with a notice of defence by that company were filed in the Magistrates Court. In that notice of defence the appellant insurance company alleged that the respondent's claim for personal injury did not occur within three years of the amendment of the plaintiff's plaint and it relied on s. 11 of the *Limitation of Actions Act 1974* (“the statute”). The relevant limitation period in respect of the respondent's claim for personal injuries expired on 22nd March, 1983. (S. 11 of the statute.)

On 9th May, 1984 the respondent issued a summons seeking to have the Magistrates Courts proceedings transferred to the Supreme Court and, in effect, to have the amendment of the plaint allowed notwithstanding the expiration of the limitation period. There was placed before His Honour an affidavit by the respondent's solicitors stating that in his opinion the assessment of the respondent's damages is likely to exceed the jurisdiction of the Magistrates Court and of the District Court. The learned Judge of first instance exercised his discretion pursuant to O. 91 r. 1 (R.S.C. (Qld.)) and ordered that the action be transferred to the Supreme Court and, after considering the provisions of O. 32 r. 1, gave

leave to the respondent to amend the plaint in accordance with the amended statement of particulars filed on 20th October, 1983 save that the sum of $5,000.00 in the claim be deleted. The appellants now appeal from that decision on the grounds that His Honour erred in the exercise of his discretion in (a) omitting to have regard to the provisions of Part III of the statute, and (b) in ordering that the action be transferred and that the plaint be amended to include a claim for damages for personal injuries.

Order 32(1) is in the following terms:

"(1) The Court or a Judge may, in any cause or matter, at any stage Of the proceedings, allow or direct either party to alter or amend the writ of summons, or any indorsement thereon, or any pleadings or other proceedings in such matter and on such terms as may be just.

(2) Where an application to the Court or a Judge for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of the issue of the writ has expired, the Court or a judge may nevertheless grant such leave in the circumstances mentioned in that paragraph if the Court or Judge thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court or Judge is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counter-claim) may be allowed under paragraph (2) if

the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counter-claim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

(6) Subject to this Rule, an amendment may be allowed under this Rule notwithstanding that the effect of the amendment would be to add or substitute a cause of action arising after the issue of the Writ of Summons or other proceedings by which the proceedings were commenced."

Although the Magistrates Courts Rules give a wide power to amend a statement of particulars of claim by filing and serving an amended statement "at any time before the day of hearing without any order" (r. 100), there is no provision in r. 100 corresponding to para. (2) of O. 32(1) permitting an amendment to be made after the expiry of any relevant period of limitation. So, if the proceedings had remained in the Magistrates Court the respondent would have succeeded in having his cause of action for damages for personal injuries joined only if he were able to make a successful application pursuant to s. 31 of the statute or could base such application on "very peculiar circumstances" within the meaning of those words in *Weldon v. Neal* [1887] 19 Q.B.D. 394. In that case Lord Esher M.R. (Lindley and Lopes L. JJ. being of the same opinion) said, at p. 395:

> " We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date

> of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so."

It was not suggested that the respondent could succeed in an application brought under s. 31 of the statute but the appellants' counsel contended that the removal application was solely for the purposes of having the personal injuries cause of action joined. It was said that the respondent could not at the time of the removal application have commenced an action in the Supreme Court for damages for personal injury without being met by a successful plea based on the statute and that the consequence of removal into the Supreme Court is to take away from the defendant by election an existing right which it had in the Magistrates Court, namely, to plead the statute. It was also submitted that the effect of allowing the amendment is to allow joinder of a new "real" defendant out of time, namely the licenced insurer.

