Lexcray Pty Ltd v Northern Territory of Australia
[2000] NTCA 4

PARTIES:	LEXCRAY PTY LTD v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT
FILE NO:	AP 22 of 1999 (9303729)
DELIVERED:	15 June 2000
HEARING DATES:	5 - 15 June 2000
JUDGMENT OF:	GALLOP ANGEL and BAILEY JJ

CATCHWORDS:

LIMITATION OF ACTIONS
Application for an extension of time within which to institute proceedings in contract and in tort – application not dealt with prior to trial or at trial – necessity in the circumstances for the application to be heard and determined prior to trial.

APPEAL
Determination of an application for an extension of time within which to institute proceedings by the Court of Appeal where application not dealt with at trial.

Limitation Act, ss 12, 21, 44
Burgess v Stafford Hotel (1993) All ER 22
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514
Williams v Minister for Aboriginal Land (1994) 35 NSWLR 497
Sola Optical Australia v Mills (1987) 163 CLR 628

REPRESENTATION:

Counsel:

Appellant:	Mr M Maurice QC with Mr A Lindsay
Respondent:	Mr J Reeves QC with Mr S Southwood

Solicitors:

Appellant:	Cridlands, Northern Territory Lawyers
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID Number:	Gal20001
Number of pages:	28

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lexcray Pty Ltd v Northern Territory of Australia
[2000] NTCA 4
No. AP 22 of 1999 (9303729)

BETWEEN:

LEXCRAY PTY LTD
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: GALLOP, ANGEL and BAILEY JJ

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 15 JUNE 2000)

[1] **GALLOP J**: The writ of summons in this matter was issued on 23 February1993. Pursuant to s 44 of the *Limitation Act*, there was endorsed on the initiating process in the statement of claim, at par 53, an application for an extension of time so far as may be necessary to commence the action pursuant to s 44.

[2] By its defence, ultimately relied upon by the defendant in the action, by the defence dated 30 August 1998, the respondent pleaded a denial that the

plaintiff was entitled to the relief it sought in par 53 of the statement of claim as follows,

> "Further, the defendant denies the allegations contained therein. Further still, the defendant says that the plaintiff's claims are time barred."

[3] We have been told that the need for an extension of time was first raised in the first defence of 12 August 1993, was repeated in the second defence of 10 December 1996; it was repeated in the third defence of 24 June 1998 and, lastly, in the fourth defence to which I have already referred.

[4] Hence there was, on the pleadings, a very clear contest between the parties about whether the proceedings were within time and, if they were not, the plaintiff, the present appellant, needed an extension of time at least in relation to its causes of action framed in contract and in tort.

[5] When this matter was raised by the appellant in the course of the conduct of the appeal, it seemed to be accepted that the matter had been overlooked by the trial judge. The various members of this Court expressed their surprise that such an important matter so clearly pleaded would have been overlooked.

[6] Closer investigation of the matter has revealed that, far from overlooking the issue, his Honour expressly adverted to the application for an extension of time at the very end of his judgment.

[7] In disposing of the damages claim, because he had rejected all the causes of action brought by the plaintiff/appellant, he found it unnecessary to pursue that complex issue since the plaintiff had not succeeded. His Honour went on to say, "Equally, there is no need to express an opinion on the limitations issue".

[8] With the benefit of counsel's assistance, it has become quite clear that his Honour had very extensive submissions from both sides on the question of whether the plaintiff should have been given an extension of time and we have today been referred to those extensive submissions by both parties.

[9] The question for this Court is whether that decision by his Honour, that there was no need to express an opinion on the limitations issue, was correct, whether it should be reviewed by this Court and, if it was not correct, how this Court should dispose of the application for an extension of time by the appellant.

[10] I have reached the clear view that it was an error for his Honour not to express an opinion on the limitations issue and that his Honour should have decided that issue at the outset of the case rather than at the very end of it. I will touch upon some relevant matters in that respect.

[11] The appellant has demonstrated by written submissions to this Court that there was a hot contest before the trial judge and, in effect, has repeated the very submissions that were put to the trial judge. I set out those submissions.

"**Facts**

1. During the appellant's negotiations to purchase Nutwood Downs and the conduct of BTEC activities on Nutwood after purchase, the Northern Territory made statements to the appellant on critical matters.

2. The appellant has subsequently discovered the true facts, and thereby found out that the statements made by the Northern Territory were not correct.

