FERSCH v POWER & WATER AUTHORITY & ORS

Court of Appeal of the Northern Territory of Australia

Asche CJ, Rice and Angel JJ

2 August & 13 September 1990 at Darwin

LIMITATION OF ACTION - s.44(3)(b) Limitation Act - interpretation - s.44(3)(b)(i) - whether termination of appellant's employment a "material fact" "ascertained" by him

LIMITATION OF ACTION - s.44(3)(b)(i) - no need for causal connection or interaction between "material fact" and decision to sue

Cases applied:

Braedon v Hynes [1986] NTJ 883
Sola Optical Australia Pty Ltd v Mills (1987) 163 CLR 628

Cases referred to:

Freudhofer v Poledano [1972] VR 287
Graham v Baker (1961) 106 CLR 340
Paff v Speed (1961) 105 CLR 549

Cases followed:

Lovett v Le Gall (1975) 10 SASR 479
Napolitano v Coyle (1977) 15 SASR 559
Sola Optical Australia Pty Ltd v Mills (1987) 46 SASR 364

Counsel for Appellant:	A. Wyvill
Solicitors for Appellant:	David de L. Winter
Counsel for Respondent:	R. Silva
Solicitors for Respondent:	Solicitor for the NT

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP16 of 1989

On Appeal from the Supreme Court of the Northern Territory SCC No. 273 of 1987

BETWEEN:

WILHELM FERSCH

Appellant

AND:

POWER AND WATER AUTHORITY

First Respondent

AND:

FLOREAT PLUMBING PTY LTD
(In Liquidation)

Second Respondent

AND:

FLOREAT PLUMBING (NT) PTY LTD

Third Respondent

ORDERS OF THE COURT

1. Appeal allowed.

2. Remit the application to the Judge at first instance to consider the matter according to law.

3. Order that the First Respondent pay the Appellant's costs of this appeal to be taxed.

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CORAM: ASCHE CJ, RICE & ANGEL JJ

REASONS FOR JUDGMENT

(Delivered the 13th day of September 1990)

ASCHE CJ: On 28 November 1983 the appellant was injured when he was working in a trench clearing away rocks and rubble from certain visible electric cables. He was

climbing out of the trench with a jackhammer in his hand when he slipped and fell further into the trench and his action caused the jackhammer to operate. The tip of the jackhammer pierced a high voltage electricity cable which was not visible or apparent and which communicated a severe electrical shock to the appellant. The appellant suffered injuries but returned to his employment shortly after the accident and remained employed by them until 26 June 1986 when he was dismissed. He has not worked since.

The appellant consulted solicitors in about February 1984 and, as appears by a comment in a letter dated 14 February 1984 written by his then solicitors to another firm of solicitors, (albeit about another matter), an action for damages for personal injuries for negligence was then under contemplation. Nothing however was done, save to seek some payment of workers compensation. The appellant changed his solicitors, but it does not appear that the second firm of solicitors took any action on his behalf for personal injuries. It was not until he had consulted a third firm that on 5 May 1987 a writ was issued claiming damages for personal injury for negligence. The writ was issued approximately 5 months after the expiration of the limitation period for such an action. The writ names three defendants. The first defendant is sued as being the person responsible for the location, care and control of the electricity cables. The second and third defendants are sued in the alternative as employers of the appellant.

The appellant being out of time in his action, the Statement of Claim accordingly bears the endorsement required by s.44(4) of the Limitation Act.

The appellant applied pursuant to s.44 of that Act for an order that the Court extend the time limited by the Act for taking action against the three defendants.

S.44(3)(b)(i) reads, so far as relevant:-

> "(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 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) ....
>
> and that in all the circumstances of the case, it is just to grant the extension of time."

The learned Judge at first instance held that the appellant had failed to satisfy him that facts material to the appellant's case had been ascertained some time within 12 months prior to the filing of the Writ. Because of that finding, His Honour did not deem it necessary to take the

next step, which is required by the latter words of the section, of considering, in the broad exercise of his discretion, whether it was just to grant the extension of time. That approach of His Honour was, in my respectful view, correct, because that exercise takes place only after the Court satisfies itself that the applicant comes within the provisions of s.44(3)(b)(i) or (ii).

The appellant now appeals from His Honour's decision and submits that His Honour should have held that the appellant had established the relevant "material fact", which was the termination of the appellant's employment on or about 26 June 1986. The appellant submits that that fact was only ascertained by him, and could only have been ascertained by him, on or about that date when he was so informed that his employment had terminated. The learned Judge at first instance held that "there is no material before me as to any material facts ascertained by the appellant within the period of 12 months prior to the filing of Writ". He refused to grant an extension of time.

