PARTIES:	HODGE, William Osborne & Anor v KIMBER, Robert Andrew
TITLE OF COURT:	Supreme Court of the Northern Territory
JURISDICTION:	Supreme Court exercising Territory Jurisdiction
FILE NOS:	No. 423/91
DELIVERED:	Darwin 26 October 1995
HEARING DATES:	14 July 1995
JUDGMENT OF:	Angel J

CATCHWORDS:

Limitation of actions - Procedure, pleading and evidence - Extension of time - Application to hear prior to trial refused - Appeal - Decision of Master upheld - Issues not discreet but substantive

Costs - Interlocutory proceedings - Cross appeal - Master refused to grant costs - Special circumstances needed - No costs to successful party

Evans Deakin Industries Ltd v The Commonwealth of Australia [1983] 1 QD R 40, followed

Limitations Act (NT) s44
Supreme Court Rules (NT) order 34.01

REPRESENTATION:

Counsel:

Appellant: J Waters

Respondent: T Riley QC

Solicitors:

Appellant: David Francis & Associates

Respondent: Cridlands

Judgment category classification: C

Court Computer Code:

Judgment ID Number: ang95018

Number of pages: 15

Distribution: Local Unpublished

ang95018

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 423/91

BETWEEN:

WILLIAM OSBORNE HODGE
Plaintiff

AND:

LESLIE RUTH HODGE

Plaintiff

AND:

ROBERT ANDREW KIMBER
Defendant

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 26 October 1995)

This is an appeal and an application for leave to cross-appeal against two orders of the Master, dated 6 April 1995.

The appeal is brought by the plaintiffs against the Master's decision that their application for extension of time pursuant to s44 of the Limitation Act be heard before trial, be refused. They seek to have the application for extension of time heard before trial.

There are four grounds of appeal:

"A That the Learned Master erred in his finding that a hearing of the Application for an extension of time prior to the Trial would not be conducive to an effective, complete, prompt and economical determination of the proceeding.

B Alternatively to (A) hereof that the Learned Master erred in finding that it was necessary for him to determine that the Appellants' Application was conducive to the effective,complete, prompt and economical determination of the proceeding.

C That the Learned Master erred in finding that the Plaintiff's application should be granted only if it could be shown by the plaintiffs or conceded by them that the determination of the issue as to an extension of time under sub-section 1 of Section 44 of the Limitation Act in favour of the Defendant would put an end to the action.

D That the Learned Master erred in finding that in order to determine whether the Plaintiff's application under sub-section 1 of Section 44 f the Limitation Act should be determined as a preliminary issue, it was necessary for the Plaintiffs to demonstrate from the material before the Court that it was just to grant an extension of time in which to institute the proceeding."

The relevant provisions of s44 of the Limitations Act provide:

"(1) Subject to this section, where this - - - Act, - - - prescribes - - - the time for -

(a) instituting an action;

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

(3) This section does not -
- - -
(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 - - - occurring after the expiration of [the limitation] period, and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff;
> - - -
>
> 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 and 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."

The defendant seeks leave to cross-appeal against the Master's decision as to costs. The proposed grounds of that appeal are twofold:

A. That the Master erred in failing to find that there was something exceptional about the circumstances of the Application so as to lead the Court, in the exercise of its discretion, to make an order as to costs, namely, that the Plaintiffs pay the Respondent's costs of the Application.

B. That the Master, in the exercise of his discretion as to costs, took into account irrelevant considerations and failed to take into account relevant considerations.

The nature of the proceedings was described by the Master as follows:

> "The plaintiffs commenced this proceeding by writ filed on 18 November 1991 claiming damages for loss caused by the defendant's negligence.
>
> The plaintiffs allege in their statement of claim that the defendant was instructed as solicitor to act for the plaintiffs in the conveyance of certain real property in Darwin owned by the plaintiffs. Part of the purchase price was to be secured by mortgages in favour of the plaintiffs.
>
> The transaction was settled on 19 December 1986 when the properties were conveyed and the mortgages registered. The plaintiffs allege that in breach of his fiduciary duty and negligently, the defendant allowed other mortgages to be registered on the properties in priority to the plaintiffs' mortgages. The plaintiffs were not informed of the prior mortgages until November 1987.
>
> The purchasers of the properties defaulted in payment and the properties were sold on 4 November 1988. After satisfaction of the debt to the first mortgagor there were no proceeds available for the plaintiffs, who suffered a substantial loss.
>
> In his defence the defendant denies breach of fiduciary duty and negligence and pleads that he acted in accordance with the plaintiffs' instructions.
>
> It is further pleaded that the proceeding is not maintainable by reason of the **Limitation Act** or alternatively, by laches, acquiescence and delay."