3. Important true facts were:

   3.1 Between the first and second visit of the Dunbars, the Northern Territory through Dr Calley changed the basis of paying compensation so that it was no longer truly linked to breeding value and resulted in payments of only 40% of replacement value.

   This was ascertained by the appellant after discovery.

   3.2 Dr Calley was aware that the tuberculin test had serious limitations when applied in the north.

   This was ascertained by the appellant following discovery.

   3.3 Dr Calley knew that eradication of TB from Nutwood would require an Approved Program along the lines he agreed with Vesteys of total destocking over the next 24 months, most in the first 12 months, save for 1,000 female cattle under 3 which would need to be tested 6 times over three years and destocked as well if testing or security of holding proved unsatisfactory and that all other cattle on the station would have to be shot to waste.

   This was ascertained by the appellant following discovery.

3.4 Dr Calley's advice that if destocking occurred, the appellant would receive on-farm value, was incorrect when it was made in January 1984.

This was ascertained by the appellant following discovery.

3.5 Despite dismissing the appellant's complaints about the unsatisfactory amounts of compensation under the Flat Rate Scheme and the respondent's repeated advice to the appellant to the effect that the Flat Rate Scheme was all that the Northern Territory was required to pay, the Northern Territory was obliged by the Commonwealth/Northern Territory Agreement to pay on-farm value for animals destocked. This was known by the senior officers who dealt with the appellant.

This was ascertained by the appellant on or about 26 February 1992, which was less than a year before proceedings were commenced.

3.6 [Not relied on]

3.7 At a time when the appellant was negotiating (unsuccessfully) for on-farm value for paddock destocking, the Northern Territory was under a direction to change the flat rate system to an on-farm value system to comply with its contractual obligations. This was not revealed by Dr Sykes when negotiating.

This information was ascertained by the appellant following discovery.

4. A feature of the appellant's position is that all of the "material facts" were known to the respondent, but were not revealed to the appellant by the respondent. They became known to the appellant either through a third party or through the respondent's discovery in this action. This means that the material facts may fit within either limb of section 44(3)(b) of the *Limitation Act*. They may be "material facts" or may constitute "representations or conduct of the respondent

resulting in the appellant's failure to institute the action within the limitation period".

5. The matters referred to above are pleaded in paragraph 53 of the Statement of Claim (found at pages 124-129 of the Pleadings book).

Law

6. Section 44(3)(b)(i) of the *Limitation Act* gives the Court a discretion to extend a limitation period where an action is instituted within 12 months after facts material to the appellant's case are ascertained by it.

Material Facts

7. The concept of a "material fact" was described by the High Court in *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 as follows:

> "A fact is material to the appellant's case if it is both relevant to the issue to be proved if the appellant is to succeed in obtaining an award of damages sufficient to justify bringing the action and is of sufficient importance to be likely to have a bearing on the case. The *Shorter Oxford English Dictionary* defines the word 'material', inter alia, to mean: 'of such significance as to be likely to influence the determination of a case'. Although a definition attributed to the 16th century, in our opinion it provides an apt guide to the intention of the legislature in choosing to refer, without any elaboration, to 'facts material to the appellant's case'."

8. Further, "material facts take in the whole complex of evidence and argument which will be advanced at the trial on its behalf".

9. The Northern Territory acceptance and application of these propositions is summarised in *Forbes v Davies and Commonwealth of Australia*, Kearney J, 1994.

10. The opinion of Dr Calley that a program concentrating on destocking was the appropriate program for Nutwood Downs will fall within the definition of "fact".

11. Some of the material facts came to the attention of the appellant after the institution of proceedings, as a result of the discovery process. Such facts fall within section 44(3)(b)(i) of the *Limitation Act*.

12. There is no doubt that the facts relied upon by the appellant are "material facts". On the negligence case, they demonstrate the falsity of key representations made in June 1983, January 1984 and in 1988. On the contract case, the Commonwealth/Northern Territory Agreement is the key contextual document. If the facts had been known, the appellant would not have allowed destocking to occur at the compensation rates paid and would not have suffered the damages it is suing for.

Discretion

13. Once the Court is satisfied that proceedings were commenced within 12 months of ascertaining material facts or the delay in instituting proceedings resulted from representations or conduct of the respondent, the final issue is whether, in all the circumstances of the case, it is just to grant the extension of time. A material consideration (the most important consideration in many cases) is whether, by reason of the time that has elapsed, a fair trial is possible.