The appellant appeals on the ground that the "material fact" for the purpose of the application was either the fact of his termination of employment or the date of such termination or both those matters.

To understand the basis of the decision of His Honour, and indeed to be sure of any basis from which a contrary interpretation may properly be drawn, one must go to the affidavit of the appellant. I agree with Mr Wyvill, who appears for the appellant, that, since there is no material to the contrary filed, and nothing inherently improbable or contradictory appearing in the affidavit, one must accept the facts therein set out as established for the purposes of the application and this appeal.

Some parts of the affidavit are directed to the appellant's ignorance of the law, his ignorance of his right of action and some misinformation given to him by a lay person as to the time limits within which to bring the action. Although some argument was addressed to the learned Judge at first instance on these matters they are not raised on this appeal.

The relevant parts of the affidavit for the purposes of this appeal are the following:-

> "8. Since the accident, my main concern has been to try and get back to work and to get on with my life.
>
> 9. I continued working with Floreat Plumbing until November, 1985 when I went to Germany for six months.
>
> 10. After returning in May of 1986, I worked for Floreat Plumbing until on or about June 26th 1986, when I was sacked because my work rate was too slow.

16. I believe that I have good cause of action against all defendants. Annexed hereto and marked "D" is a true copy of the Accident Report processed by the Industrial Safety Division of the Department of Mines and Energy.

17. I have been unemployed and in receipt of sickness benefits since being sacked by Floreat Plumbing in June, 1986. I am unable to work because of my epilepsy and my nervous condition generally. I do not expect to be able to obtain employment in the future.

18. Prior to the accident I was employed regularly receiving approximately $400-00 per week net of tax.

19. I believe that the change in my capacity to work has been caused or contributed to by the injuries the subject of this claim."

The first thing that can be said about these passages is that they do not convey a causal connection between the injury and the loss of employment. So far as the affidavit goes they are two unconnected incidents. Mr Wyvill, it is true, made a valiant attempt to suggest that paragraph 19 could and should be read as an allegation that the appellant lost his employment because his injuries affected his capacity to work. Mr Wyvill submits that the learned Judge at first instance must have forgotten or omitted to take into account paragraph 19, and was therefore in error when he said:-

> "The slowness of his rate of work is not attributed by him to any injury sustained in the accident". (P.129 of the Appeal Book).

However His Honour obviously had that part of the affidavit well in mind because he says, (at p.130 of the Appeal Book),

> "The plaintiff goes on to assert that he believes that the change in his capacity to work has been caused or contributed to by the injuries, the subject of his claim, but as elsewhere, he does not depose to when he ascertained the facts which led to that belief."

I agree with His Honour. Although - as is made abundantly clear by certain cases to which I will later refer - a causal connection or interaction between the material fact and the appellant's decision to sue need not be shown, it would certainly have strengthened the appellant's case here. There are certainly likely to be situations where a person returns to work after an injury believing or hoping that the injury will not affect his working capacity; but over a period which might be quite substantial he comes gradually to the realisation of a material fact, namely that his working capacity has declined because the injury or its effects are still with him. When he finally reaches the point where he positively concludes that his working capacity has been affected by the injury, that is the point when he has "ascertained" (O.E.D. "made subjectively certain") something he could not be said to have "ascertained" before. This, however, is not how I read the affidavit of the appellant.

I do not think that one can go outside what is said in the affidavit and give some generous interpretation to paragraph 19 which does not equate with what is said.

Mr Wyvill, however, submits that, since it is made clear by the cases that an interaction between the material fact and the decision to sue is not required, he need only establish a "material fact" which was "ascertained" by the appellant within the prescribed period. He submits that the fact of the appellant's loss of employment is a material fact because it must necessarily be material to the quantum of any damages the appellant might ultimately be awarded. He submits that, in any action by the appellant brought as arising from the accident, the date of the cessation of employment would have to be material in assessing quantum. And the date could obviously not be "ascertained" by the appellant until he was told of his dismissal, which, in this case, seems to have occurred about the same time as the dismissal itself.