Order 96 r. 1, which empowers a Judge if he "thinks it desirable" that any action or proceeding commenced in the Magistrates Court should be tried in the Supreme Court to direct such transfer, gives to him an absolute discretion on such an application; *Challis v. Watson* [1913] 1 K.B. 547; *Lee v. Proprietors of Hay's Wharf Limited* [1940] 2 K.B. 306; *Re Schneider* [1970] Q.W.N. 7. It seems that the only issue on an application for transfer is whether, having regard to all the circumstances, it is desirable that the action should be tried in the Supreme Court or remain in the Magistrates Court. His Honour made it quite clear that he was of the opinion that it would be unjust not to transfer the action and so to permit the respondent to bring his claim for personal injuries "where there has

been but slight delay after the expiration of the three-year period and where there has been no evidence to show prejudice to the defendant by election".

I turn now to consider O. 32 r. 1. and it is convenient to commence with the decision of the Court of Appeal of New South Wales in *McGee v. Yeomans* [1977] 1 N.S.W.L.R. 273. There Glass J.A. (with whose reasons Moffitt P.agreed and Mahoney J.A. gave reasons to the same effect) pointed out (at p. 277) that since *Weldon v. Neal* (supra) it had been a settled rule of practice that except in "very peculiar circumstances" an amendment will not be allowed setting up a cause of action which at the time of the amendment is barred by a statute of limitation. He set out the relevant New South Wales Rules as well as the corresponding English Rules, referred to the division of opinion within the ranks of the judges in England concerning the construction of similar provisions in the English Rules and went on to conclude that the N.S.W. Rules, upon their proper construction, displaced the settled rule of practice laid down in *Weldon v. Neal* (supra). In short, in *McGee v. Yeomans* (supra) the Court held that the provisions of r. 4(1) and (3), (4) and (5) of Pt. 20 of the N.S.W. Rules not only excluded from those cases the settled rule of practice but also, by necessary implication, excluded it from those cases falling within the general power to amend (N.S.W. r. 1. (1)) and substituted a general discretion to allow an amendment notwithstanding that it raises a barred cause of action, "whenever justice so requires". A number of decisions in England to the contrary were distinguished, Glass J.A. drawing attention to the differences between the English Rules and the New South Wales Rules. One of those differences is that the general power of amendment, in r. 1(1) of Pt. 20 (N.S.W.), is not made subject to the later provisions in the N.S.W. rule corresponding to paragraphs (3), (4) and (5) of the Queensland rule. In New South Wales there is also a specific provision (r. 4(7)) that the rule does not limit the powers of the court under r. 1(1). The English rule (O. 20 r. 5(1)) commences "Subject to ... the

following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend ...". Thus, the Queensland rule also differs in an important respect from the English rule, although there is no rule in Queensland corresponding to sub-r. 4(7) of the New South Wales rule. Glass J.A. said, at p. 280:

> " By providing in r. 4(3) - (5) that an amendment may be authorised which allows the substitution of a new party, the suing by the plaintiff in a new capacity and the substitution of a new cause of action, the rule [of practice] was in those circumstances totally destroyed.
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> .....
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> In its place there has been substituted a general discretion to allow an amendment, notwithstanding that it raises a barred cause of action, whenever justice so requires. The exercise of the discretion is unfettered by any rules of practice. It is not possible by judicial decision to establish in advance categories of amendments which it would be just or unjust to allow".

The Full Court of Queensland also considered O. 32 r. 1 in *Archie v. Archie* (1980) Qd.R. 546. There the Court was concerned with the provisions of O. 3 r. 11 which provides that the Court may at any stage of the proceedings order that the names of any persons who ought to have been joined be added either as plaintiffs or defendants. The trial Judge had refused an application by a plaintiff who had brought an action for damages and personal injuries against a defendant to join another person as a defendant after the period of limitation within which he could have begun an action against the second defendant had expired. In doing so the learned Judge held that he had no discretion to exercise in the circumstances. Hoare J. (with whose reasons Kneipp J. agreed), after reviewing the relevant English authorities and *McGee v. Yeomans* (supra) said, at p. 561:

> " In my opinion, while there is no doubt that the general rule is as stated in *Weldon v. Neal* (supra), it seems to me that on principle the Court has a discretion. I would readily accept that the discretion should only be

> exercised ‘in peculiar circumstances’ or ‘special circumstances’ but it seems to me that it is contrary to principle to assert that the rule is of rigid application and that therefore there is no room for the exercise of a discretion. There could well be circumstances in which a plaintiff in an action could be deliberately misled by the other party in such a way as to render it most unjust to refuse the addition of another party to the action even though the benefits of statutory limitation would be denied the party joined.
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> Accordingly, to the extent that the trial judge considered that he had no discretion in the matter, in my opinion with respect the trial judge was in error and that he did have such a discretion.”