14. The short answer is that a fair trial has occurred, notwithstanding the delay. The respondent did not run its case on the basis that there was any prejudice to it in conducting the Defence.

15. In the circumstances of this case, an important issue in exercising any discretion is the conduct of the respondent.

16. The respondent has concealed from the appellant the true position in relation to compensation. The position it advised the appellant, publicised to industry and pleaded in this case was that there was no entitlement to compensation other than

the Flat Rate Scheme and that the Commonwealth and industry approved of the Northern Territory's approach of paying less than on-farm value. The respondent was not able to prove these assertions at trial, even after a direct challenge.

16.1 The documents reveal that during the Flat Rate Scheme, "Industry have always argued that the compensation rates should be replacement value. This has been rejected … [as the stock are reactors or destockers from infected properties …]".

16.2 The appellant challenged the respondent to "produce one document which shows that the Northern Territory Cattleman's Association agreed to the Flat Rate Scheme and the rates paid under it". The respondent produced one self serving memo of its own and two documents which related to the subsequent three tier scheme. No witness called by the NT gave evidence that industry agreed to the rates set under the Flat Rate Scheme.

16.3 The appellant challenged the respondent to prove that the view of the Commonwealth was that bush cattle were not necessarily entitled to compensation. The respondent was unable to meet this challenge, producing only documents about unmusterable bush animals.

17. The respondent did not disclose the existence or effect of the Northern Territory/Commonwealth Agreement to the appellant. The respondent called no oral or written testimony to prove that the appellant (or any other pastoralist) was advised. The public documents of the respondent are consistent with a decision to conceal those facts. For example, the publicity document "Taming the Outback", the respondent's main informative document during the operation of the Flat Rate Scheme in the north, does not refer to the Northern Territory/Commonwealth Agreement. It refers directly to Type C assistance, Type D assistance and Type E assistance which are all references to Schedules of the Northern Territory/Commonwealth Agreement. It does not refer to Type B assistance which is on farm value. Where the document deals with the compensation scheme it is, at best, vague.

> "In the Southern Region, there is a guaranteed price for stock which is set regularly and based on market value.
>
> Destocking compensation will be paid for breeders, herd bulls, light weight spayed cows, light weight steers and scrub bulls, young stock, unmusterable cattle, untruckable cattle and calves.
>
> In the Northern Region compensation is based on average prices."

18. The respondent concealed from the appellant its understanding of the true risks in carrying out a BTEC Program on Nutwood Downs, in each of the critical areas namely:

    18.1 The effectiveness of the test;

    18.2 The amount of destocking and repeated testing involved;

    18.3 The extent to which the station would be given over to BTEC activities;

    18.4 The levels of compensation to be paid.

19. Rather, at the last opportunity for the respondent to be accurate and frank it wrote the letter advising:

> "Nutwood Downs has a problem with TB which will require relatively severe herd reduction in 1984."

20. The respondent should not receive the benefit of concealing the true position from the appellant while a limitation period was running.

21. An approach might be to consider matters relevant to the exercise of discretion separately. This is the approach set out in *Forbes v Davis and the Commonwealth of Australia* – Kearney J (although Kirby J in *Brisbane South Regional Health Authority v Taylor* 139 ALR 1 at 22 cautioned against following set criteria in different factual circumstances).

22. Relevant matters to consider are:

22.1 The length of the delay.

22.2 The explanation for the delay.

22.3 The hardship to the appellant if the action is dismissed and the cause of action left statute barred.

22.4 The prejudice to the respondent if the action is allowed to proceed notwithstanding the delay.

22.5 The conduct of the parties in the litigation.

22.6 The nature, importance and circumstances surrounding the ascertainment of the new material facts.

22.7 The extent to which, having regard to the delay, the evidence is likely to be less cogent than if the action had been brought within the time allowed.

Taking those matters in turn:

22.1 The Length of the Delay

The causes of action in contract and tort span the period June 1983 to January 1988. Damage was first suffered in, say, December 1984 when the appellant received compensation under the Flat Rate Scheme for the 611 animals destocked in that year.

The proceedings were issued on 23.02.93. The delay ranges therefore from 2 years to 6 years after the limitations period expired.

The weight to be given to the length of delay depends on the circumstances of the particular case. Here, since the material facts relied on by the appellant were known but not disclosed by the respondent, the appellant had to

ascertain those facts from other sources and from interlocutory proceedings. It is not the case of an appellant failing to carry out reasonable investigations on its own.