When a section similar to s.44 of the Northern Territory Act was introduced into South Australia, the initial view of the South Australian Full Court was to give a broad and generous interpretation to the section. Lovett v Le Gall (1975) 10 SASR 479: Napolitano v Coyle (1977) 15 SASR 559. Subsequently, in two cases (Cakebread v Henriks (1986) 128 LSJS 139: Raison v Alexoudis

(1986) 130 LSJS 174), the view was taken that an extension of time should be denied unless some interaction could be shown between the plaintiff's ascertainment of material facts and his decision to institute proceedings. In Sola Optical Australia v Mills (1987) 46 SASR 364 a Full Bench of the Supreme Court disapproved Cakebread and Raison, holding such cases wrong both in principle and precedent in not following the earlier decisions of Lovett and Napolitano. When the Sola Optical case went on appeal to the High Court ((1987) 163 CLR 628) the view taken by the Full Bench in that case was approved and Cakebread and Raison were overruled. It was firmly laid down that there need be no interaction between the material fact and the decision to sue.

Even if the appellant's failure to discover the fact in time was due to his own carelessness he may still come within the purview of the subsection. See Lovett v Le Gall (1975) 10 SASR 479 at 483. However, as Bray C.J. points out in that case, his lack of diligence would be relevant to the overall exercise of the Court's discretion. See also: Napolitano v Coyle (1977) 15 SASR 559 at 569.

In Sola Optical Australia Proprietary Limited v Mills (1987) 163 CLR 628 their Honours of the High Court in a unanimous judgment referring to s.48(3)(b)(1) of the South

Australian Limitation of Actions Act, (which is in very similar terms to s.44(3)(b)(1) of the Northern Territory Act), said this:-

> "There is no warrant for writing into the Act a further qualification that, to attract the operation of s.48(3)(b)(i), there must be some interaction between the material fact and the plaintiff's decision to sue. 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. 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'."

In Lovett v Le Gall (supra) which was approved by the High Court in the Sola Optical case, Bray C.J. at p.482 observed that the phrase "facts material to the plaintiff's case were not ascertained by him ..." took in "the whole complex of evidence and argument which will be advanced at the trial on his behalf". Wells J. in the same case said at pp.485-6:-

"Counsel concentrated most of their attention on the passage '...facts material to the plaintiff's case ...'. It seems to me that that passage must be read as a whole. When it is so read, the word 'material' denotes, in my opinion, facts that are not only relevant to the issues - which, I apprehend, may include the issue of damages - but are also of such a nature and of such weight that they may fairly be taken into account by a plaintiff who is in the course of considering whether he should or should not prosecute his claim to trial. Similarly, the word 'case' has a much wider purview than the expression 'cause of action'; it comprehends, in my opinion, all evidence, law and argument to be relied on in court by the party concerned. I may add that if the passage meant what Mr Rice's argument would have it mean - that is, 'facts essential to the formulation of the plaintiff's cause of action ' - it is rather surprising that Parliament did not use those very words', which are founded upon a well-known expression of art, 'cause of action', and, when so founded, are, in my view, as clear as could be wished. It is true, as Mr Rice pointed out, that an applicant seeking an extension of time, might qualify under the opening passage of sub-s.(2) of s.48 by relying on facts that are technically of the required description but are of little real importance. The short answer is that to qualify is not to succeed; there is ample scope in the discretionary power conferred by the concluding passage of sub-s. (2) to reject applications that are without real and honest merit."

Maurice J. in Braedon v Hynes [1986] NTJ 883 at 893 considered that Lovett v Le Gall, which he followed, was authority for saying that, by the concept of "the appellant's case", the words in the subsection "comprehended not merely the facts essential to formulating the cause of action in the form of a statement of claim, but the whole complex of evidence, law and argument to be relied on in court by the party concerned".

It becomes necessary, therefore, to consider whether the appellant here "ascertained" "material facts" within the meaning of the subsection as interpreted by the authorities and, in particular, by the High Court. In my view the appellant must succeed.

He would, presumably, claim, inter alia, loss of earning capacity. In assessing that claim the Court would need to take into account what he had already been paid. In Paff v Speed (1961) 105 CLR 549 at 566 Windeyer J. says:-

> " It is, I think, important to distinguish between claims based on a termination of employment with a particular employer and, on the other hand on the destruction of a man's capacity to do work of a particular kind. In the first case the loss is of wages that might have been earned and of other emoluments and advantages, including opportunities of achievement and promotion in that service. In the second case the loss is of earning capacity; and the only relevance of the wages that were earned and of the conditions of employment before the accident is as an aid in assessing damages for that loss."

Later, on the same page, His Honour says:-

> " Where a plaintiff claims damages, not because he has lost the benefits of his engagement with a particular employer, but because he has been deprived of the capacity for employment in a particular trade or calling, payments received from his employer up till the date when his employment ceased are, generally speaking, to be taken into account in assessing his damages up to that time. From the date his engagement ceases, however, his claim is for the destruction of earning capacity."