The different views taken by judges in England have arisen from the question whether, in cases outside paras. (3), (4) and (5) amendments may be permitted in the exercise of a discretion which goes beyond the strictness of the *Weldon v. Neal* (supra) principle. This Court is bound by the majority decision in *Archie v. Archie* (supra) so that there is a discretion in all cases. Hoare J. said (at p. 564) that the discretion should not be fettered by strict rules. In *McGee v. Yeomans* (supra) Glass J.A. said (p. 279) that it was the differences between the relevant N.S.W. and English Rules which gave Cross L.J. a doubt about the width of the general powers to deal with other limitation amendments in *Brickfield Properties Ltd. v. Newton* [1971] 1 W.L.R. 862, at p. 881. Because of the differences between the Queensland Rules and the English Rules I prefer to adopt the view of the N.S.W. Court of Appeal and in the circumstances there is no need for me to discuss in detail the English authorities which were considered in *Archie v. Archie* (supra) and *McGee v. Yeomans*. In Queensland it is permissible to make amendments which go beyond the general rule as stated in *Weldon v. Neal* (supra).

In any event the, present case falls squarely, in my opinion, within para. (5) of O. 32 r. 1 in that the effect of the amendment being sought is to add a new cause of action which “arises out of substantially the same facts”

as a cause of action in which respect of which relief has already been claimed in the action. Paragraphs (5) and (2) of r. 1 are explicit in giving a discretion to the Court or Judge to add a new cause of action by way of amendment where the application for leave to amend is made after the expiry of the limitation period. This is not a case where it is sought to join another party as a defendant although, as was pointed out by counsel for the appellant, the effect of allowing the amendment is to allow joinder of a new real defendant out of time. Although by virtue of the provisions of *The Motor Vehicles Insurance Acts* the appellant Shiavon is the nominal defendant in the action for damages for personal injuries and the appellant State Government Insurance Office (Queensland) is the real defendant, this does not mean that the application for leave to add a new cause of action is an application to join another defendant. Any circumstances relevant to the position or prejudice of the "real" defendant are matters which may be taken into consideration by a judge in the exercise of his discretion to grant an amendment. See *McCann v. Parsons* (1954) 93 C.L.R. 418.

It was conceded that the cause of action for damages for personal injuries does not arise out of the same facts as the cause of action for damages for property damage: *Brunsden v. Humphrey* [1884] 14 Q.B.D. 141 at pp. 146 and 152. However, it arises substantially out of the same facts: *Brickfield Properties Ltd. v. Newton* [1971] 1 W.L.R. 862 at p. 880 (per Cross L.J.) and at p. 873 (per Sachs L.J.); *McGee v. Yeomans* (supra) at p. 284. There was but one accident, one duty of care and one breach of the duty and the damages occurred either contemporaneously or within a split second of each other. The fact that the respondent's injuries raise a separate issue for determination does not mean that a cause of action based on this element does not arise out of substantially the same facts. Once the discretion of His Honour was enlivened he was entitled to take into account all relevant facts. It is impossible to lay down any specific rules as to the exercise of the discretion.