22.2 The Explanation for the Delay

This was not a delay for which the appellant was personally responsible. The delay essentially arose from the conduct of the respondent.

22.3 The Hardship to the appellant if the Action is Dismissed and the Cause of Action left Statute Barred

The appellate will have no remedy except for its claim for breach of fiduciary duty. It is not a case where the appellant has an action against a third party for causing the delay.

22.4 The Prejudice to the respondent if the Action is Allowed to Proceed Notwithstanding the Delay

The respondent has not pointed to any prejudice it suffered during the trial. It has apparently been able to call all of the witnesses it wished to call and tender all of the documents it wished to rely upon. The respondent's witnesses who professed to have a reduced memory of relevant matters were Dr Calley and to a lesser extent Dr Ainsworth. The respondent did not endeavour to suggest that the memory of either of those witnesses had been better at some point prior to the expiry of the limitations period, or that it could not fairly conduct its defence.

22.5 The Conduct of the Parties in the Litigation

Although six years have passed since the proceedings were instituted, most of that delay can be sheeted home to the respondent. The appellant prosecuted its action with all appropriate speed and no interlocutory orders were made against it. By contrast, the respondent did not

take any interlocutory step without orders being made against it.

22.6 The Nature, Importance and Circumstances Surrounding the Ascertainment of the New Material Facts

This is really an examination of whether the material facts are based upon "trumped up, frivolous or artificially manufactured material". Such an examination relates to cases where there is a suggestion that material fact may have been fabricated or arranged by an appellant for the purpose of extending a time limit. The material facts relied on here are not of the appellant's making and the appellant's knowledge of them came about in legitimate ways.

22.7 The Extent to Which, Having Regard to the Delay, the Evidence is Likely to be Less Cogent than if the Action had been Brought Within the Time allowed

22.8 A trial was held which was fair to both parties.

Representations or Conduct of the respondent

23. Alternatively to proving the existence of a new material fact, the Court may exercise a discretion to extend the limitations period where:

> "The appellant's failure to institute the action within the limitation period resulted from representations or conduct of the respondent … and was reasonable in view of those representations or the conduct and other relevant circumstances."

24. The conduct of the respondent in this case was to conceal its contractual obligation to pay on-farm value and to conceal its opinion as to the real financial risks to the appellant in carrying out BTEC activities. The appellant repeats and relies on paragraphs 15-20 of this submission.

25. In referring to conduct of the respondent, the appellant pleads the various representations made about the availability of or entitlement to compensation, the statements of compulsion made towards the appellant and the general pattern of conduct of the respondent towards the appellant. In short, the respondent conducted itself towards the appellant and made representations to the appellant consistent with the position that it was acting with the authority of the Crown, it was advising the appellant of all relevant information and that the appellant had no entitlements other than those bestowed upon it by the respondent.

26. It was reasonable for the appellant to rely on such assertions made by the officers of the Crown apparently having rule making powers and knowledge of the detail of the scheme.

Equity

27. The limitations periods set by the *Limitation Action* for tort and contract, do not apply to equitable relief, except by analogy (section 21 *Limitation Act*). An identical provision was considered in *Williams v Minister, Aboriginal Land Rights Act 1983 and Another* (1994) 35 NSWLR 497. Kirby P and Priestley JA found that the *Limitation Act* did not apply to equitable actions such as an action for compensation for breach of fiduciary duty. Further, an analogy may not be able to be drawn where the circumstances included concealment by the wrongdoer.

28. The respondent has not conducted a defence of Laches."

[12] Likewise, the defendant put some written submissions to the trial judge. They appear in the supplementary appeal book at page 40 and we have just this afternoon been referred to them again. I set them out.

"The Limitation Period

The writ was issued on 23 February 1993.

The plaintiff relies upon the matters pleaded at paragraph 53 of the statement of claim to obtain an extension of time under s 44 of the *Limitation Act*. The plaintiff needs an extension of time in relation to each of the causes of action pleaded in the proceedings and, for that purpose, a material fact relevant to that cause of action.

The matters relied upon do not satisfy the requirement for a material fact. A material fact is one which is "relevant to the issues to be proved" and of "sufficient importance to be likely to have a bearing on the case"; *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 at 636. As to the material facts relied upon we submit:

(i) The existence of the Commonwealth/Territory BTEC Agreement (Ex P1) is not relevant to any issue between the parties – see the submissions above in that regard.