These remarks seem to have been accepted by the High Court (Dixon CJ, Kitto and Taylor JJ), in Graham v Baker (1961) 106 CLR 340 at 346-7. Their Honours in that case point first to the error of regarding the right of a plaintiff, whose earning capacity has been diminished by the defendant's negligence, as consisting of two separate matters, i.e., loss of wages up to the time of the trial and an estimated future loss because of his diminished earning capacity. "A plaintiff's right of action is complete at the time when his injuries are sustained." Their Honours, however, then comment that:-

> "... it has been found convenient to assess an injured plaintiff's loss by reference to the actual loss of wages which occurs up to the time of trial and which can be more or less precisely ascertained and then, having regard to the plaintiff's proved condition at the time of trial, to attempt some assessment of his future loss. We mention this matter because it has been suggested that since an injured plaintiff is entitled to recover damages for the impairment of his earning capacity, the fact that a totally incapacitated plaintiff has, during the period of his incapacity received his ordinary wages is not a matter to be taken into consideration. To be precise, however, an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss. And if, notwithstanding such impairment, both his contract of employment and his right to ordinary wages continue, how can it be said that his impairment has resulted in any loss so far as his earning capacity is concerned? According to Windeyer J. in Paff v Speed the answer to this question is clear and the same view has been taken on other occasions".

See also Freudhofer v Poledano [1972] VR 287 at 289-291: Lunz - "Assessment of Damages" 2nd Ed. para 5.2.06.

The reason for this excursus into what is sometimes seen as a difficulty in the concepts of general and special damage, - a matter which is more particularly discussed in Freudhofer v Poledano (supra), - is to make the point that the plaintiff's period of employment after the accident is a factor which would need to be taken into account by the Court in assessing the damages for loss of earning capacity. It must follow that such an exercise must be encompassed within the reasoning of the High Court in the Sola Optical case. Their Honours say that a fact is material, firstly, if it is "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". I consider that I must take those remarks as including quantum as an "issue to be proved". The juxtaposition of the phrase "award of damages" with the adjective "sufficient" can only lead to that conclusion; and, in assessing quantum, the appellant's period of employment must be a relevant matter by reason of Paff v Speed and Graham v Baker, to which reference has already been made. Equally relevant would be the date of cessation of employment. Secondly, the High Court requires the fact to be "of sufficient importance to be likely to have a bearing on the case". I note the use of the word "likely", and it seems to me that, in any assessment of the

appellant's damages for loss of capacity to work, past present and future, the fact of the appellant's previous employment and the period of that employment must be considered of sufficient importance as likely to have a bearing on the case. Indeed those matters must certainly be taken into account in the assessment of damages; but not only there. It would also appear likely to be a matter explored in some depth by the defendant, in an endeavour to establish (a) that the appellant's capacity to work had not been affected, or not been as affected as he might maintain, or, (b), that his dismissal arose from causes unconnected with the injuries suffered in the accident.

When one adds to these observations of the High Court the other observations I have already quoted such as Bray C.J. in Lovett v Le Gall ("the whole complex of evidence and argument") and Wells J. in the same case ("may include the issue of damages"), the authorities lead irresistibly to the conclusion that the appellant here "ascertained" a "material fact" on or about the date he was dismissed from employment even if his affidavit does not reveal a causal connection or interaction between that fact and his later decision to take proceedings.

I must, however, with the greatest of respect to the binding authority of the Sola Optical case in the High Court, confess that the conclusion gives me some unease in

this case; yet the principles are too clearly set out to admit of contradiction. If a plaintiff's earnings after injury can constitute a material fact even without an interaction between that fact and his decision to sue, why should not the fact that he has not earned be equally material? The Court would still have to take that fact into account in assessing damages. No doubt if a plaintiff maintained that he tried desperately to get jobs but finally realised ("ascertained") that he could not because of his injury, that would be a legitimate situation to explore; but the justification would be because of the interaction between his lack of employment and his decision to sue. But suppose instead he merely accepted that the particular industry in which he worked was facing a depression and there were no jobs available? Suppose he then claimed (correctly) that he could not have finally ascertained that fact until the three years had expired? Could he then take proceedings? It would seem that he could. Similarly, if a benevolent employer found him an apparently permanent job within his capabilities, but that employer went out of business or was forced to retrench, could he then resort to a claim for damages for which he was out of time?