Mr Waters, counsel for the plaintiffs/appellants in this application, submitted that it is the common practice of this court in dealing with applications pursuant to s44 of the Limitations Act, to dispose of them separately and prior to trial. That is so.

Order 34.01 Supreme Court Rules provides:

> "(1) At any stage of a proceeding, the Court may give directions for the conduct of the proceeding which it thinks conducive to its effective, complete, prompt and economical determination.
>
> (2) A party may apply for directions on the hearing either of a summons filed for the purpose or of a summons for other relief."

Mr Waters submitted, in essence, that it is sensible to decide the application for extension of time prior to trial as its resolution would determine whether the trial would proceed or not. He said it would be futile "to come fully armed to argue the totality of the issues at trial, and then to determine the threshold issue at trial".

Mr Waters conceded that the institution of these proceedings occurred more than three years after the alleged cause of action arose, and that s15 of the Limitations Act bars further prosecution. An extension of time pursuant to s44 of the Limitations Act was sought to avoid that bar. It was submitted that material facts came to the knowledge of the plaintiffs or their legal advisers within the twelve month period prior to the expiration of the Limitation period. The affidavit of Mr Francis, dated 16 November 1994, paragraph 4, deposed to this. The material facts upon which the plaintiffs rely are referred to in a letter of David Francis and Associates, dated 4 May 1994, which, in substance, is duplicated in the Hodges' affidavit, dated 16 November 1994. They depose to the inspection of documents and files by Mr

Francis, solicitor for the plaintiffs, from which certain facts were ascertained in 1991. These purported material facts relate to the extent to which the plaintiffs agreed or had knowledge of the existence or otherwise of the granting of mortgages to a bank and a finance company over and in priority to a mortgage to the plaintiffs.

The question in issue is whether or not the cross-examination of Mr Francis and the Hodges, which relate to the ascertained facts in 1991, should be dealt with before trial or at trial.

It was said that the nub of the matter is whether Mr Kimber, former solicitor to the Hodges, disclosed at the relevant time to the Hodges that their security was to be subject to other securities given by the bank (ANZ) and the finance company (AGC). It was said the outcome of the trial will ultimately turn on questions of credit, and what is found to have passed between the plaintiffs and their then solicitor at the time the plaintiffs' mortgage was granted.

Mr Waters submitted that the issues to be canvassed on the application for an extension of time are discreet from those at trial and that there was no issue of prejudice as to costs or time raised on any of the affidavit material. Thus the matter should be dealt with in accordance with the normal practice, ie, pre-trial.

Mr Riley QC, for the defendant, submitted that the s44 application for extension of time and the trial should be heard together. It was submitted that it was not necessary for the defendant to file affidavit material as the defendant's case could be dealt with on the pleadings and on the affidavit material as provided by the Hodges, the plaintiffs.

The real issue, he said, turned on the credibility of the plaintiffs, the Hodges, as opposed to that of the defendant, Mr Kimber. He submitted it centred on one issue only, that being whether Kimber properly explained the true nature of the security to the Hodges.

Mr Riley QC submitted that were the plaintiffs' case to be accepted, then the cause of action arose in December 1986 (paragraph 23 of the Amended Statement of Claim), ie, at the time of the alleged failure of Mr Kimber to secure a first mortgage for his clients, the plaintiffs. It was said that the plaintiffs suffered loss then because inadequate security had been provided. In support of this submission he cited two cases: *Jobbins v Capel Court Corporation Ltd and Anor* (1989) 91 ALR 314; *Gillespie v Elliott* (1987) 2 Qd R 509.

Mr Riley QC submitted that another date was possible, viz November 1987 (paragraph 24 of the Amended Statement of

Claim), when the plaintiffs' then solicitors, Ward Keller, first informed the plaintiffs of the extent of the prior mortgages and that there was no chance of recovery upon their security. Accordingly, it was said, the only applicable dates upon which the cause of action arose are December 1986 or November 1987. Mr Riley QC noted that the plaintiffs allege the cause of action arose in November 1988 (paragraph 25 of the Amended Statement of Claim). These dates are important, it was submitted, because the nature of argument as to delay and prejudice will vary according to which date is accepted when the application is heard. This, too, explained why no affidavit material had been filed (yet) as to prejudice.