The factors relevant to the exercise of a discretion under O. 32 r. 1 are similar to those which are relevant in applications to renew a writ which has not been served within 12 months (0. 9 r. 1) and in applications for leave to proceed when no fresh proceeding has been taken in a cause until the lapse of three years from the time when the last proceeding was taken (O. 90 r. 9). I refer to the following passage from the judgment of Gibbs J. (as he then was) in *Jones v. Jebras and Hill* [1968] Qd.R. 13 where His Honour said, at p. 23:

> " It seems to me further with respect that the amendments made at the same time to O. 32, r. 1 and to O. 93, r. 17 are not irrelevant in considering the effect of the amendment to O. 9, r. 1. These amendments show a general intention to give a wider discretion to the court than was previously possessed, and the amendments together reveal an intention to ensure that procedural errors and delays will not necessarily be fatal but may be rectified if the justice of the case warrants it.
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> .....
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> The question that remains is whether there is other good reason why the writ should be renewed. The question to my mind is quite analogous to that which arises under O. 90, r. 9 when it becomes necessary to decide whether there is good reason for allowing a fresh proceeding to be taken after three years, and which was considered in *William Crosby and Co. Pty. Ltd. v. The Commonwealth* (1963) 109 C.L.R. 490, *Campbell v. United Pacific Transport Pty. Ltd. and Others* (1966) Qd.R. 465 and *Kaats v. Caelers* (1966) Qd.R. 482."

In exercising his discretion to allow the amendment His Honour, as I have indicated, made it clear that he took into consideration that there had been only a slight delay after the expiration of the limitation period and there was no evidence to show prejudice to the defendant by election. He also had regard to the fact that the respondent's present solicitor testified that the assessment of the damages for personal injuries is likely to exceed District and Magistrates Courts jurisdiction. Undoubtedly one of the reasons which he took into consideration was the fact that

procedures are available in the Supreme Court which would allow the respondent to have his cause of action for damages for personal injuries litigated in that Court but which he could not do in the Magistrates Court. I cannot see that this is other than a relevant consideration and is within the words, “if the Court or Judge thinks it just to do so”, of para. (2) of O. 32 r. 1. I am unable to see that His Honour took into consideration any irrelevant matters or failed to take relevant matters into consideration. I would not interfere with the exercise of his discretion.

Mr. Davies submitted that the consequence of removal was to take away from the defendant by election an existing right to plead the statute in the Magistrates Court. However, such a right is subject to the proceedings being removed to the Supreme Court and so subject to amendment to add a new cause of action pursuant to O. 32 r. 1(5). There is no basis for interfering with the absolute discretion to transfer the proceedings.

I will mention another point raised by Mr. Davies. He asked us to conclude, in accordance with the decision in *Liff v. Peasley* [1980] 1 W.L.R. 781, that the consequences of the removal and of the amendment would not deprive the appellants of the right to plead the statute in the Supreme Court. In that case the Court of Appeal (Stephenson and Brandon L.JJ.) again referred, with approval, to the long-established rule of practice in England that the court will not allow a person to be added as defendant to an existing action if the claim sought to be made against him is already statute-barred and he desires to rely on that circumstance as a defence to the claim. The Court there discussed what is the true basis of the rule of practice - the “relation back” theory or the “no useful purpose” theory. In the light of the view that I have taken as to the effect of the Queensland Rules there is no need to discuss whether, for the purposes of joining a new defendant or adding a new cause of action, the time for determining the expiration of the limitation period is the date of the issue of the writ or the date of the making of

the amendment. Upon the proper construction of O. 32 r. 2 it is my opinion that the effect of such an amendment is that the right to plead the statute has gone. In *Baldry v. Jackson* [1976] N.S.W.L.R. 415 Samuels J.A. (with whose reasons Moffitt P. and Glass J.A. agreed) when construing the relevant N.S.W. Rules said, at p. 419:

> " But an amendment, duly made, takes effect, not from the date when the amendment is made, but from the date of the original document which it amends; *Sneade v. Wotherton Barytes and Lead Mining Co.* [1904] 1 K.B. 295 and *Warner v. Sampson* [1959] 1 Q.B. 297. There is nothing in the rules to displace this principle and Pt. 20, and, in particular, r. 4(4) and (5), is entirely consistent with it.

For the above reasons I would dismiss the appeal with costs.