(ii) The defendant repeats (i) and adds that the agreement does not require the payment of market value but rather "on farm" value as described in the Calley Plan (Ex P11) provided to the plaintiff in January 1984.

(iii) The contribution by the Commonwealth to the compensation payable under the BTEC is not relevant to any issue between the parties.

(iv) The plaintiff was made aware of all matters relevant to the flat rate scheme in 1984. There is no additional information learnt at a later time which added to or altered the information then available to the plaintiff.

(v) The changes to the compensation scheme in 1983 have no bearing on any matter in issue between the parties. The system changed again to the flat rate scheme in 1984. The changes in 1983 did not ever have application to the plaintiff.

(vi) The effects of the BTEC on the plaintiff were known to the plaintiff at all relevant times. They were spelled out in the Calley Plan provided to the plaintiff in 1984, which document reflects the position of Dr Calley.

(vii) There is no evidence of when the "Market Value Estimates" became known to the plaintiff nor, indeed, whether they had any impact on the plaintiff if and when they did become known.

(viii) Again there is no evidence of when the plaintiff learned of these matters which appear in the statement of claim. The particular items have been addressed in the body of the submissions and, in our submission, cannot amount to material facts.

(ix) The southern market rates have no bearing on this proceeding.

(x) There is no evidence of when the plaintiff became aware of the discussions between Dr Calley and Mr Watt. In the circumstances those discussions cannot amount to a material fact. They are not relevant to what arrangements the plaintiff entered into.

Finally there is nothing in the conduct of the defendant which caused or contributed to the plaintiff not proceeding at an earlier time. The plaintiff had legal advice from a very early time. Mr Winter conducted some of the negotiations in 1988."

[13] The plaintiff/appellant needs an extension of time to support its causes of action in contract and in tort, and relies upon s 44 of the *Limitation Act*, which I set out,

"(1) Subject to this section, where this or any other Act, or an instrument of a legislative or administrative character prescribes or limits the time for –

(a) instituting an action;

(b) doing an act, or taking a step in an action; or

(c) doing an act or taking a step with a view to instituting an action,

a court may extend the time so prescribed or limited to such an extent, and upon such terms, if any, as it thinks fit.

(2) A court may exercise the powers conferred by this section in respect of an action that it –

(a) has jurisdiction to entertain; or

(b) would, if the action were not out of time, have jurisdiction to entertain.

(3) This section does not –

(a) apply to criminal proceedings; or

(b) empower a court to extend a limitation period prescribed by this Act unless it is satisfied that –

(i) facts material to the plaintiff's case were not ascertained by him until some time within 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff; or

(ii) the plaintiff's failure to institute the action within the limitation period resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and other relevant circumstances, and that in all the circumstances of the case, it is just to grant the extension of time.

(4) Where an extension of time is sought under this section in respect of the commencement of an action, the action may be instituted in the normal manner, but the process by which it is instituted must be endorsed with a statement to the effect that the plaintiff seeks an extension of time pursuant to this section.

(5) Proceedings under this section may be determined by the court at any time before or after the close of pleadings.

(6) This section does not –

(a) derogate from any other provision under which a court may extend or abridge time prescribed or limited by an Act or an instrument of a legislative or administrative character; or

(b) affect a rule of law or equity under which a limitation period affecting a right to bring an action may be extended or within which an action may be brought notwithstanding the expiration of the limitation period.

(7) This section extends to an action in which the damages claimed consist of or include damages in respect of personal injuries to any person or to an action which arises under the *Compensation (Fatal Injuries) Act* notwithstanding that the limitation period for that action has expired before –

(a) the commencement of this Act; or

(b) an application is made under this section in respect of the action."

[14] In particular, the appellant relies upon both legs of the empowering provision in s 44(3)(b)(i) and (ii).

[15] The application of the respondent to this Court is to strike out those grounds of the appeal which seek the extension of time that the appellant needs. Those grounds are set out in the notice of appeal in grounds 27 to 30. They are in the following terms.

"27. The trial judge erred in failing to find:

a. the following facts were ascertained by the appellant only after discovery;

(1) Between the first and second visit of the Dunbars, the Northern Territory, through Dr Calley changed the basis of paying compensation so that it was no longer truly linked to replacement value and resulted in payments of only 40% of the replacement value.

