IN THE SUPREME COURT OF QUEENSLAND No. 122 of 1988

FULL COURT

BEFORE:

Mr. Justice Connolly

Mr. Justice Carter

Mr. Justice Moynihan

BRISBANE, 13 OCTOBER 1989

IVAN TRAJ (Plaintiff) Appellant

-and-

THE CANNERY BOARD (Defendant) Respondent

JUDGMENT

MR. JUSTICE CONNOLLY: In this case I would grant leave to appeal. I would allow the appeal with costs. I would set aside the order of Judge McCracken of 7 November 1988. In lieu I would order that the time limited by District Court Rule 52 with application to renew the plaint be extended and that the plaint be renewed for 12 months from the date of such renewal inclusive of such date. I would order that the applicant pay the costs of and incidental to the application before the learned District Court Judge. I would grant an indemnity certificate under the Appeal Costs Fund Act. I publish my reasons.

MR. JUSTICE CARTER: I agree with the reasons published by my brother Connolly and with the orders he proposes.

MR. JUSTICE MOYNIHAN: I agree with the order proposed by the learned presiding judge and with the reasons which he publishes.

MR. JUSTICE CONNOLLY: The order of the Court will be as I have indicated.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 122 of 1988

Before the Full Court

Mr. Justice Connolly

Mr. Justice Carter

Mr. Justice Moynihan

BETWEEN:

IVAN TRAJ (Plaintiff) Appellant

AND:

THE CANNERY BOARD (Defendant) Respondent

JUDGMENT - CONNOLLY J.

Delivered the 13th day of October, 1989.

CATCHWORDS:

Counsel:	Mr. P. Favell for the Appellant Mr. M. Amarena for the Respondent
Solicitors:	Phillips and Lowes as T/a for Gill and Lane for the Appellant Morris Fletcher and Cross for the Respondent
Hearing date:	3rd October, 1989.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 122 of 1988

FULL COURT

BETWEEN:

IVAN TRAJ (Plaintiff) Appellant

AND:

THE CANNERY BOARD (Defendant) Respondent

JUDGMENT - CONNOLLY J.

Delivered the 13th day of October, 1989.

On 9th July, 1987 a plaint was issued for damages for personal injuries sustained on 10th July, 1984 and for further such injuries sustained on 7th November, 1984. It was never served on the defendant. On 18th October, 1988 a summons issued, returnable before a Judge of District Courts, under D.C.R. 375 for enlargement of the time for service. It was in truth an application for an enlargement of the time within which an application for the renewal of the plaint could be made. The application was dismissed on 7th November, 1988 for two reasons, so far as appears from an affidavit filed for use on appeal. The first was that the learned District Court Judge doubted whether r. 54(c) was applicable where the application was made under D.C.R. 375. The second reason given by his Honour would seem to have been that there was insufficient material before him for the proper exercise of his discretion. On 23rd December, 1988 an application for leave to appeal to this Court was instituted against the order of 7th November, 1988.

It is difficult to imagine a more sustained train of misadventures in relation to a relatively simple matter. First, the time for appeal expired 28 days after 7th November 1988, that is to say on 5th December, 1988: D.C.R. 334. The time for appeal may be enlarged by a Judge of

District Courts under D.C.R. 375 but not, in the first instance at least, by the Full Court: Beggs v. Mellor [1969] Q.W.N. 44. When the matter came on for hearing the Court therefore stood the matter down to enable an application to be made in the District Court and on 28th September, 1989 the time for appeal was enlarged by Skoien D.C.J. Secondly, leave to appeal is required if the decision was other than a final judgment (the word "judgment" being defined to include any order or other decision or determination). We treated the application as one for leave but heard argument on the merits. The delay in seeking leave, a period of 18 days, was described as excessive by counsel for the respondent, but it is of little significance compared with the other problems in this case.

D.C.R. 52 reads as follows:—

> "52. No plaint shall be in force without service for more than twelve months from the day of the date hereof, including the day of such date; but if any defendant therein named has not been served within that time, the plaintiff may, before the expiration of the twelve months, apply in writing to the Registrar for leave to renew the plaint."

The plaint was, therefore, no longer in. force from 10th July, 1988. However, D.C.R. 53 provides:—

> "53. The Registrar, if satisfied that reasonable efforts have been made to serve such defendant, and service has not been effected, or for other good reason, may order that the plaint be renewed for a further period not exceeding twelve months from the date of such renewal ..."

It is not even suggested that reasonable, or any, efforts had been made to effect service within the year on the defendant, a corporation whose address is shown on the face of the plaint as Earnshaw Road, Northgate. It follows that the renewal of the plaint requires, assuming that time be extended to make the application for such renewal, "other good reason." That, reason, curiously but not, I

think, erroneously, is said to lie in the circumstances of the case in the inaction of the solicitors who issued the plaint, that is to say in the failure to effect service, inaction which is not suggested to have been due to any fault on the part of the plaintiff. The plaintiff is a man of Yugoslavian extraction and has a poor command of English. He had approached his present solicitors but would seem to have been redirected to the solicitors who issued the plaint by his union. After long delay, he came back to his present solicitors on 11th August, 1988 and they then set in train efforts to renew the plaint and reactivate the action. Counsel appeared for the defendant on the hearing of the application before the learned District Court Judge, but no material was filed suggesting any specific prejudice to the defendant if the application were to be granted.