Mr Riley QC submitted that very rare is the occasion upon which a court will separate an issue, and only where a discreet issue can be isolated and dealt with clearly, succinctly and with limited expense. He referred to *Evans Deakin Industries Ltd v The Commonwealth of Australia* [1983] 1 Qd R 40; *Verwayen v The Commonwealth of Australia* [1988] VR 203; *Dunstan v Simmie & Co Pty Ltd* [1978] VR 669. It was submitted that this principle was relevant notwithstanding Orders 47.04 and 34.01 of the Supreme Court Rules.

Mr Riley QC submitted that the chief material fact upon which the plaintiffs rely is that there is no record to be found on any of the files of Mr Kimber that he informed the plaintiffs as to the priority of their mortgage. Nothing on

the files indicates any intention or instructions on the part of the plaintiffs to obtain a first mortgage. That in itself took the matter no further, it was said, and so could not be a material fact. If the plaintiffs' position is accepted and Mr Kimber did act negligently, nothing on the file is helpful one way or the other, and the result would be the same.

The conclusion from all of this, it was said, was that the facts relied on were equivocal rather than material, and that the full facts would only be disclosed through the process of the trial; accordingly, the application for an extension should not be determined by way of preliminary hearing. The issues were not discreet but inextricably and as a matter of substance bound up with the issues at trial and they could only be determined in the light of all the evidence at trial.

In his reasons, the Master said:

> "It is necessary to give brief consideration to the provisions of s44 of the **Limitation Act** which provides for an extension of time limitations.
>
> A plaintiff seeking an extension may institute proceedings in the normal manner provided that the originating process is endorsed with a statement to the effect that an extension is sought pursuant to section 44(4). The writ has been so endorsed. S.44(5) provides:
>
> ' **Proceedings under this section may be determined by the court at any time before or after the close of pleadings. '**
>
> Affidavits read in support of this application disclose that the plaintiffs rely on the ascertainment of material facts.

Reference was made to the decision of the High Court in **Wardley Australia Ltd and Anor v State of Western Australia 175 CLR 514** and the statement of the majority at p.533 that:

> **' We should, however, state in the plainest 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 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.'**

Both **Wardley's** case and the case referred to were not concerned with an application for an extension of time. They arose out of applications to strike out proceedings on the grounds that the claims were statute barred. They highlighted the difficulties which may arise in ascertaining when a cause of action arose without consideration of all the evidence.

Although this application has not been brought pursuant to 0.47.04, which relates to the separate trial of questions, similar issues arise. In **Dunstan v Simmie & Co. (1978) VR 669** Young C.J. and Jenkinson J said at page 671:

> **'.... although every case must depend upon its own facts it will as a general rule only be appropriate to order that a preliminary issue be isolated for determination before trial where the determination of the issue in favour of the plaintiff or the defendant will put an end to the action or where there is a clear line of demarcation between issues and the determination of one issue in isolation from the other issues in the case is likely to save inconvenience and expense. '**

Counsel for the plaintiff indicated that if the application for an extension was refused it may be decisive insofar as the plaintiffs were concerned but was unable to concede that this would necessarily be the case. The parties did not refer to the alternative defence of laches acquiescence and delay.

Consideration needs to be given to the question as to whether the determination of the application is conducive to the effective, complete, prompt and economical determination of the proceeding (0.34.01).

There are two broad issues to be decided in an application pursuant to s.44(1) of the **Limitation Act**. Firstly, whether there are grounds such as the ascertainment of a material fact within the prescribed period and, secondly, whether it is just in all the circumstances to grant the extension of time. (S. 44(3), and see **Foster v Vin Keneally & Associates 48 NTR 51, 55**).

The affidavits read in support of this application refer mainly to the ascertainment of material facts. There is little evidence going to the justice of the application for an extension of time.

It is argued on behalf of the plaintiffs that the only issue in the application for an extension is that relating to the ascertainment of material facts. However, other issues may need to be considered. For example, it is pleaded in paragraph 24 of the statement of claim that the plaintiffs were informed in November 1987 that a bank had priority in respect of the mortgages. An explanation may be required as to why proceedings were not instituted until 18 November 1991.

Counsel for the defendant has indicated that the plaintiffs would be required for cross-examination should the application for an extension proceed, and that their credibility would be in issue.

On the pleadings there are issues as to the instructions given to the defendant and the advice received. If issues of credibility are involved it may be appropriate that the application for an extension of time be dealt with at the trial.