(2) Dr Calley was aware that the tuberculin test had serious limitations when applied in the north;

(3) Dr Calley knew that eradication of TB from Nutwood would require an Approved Program along the lines he agreed with Vesteys of total destocking over the next 24 months, most in the first 12 months, save for 1,000 female cattle under 3 which would need to be tested 6 times over three years and destocked as well if testing or security of holding proved unsatisfactory and that all other cattle on the station would have to be shot to waste.

(4) Dr Calley's advice that if destocking occurred, the plaintiff would receive on-farm value, was incorrect when it was made in January 1984.

(5) The flat rate scheme under which compensation was paid to the appellant was at all times less than on-farm value and was understood and recorded to be so by the respondent until at least April 1985.

b. On or about 26 February 1992, which was less than a year before proceedings were commenced, the appellant discovered that despite the respondent dismissing the appellant's complaints about the unsatisfactory amounts of compensation under the Flat Rate Scheme and the respondent's repeated advice to the appellant to the effect that the Flat Rate Scheme was all that the respondent was required to pay, the respondent was obliged, by the Commonwealth/Northern Territory Agreement to pay on-farm value for animals destocked. This was known by the senior officers who dealt with the appellant.

28. All of the facts referred to in paragraphs 27a and b were material facts within the meaning of s 44(3)(b) of the *Limitation Act*.

29. A proper exercise of the discretion of the Court required the extension of time so as to permit the commencement of the proceedings at the time when they were in fact commenced.

30. Further and alternatively the trial judge erred in failing to find the Appellant's failure to institute the action within the limitation period resulted from representations or conduct of the respondent and was reasonable in view of those representations or conduct and other relevant circumstances."

[16] The basis upon which the respondent seeks that those grounds of appeal be struck out is that they amount to an abuse of process because the trial judge was correct, and has, in fact, by his findings of fact at trial destroyed the foundation for those grounds of appeal.

[17] Alternatively, the respondent submitted that we should remit the extension of time issue to a judge for trial. Reference was made to *Burgess v Stafford Hotel* (1993) All ER 22. Counsel for the respondent submitted that on these grounds of appeal, this court is, in effect, being asked to find facts by assessing the credibility of witnesses at the trial at the same time as we are hearing the appeal itself. Counsel poses the dilemma of what would happen if the unsuccessful party, on the resolution of the application for an extension of time, wished to appeal against the decision of this court on that issue.

[18] There is some force in those matters, but it seems to me that both parties contributed to the very unsatisfactory state which now exists. In my

opinion, and notwithstanding the High Court authority that I'll come to, the application for an extension of time being at the very doorstep of the plaintiff's causes of action, should have been determined before the case itself was heard. I said so during the course of the argument and I adhere to what I said.

[19] Nevertheless, I am satisfied that it was a live issue before the trial judge (see the transcript at pages 2566 and following and the appellant's written submissions, and the transcript at page 2358 and following and the written submissions of the respondent).

[20] Counsel for the appellant now says there were material facts and he articulated those facts material to the plaintiff's causes of action. He pointed to four matters. First, the Commonwealth/Northern Territory agreement which raises, on the argument of the appellant, an obligation to pay on-farm values. The appellant was not aware of that document until 26 February 1992 when the solicitor for the appellant showed it to one of the directors of the appellant, Rod Dunbar.

[21] Secondly, the Commonwealth directive in 1987 to the Northern Territory to pay compensation at on-farm rates was not communicated and the appellant was not aware of that fact until the process of discovery was complete after the action had been commenced. Thirdly, likewise the Vesteys' approved program of 19 December 1983 and a handwritten program in January 1984 were not discovered until the discovery process. And lastly, the 29 August

1983 memorandum by Dr Calley changing the formula for compensation rates was not known until after discovery.

[22] So it is put on behalf of the appellant that the whole basis for saying the plaintiff was wrongly dealt with became apparent only at those times.

[23] The High Court authority that I referred to is *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514. That was a case where proceedings had been brought on an indemnity. It was common ground that the damage which flowed from the execution of the indemnity was not ascertainable at the time of the execution of the indemnity. In the circumstances, the Federal Court had held that it was appropriate for the extension of time sought not to be litigated until such time as all the damage had been ascertained. Some reliance was placed upon that by senior counsel for the appellant in this appeal.