The period of limitation for the causes of action set up by the plaint expired on 10th July, 1987 and 7th November, 1987 respectively. It follows that, the plaint no longer being in force, an order under D.C.R. 375 for enlargement of the time limited for the application for renewal would open the door to the defeating of the defendant's immunity from action and the renewal of the plaint under D.C.R. 53 would, in fact, defeat the defendant's accrued immunity.

It was, however, held in Jones v. Jebras and Hill [1968] Qd. R. 13, a decision of Gibbs J., as he then was, that the discretion to renew a writ exists even if a period of limitation has expired, as it had in that case. Jones was approved by this Court in Adam v. Shiavon [1985] 1 Qd. R. 1, the Court holding that the factors relevant to the exercise of the discretion to permit amendments under O. 32 r. 1 are similar to those relevant to applications under O. 9 r. 1 and O. 90 r. 9. Order 9, r. 1 of the Rules of the Supreme Court covers the same ground, in almost identical language, as D.C.R. 52 and 53. It has also been held that a satisfactory explanation of delay is not a condition precedent to the granting of leave to proceed under O. 90 r. 9 and, in my opinion, the same approach should be

adopted to applications for renewal of writs or plaints although, of course, it is a relevant consideration: Wilson v. Bynon [1984] 2 Qd. R. 83.

I take "good reason" in D.C.R. 53 to be good reason for excepting the case from the general prohibition on proceedings on a plaint which has ceased to be in force. In so stating the proposition I am, of course, modifying what the High Court said in relation to O. 90 r. 9 of the Rules of the Supreme Court in William Crosby & Co. Pty. Ltd. v. Commonwealth (1963) 109 C.L.R. 490 at p. 496. Whether there is such good reason involves a consideration of all relevant matters which will include the reason for the delay, and this in turn will include whether there was reasonable excuse for the delay; prejudice to the defendant if the application be granted; and the seriousness of the consequences to the plaintiff if it be refused.

In a case in which judgment will be delivered at this sittings, I have expressed the view that the proper approach to a question such as this is to identify the relevant factors, assess the weight to be given in the circumstances of the case to each of them, and then to determine whether, on balance, there is good reason for making the order: Dempsey v. Dorber (No. 1699 of 1984).

There is, of course, no excuse for the delay but the plaintiff is obviously the victim of the inaction of his former solicitors. It must also be remembered that a plaintiff cannot properly be penalised for delay up to the period of limitation. The period which elapsed since the arising of the cause of action can, of course, properly be regarded where prejudice to the defendant is raised but it is not a question of punishing the party for not issuing his plaint until the period of limitation has virtually expired. The relevant delay in this case is three months. It cannot be regarded as inordinate. The defendant on the other hand did not attempt to set up any specific prejudice, although it is, of course, entitled to rely on the well known fact that human memory tends to become less

reliable with the passage of time. It does not, however, suggest that any witness, who would be necessary for the proper conduct of its defence, has become unavailable or to set up any other matter of particular prejudice. It cannot, in particular, point to anything which has happened since the plaint ceased to be in force which, as a matter of discretion, should lead the Court to refuse to allow service which could have been effected with complete validity on the day before that event occurred. On balance, therefore, it seems to me that the relevant considerations call for the order which was sought from the learned District Court Judge and which was refused. The questions of law which are raised by the proceedings before us are of sufficient consequence to warrant leave to appeal. I would therefore grant leave to appeal, allow the appeal, set aside the order of 7th November, 1988 and in lieu thereof would order that the time limited by D.C.R. 52 for application for leave to renew the plaint be extended and that the plaint be renewed for a further period of twelve months from the date of such renewal, inclusive of such date. The applicant, seeking an indulgence, must pay the costs of the application before the learned District Court Judge. The costs of the appeal must be paid by the respondent, but it seems to me to be a proper case for the granting of an indemnity certificate under the Appeal Costs Fund Act, the learned District Court Judge having, with respect, failed to address the relevant questions.

I should finally say a word about D.C.R. 54(c). The purpose of this sub-rule is not altogether clear. It can best be left until a situation arises in which a Court would otherwise be disposed to refuse to allow the plaint to be renewed.

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BETWEEN:

IVAN TRAJ (Plaintiff) Appellant

AND:

THE CANNERY BOARD (Defendant) Respondent

CONNOLLY J.

CARTER J.

MOYNIHAN J.

Reasons for Judgment delivered on the 13th day of October, 1989 by Connolly J.

Carter J. and Moynihan J. agreeing with the reasons and order made.

"ORDER THAT LEAVE TO APPEAL BE GRANTED, APPEAL ALLOWED WITH COSTS. THE ORDER OF McCRACKEN DCJ. MADE ON THE 7TH NOVEMBER, 1988 BE SET ASIDE AND IN LIEU ORDER THE TIME LIMITED BY DISTRICT COURT RULE 52 FOR APPLICATION FOR LEAVE TO RENEW THE PLAINT BE EXTENDED AND THE PLAINT BE RENEWED FOR A PERIOD OF 12 MONTHS FROM THE DATE OF SUCH RENEWAL INCLUSIVE OF SUCH DATE. ORDER THE APPLICANT PAY THE COSTS OF AND INCIDENTAL TO THE APPLICATION BEFORE THE LEARNED DISTRICT COURT JUDGE. ORDER THAT AN INDEMNITY CERTIFICATE UNDER THE APPEAL COSTS FUND ACT BE GRANTED."