If the alternative defence of laches, acquiescence and delay is pursued it will probably be necessary to canvass similar issues to those raised by the limitation defence.

There was no evidence or submissions as to the time which the application for an extension and the trial may take and the comparative cost and inconvenience to the parties and their witnesses.

I am unable to conclude that a hearing of the application for an extension of time prior to the trial would be conducive to an effective, complete, prompt and economical determination of the proceeding.

The application is dismissed."

Whether the plaintiffs' application for an extension of time should be heard as a preliminary issue depends, inter alia, upon whether the issues arising therefrom are discreet and able to be separated from the substantive issues to be canvassed at trial. I do not think they are. I agree with the Master.

In *Evans Deakin Industries Ltd v The Commonwealth of Australia*, supra, Andrews SJP at 45, in relation to an application for a pre-trial determination, stated:

> "The saving of expense and time is relevant always, but where it is apparent that there may well be significant overlapping in the disposal of separate issues such a consideration would not ordinarily be sufficient to justify the making of an order such as is sought here. I think the circumstances will rarely arise to justify this kind of an order and that great care must be taken before a decision to make one. I think the rarity of such an order does not really reflect a principle, but rather establishes that the circumstances rarely arise to justify it.
>
> Difficulties which may arise where there is no clear demarcation between issues are probably numerous. I have referred to the mustering of witnesses. As well it is apparent that there would be two sets of cross-examination upon evidence touching upon the same sets of facts and two separate decisions as to credibility bearing on overlapping issues of fact. It is by no means certain that the trials would occur before the same judge. There will I think in such a situation be a duplication of costs and, unless it is fairly plain that the resolution of one will ensure a considerable reduction in time and expense involved in the investigation of the balance of the issues, there is no real justification for making an order of this kind, assuming that to be the only relevant consideration."

The matters determinative of the application for extension of time are matters that will necessarily be

ventilated at trial. They will require the same witnesses to be called and there will be unnecessary duplication and expense.

In *Jobbins v Capel Court Corporation Ltd and Anor*, supra, the Full Court of the Federal Court at 317 said:

> "For the purposes of [Limitation] statutes, a number of principles have been worked out. In the first place, where the incurring of damage is an essential element of a cause of action, the suffering of some damage (the other elements of the cause of action having already occurred) will, in general, start time running even although the damage continues to grow. The running of time is not suspended until all the damage which will be suffered has ceased to flow, nor does further damage constitute a fresh cause of action: see *Cartledge v E Jopling & Sons Ltd* [1963] AC 758; *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1963] 2 AC 1; *Forster v Outred & Co* [1982] 1 WLR 86; *D W Moore & Co Ltd v Ferrier* [1988] 1 WLR 267; *Hawkins v Clayton* (1988) 164 CLR 539 ..."

Precisely when the plaintiffs' cause of action arose is in contention in the present case and this question needs to be determined in order to dispose of the application for extension of time. It can best be heard at trial in light of all the evidence.

I agree with the reasons of the Master and his application of *Wardley Australia Ltd and Anor v State of Western Australia*, supra. I note that Mr Waters sought to distinguish that case when he stated that it should be confined to cases involving difficulty in areas of proof. I am of the view the issues raised by the plaintiffs' present

application can not suitably or conveniently be separated or isolated in substance from the issues for trial, or at least that the plaintiffs have failed to demonstrate that they can.

I uphold the decision of the Master. The application for an extension of time pursuant to s44 of the Limitation Act should be heard at trial. The appeal is dismissed.

The Master declined to order costs in favour of the successful defendant. The defendant now seeks leave to appeal from the Master's order. The Master followed the normal rule, namely that the successful party, in the absence of special circumstances, does not recover costs with respect to an interlocutory application - such is the basis of Order 63, sub-rules (4) and (18) and see *TTE Pty Ltd & Anor v Ken Day Pty Ltd* (1991-1992) 2 NTLR 143. Here, it was said, the Master erred in not making an order for costs against the plaintiffs who had brought an unsuccessful application in the face of the defendant's known attitude of opposition, and, as Mr Riley QC submitted, "... at the end of the day it was an application that could not succeed". It was said that it was not a "run of the mill" interlocutory application, eg an application for further and better answers to a request for particulars or for further and better discovery, but an application of substance and that the successful defendant ought to have received his costs incurred.

Although there is some force in what Mr Riley QC submitted, I am of the view that the Master's exercise of discretion as to costs did not miscarry, or at least was not demonstrated to be wrong, and that leave to cross-appeal should be refused.

Order accordingly.