[24] In the course of their judgments, the High Court said at 533,

> "It follows from what we have said that we agree with the approach adopted by the Full Court of the Federal Court in the present case and in *Magman International Pty Ltd v Westpac Banking Corpor*ation (1991) 32 FCR 1.
>
> We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question. *Magman International* illustrates the problems which can arise, particularly in a case involving foreign loans."

[25] They went on to say:

> "In view of the construction which we have placed upon the indemnity, namely, that it generates and executory and contingent liability upon the part of the respondent, the respondent suffered no loss until that contingency was fulfilled and time did not begin to run until that event. Consequently, par 16(c) of the amended statement of claim was introduced before the expiration of the limitation period set by s 82(2) [*Trade Practices Act*] and there is no occasion to discuss the power of a judge of the Federal Court to allow an amendment which adds a cause of action to a statement of claim when that cause of action is otherwise statute barred. …"

[26] Counsel for the appellant frankly conceded that at the time of the institution of proceedings in this case, the appellant's damages were ascertained, and indeed, had been ascertained for some time. In my respectful view, and based on experience in the ordinary conduct of cases and preparation for trial, applications of this sort should be litigated and disposed of before the trial is fixed and not during the course of the trial. In my respectful view, there is nothing in what the High Court said in *Wardley Australia Limited v Western Australia* (supra) to depart from that well-established practice.

[27] Insofar as it was submitted that the trial judge and the parties were correct to leave the extension of time issue until the end of the trial, I do not agree. In any event, as has been noted in *Williams v Minister for Aboriginal Land* (1994) 35 NSWLR 497 at 508, there is no time limit prescribed in the *Limitation Act* for equitable compensation for breach of fiduciary duty, and indeed, equitable remedies are expressly excluded. Section 21 of the *Limitation Act* provides that the various sections, including s 12, which deals with actions in tort and in contract, do not apply except so far as they

may be applied by analogy to a cause of action for, amongst other things, other equitable relief, specific performance of the contract or for an injunction or for other equitable relief.

[28] It is worth quoting what the High Court has said about what is a material matter. In *Sola Optical Australia v Mills* (1987) 163 CLR 628 at 636, the High Court gave guidance about what materiality means. They said:

> "It is materiality to the plaintiff's case that must be shown. This is a broad general requirement that is capable of satisfaction by objective inquiry. To introduce notions, related to the decision to sue, that would require an examination of the subjective workings of the plaintiff's mind would complicate the court's task and impede rather than advance the purpose of the Act."

[29] And this is the important part:

> "A fact is material to the plaintiff's case if it is both relevant to the issues to be proved if the plaintiff is to succeed in obtaining an award of damages sufficient to justify bringing the action and is of sufficient importance to be likely to have a bearing on the case. The *Shorter Oxford English Dictionary* defines the word 'material', inter alia, to mean 'Of such significance as to be likely to influence the determination of a cause'. Although a definition attributed to the sixteenth century, in our opinion, it provides an apt guide to the intention of the legislature in choosing to refer, without any elaboration, to 'facts material to the plaintiff's case'."

[30] It is, in my view, an error to approach the question of whether the facts relied upon by the appellant here were material to the plaintiff's case by reference to the findings of fact made by the trial judge. The plaintiff's case, in my view, embraced proof of the facts which were outlined by senior counsel, and I have already identified those four matters, and as such, in my view, they were facts material to the plaintiff's case.

[31] I do not accept the submission on behalf of the respondent that the plaintiff, having delayed the application to extend time, is, in effect, stuck with his Honour's findings about whether those facts are material. Those matters, in my opinion, would have been material to the conduct of the appellant's case.

[32] There is a substantial submission, however, put by the respondent that the appellant has not shown that it was not aware of material facts at the relevant times, and counsel for the respondent points to the outline of submissions at the trial which I have already referred to as being in the supplementary appeal book at page 41.

[33] Substantial arguments were advanced going to whether it is just to allow the extension of time, for instance, the length of delay and the conduct of the appellant in entering into contracts after 1984 and now wishing to rely upon what would have happened if it had been, on the appellant's case, fully aware of relevant matters.

[34] Also, the fact that the fiduciary relations claim is a discrete claim capable of being litigated independently of the other claims in contract and tort and estoppel, and so on.

[35] There is some substance in those matters, but the only basis that I can see upon which the application for an extension of time was litigated before the trial judge was that the appellant had not discharged the onus of proving the first leg of subsection (3), the awareness leg, and had not established the second leg, that relating to the conduct of the respondent.

[36] I think now it is too late to litigate those things. This matter has got to be put back on the rails somehow. As I say again, I do not think the trial should have taken place without the extension of time question being resolved. In all the circumstances, I think his Honour the trial judge was wrong in the exercise of his discretion not to consider that question. That being so, it is up to us to consider the question and, for myself, I would grant the extension of time necessary for the appellant to sustain its causes of action in the Supreme Court.

[37] **ANGEL J**: I agree with the orders proposed by the Presiding Judge in this matter. The trial included, on the pleadings, a time issue. Mr Reeves, for the respondent before us made a submission that his Honour made no appealable error in saying, at the conclusion of his reasons for judgment, "Equally, there is no need to express an opinion on the limitation issue".

[38] Clearly, there was a limitation issue before his Honour, the subject of written submissions from each side. Whether or not there was appealable error in the way his Honour the trial judge treated the issue, the fact of the matter is that that issue, appeal having been lodged against the dismissal of the appellant's claim, is clearly before this Court, and the question as I see it is whether this Court ought to entertain that issue or, alternatively, ought, as invited by Mr Reeves, to remit the matter back to a single judge sitting as the Supreme Court.

[39] As a matter of discretion, I think it is clear that this Court ought to deal with the issue here and now. A single judge, if the matter were remitted, would have to start anew on an issue in the midst of a large case with many and complex issues, and I do not think that is desirable.

[40] Secondly, the time issue is a relatively short point to be decided on matters that were before the trial judge in written form, and not the subject of extensive submissions.

[41] Thirdly, why should either party have an opportunity to have another go at the time issue? The parties had their opportunity. They conducted the case as they saw fit before the single judge and I think we ought to treat the matter accordingly and deal with the matter on the facts before the trial judge.

[42] I am generally in agreement with the Presiding Judge as to his conclusion. I do not think there is any question that the facts raised by the appellant were material facts for the purposes of s 44 of the Act. In the negligence case taken by the appellant, the facts relied on, which have been referred to by the Presiding Judge, demonstrate the falsity of key representations allegedly made in mid 1983 and early 1984 to the Dunbars by Dr Calley and are central to the appellant's case.

[43] The ultimate success or otherwise of the appellant's case before the trial judge, it seems to me, is an irrelevant consideration for the purpose of deciding the issue of materiality. I also agree with what the Presiding Judge

has said insofar as the appellant relies on the second leg of s 44(3), that is the conduct of the respondent.

[44] The fact of the matter is the appellant's claims are based on proceeding in ignorance of these matters until discovery was made in the action some years after the event and I do not think the appellant can be criticised for being out of time with its proceedings insofar as it is reliant on those matters, in particular the Commonwealth directive of 1987 which was central to the appellant's fiduciary duty case and non-disclosure case and the Vestey approved program matters, that is, the Cec Watts, Calley memo, the Calley hand-written program of 31 January 1983 and Calley's file note. It seems to me that the appellant should have the orders it seeks.

[45] **BAILEY J**: Yes, I also agree that the extension that is sought by the appellant should be granted for the reasons expressed by the Presiding Judge. I note that that necessarily also means that the application to strike out appeal grounds 27-30 must be refused.

[46] In this regard I add that I have paid particular attention to the manner in which the *Limitation Act* issue was dealt with in the court below. The procedure adopted was, in my view, wrong for the reasons given by the Presiding Judge. However, aside from that I have paid particular regard to the oral and written submissions of the parties before the learned trial judge.

[47] Today, Mr Reeves for the respondent, who I note did not appear at the trial, has made what, in my view, are cogent and powerful submissions for not

exercising the discretion in s 44(2) of the *Limitation Act*. However, no similar submissions were made to the learned trial judge. At trial the respondent's submissions focussed very largely on whether the matters relied upon by the respondent satisfied the requirement for a material fact and, to a far lesser extent, the alleged absence of evidence as to when the appellant became aware of what was alleged to be a material fact.

[48] In any event, notwithstanding the attractive submissions by Mr Reeves against the exercise of discretion, I do consider that it is now too late to refuse the extension sought on discretionary grounds when the point was not taken before the learned trial judge.

[49] **GALLOP J**: The orders of the Court, therefore, will be that the application by the respondent to strike out grounds 27-30 of the Notice of Appeal is refused. And further, we make an order allowing to the appellant an extension of time necessary to institute the action in contract and in tort.