The cases previously cited seem more properly sustainable as a matter of fairness and justice. Plainly enough the discovery by the appellant in the Sola Optical case of medical evidence previously unknown to her and

indicating very serious loss of function of the right hand was the discovery by her of a material fact. Lovett v Le Gall was even stronger because there the appellant discovered not only more serious problems related to her injury but also the existence of two witnesses likely to assist her case on liability (p.480). So also in Napolitano the appellant learned of facts previously unknown to him, namely that a doctor, whom he believed had reported nothing wrong with him, had in fact considered that there was permanent disability, and also that a Police Report, previously unseen by the appellant, contained information which could assist him on the question of liability (pp.562-3). In Braedon v Hynes, inter alia, the identity of the defendant was not discovered until after the expiration of the limitation period.

Those cases seem to me much clearer than the present case, pointing, as they do, to facts which are obviously 'material', in the Dictionary sense accepted by the High Court in Sola Optical as "of such significance as to be likely to influence the determination of a cause". Clearly in those cases the plaintiff discovered something significant, which he did not know before, and which, if presented to the court, would be likely to influence its determination either as to liability or as to extent of incapacity. Clearly also, if the plaintiff were then shut out from commencing proceedings because of time limitations,

a prima facie case of injustice to the plaintiff would appear; subject, however, to the broader exercise of discretion contained in the latter part of s.40(3); where factors such as the plaintiff's own carelessness or dilatoriness might swing the balance back against him.

But the "material fact" relied on in this case, although it comes clearly within the category outlined by the High Court, seems to me very different and not of such significance as the other cases. It must be remembered that the policy of the Limitation Act is twofold: to allow potential defendants to regulate their lives and businesses on the assurance that, after a certain time, they will not be harassed by "old unhappy far off things": but to make provision for the exceptional case where, by reason of unforeseen or newly discovered matters, it could be unfair to enforce a time limitation on a prospective plaintiff. Bearing those considerations in mind, is there anything unfair or unjust to the appellant here? What he seems to be saying is, "I found I was out of time, I didn't discover anything before or after that (i.e. within the requisite 12 months) which affected my decision to sue; but, fortunately, I have found something which goes to quantum and, happily, I can rely upon that".

The result does seem to suggest that a person out of time may not find it beyond reasonable ingenuity to

ascertain a material fact sufficient to pass the initial test contained in s.44(3)(b)(1), particularly since he need not show any interaction between the ascertainment of that fact and his intention to sue. With respect, I would draw attention to the comments of Milhouse J. in his dissenting judgment as a member of the Full Bench when the Sola Optical case was on appeal in South Australia:-

> " The scheme of the legislation is to require some genuinely new fact to emerge which is sufficient to alter a decision, previously made, not to proceed. That surely is the point of pl. (i) - something new emerges within twelve months before the limit passes or after it has passed, to change the mind of the intending plaintiff and to decide him on proceedings. Otherwise the placitum is quite pointless: the requirement to be satisfied has no relevance at all to the merits of the application: it is simply a test to be passed for the sake of having a test, nothing more. If that were so it would have been easy and more sensible for Parliament simply to give an unfettered discretion to the court without any qualifying test at all" (46 SASR 388).

I also rather share the concerns of Johnston J. who also dissented in that case. Those concerns were to the effect that it would be "destructive of the intention of Parliament to unduly dilute the meaning of "material"." (46 SASR 398).

However the answer given by the High Court is conclusive and must suffice:-

> " It was argued for the appellant that this construction of the section opens it up to

> contrivance and obscurity. On the other hand, to introduce, by a process of construction, controlling criteria to limit its abuse is to compound rather than to alleviate any difficulty. The breadth of the residual discretion vested in the court provides an ample safeguard against abuse and provides that flexibility which will facilitate the achievement of the legislative purpose, namely a just result in a wide range of circumstances" (Sola Optical - 163 CLR - 637).

The result must be that the appeal is allowed. Since His Honour, by reason of his decision, did not turn his attention to that residual discretion contained in the latter part of s.44(3)(b), it seems necessary to remit the case to him to carry out that exercise. On the question of costs the Court notes the appellant did not proceed with the appeal against the second and third respondents and Notice of Discontinuance was given to them before the hearing of the appeal. The appellant proceeded on the appeal against the first respondent only, and the appellant having been successful on appeal, the first respondent must pay the appellant's costs of this appeal.

RICE J: For the reasons given by Angel J., I would allow the appeal and remit the matter to the learned Judge for the purpose of exercising his discretion.

The appellant should have his costs of the appeal.

ANGEL J.: In my opinion this appeal should be allowed.

The facts are set out in the reasons for judgment of the learned Chief Justice.

The learned Judge held that the affidavit of the appellant did not disclose whether a fact material to the appellant's case was ascertained by the appellant between 5 May 1986 and 5 May 1987 in accordance with s.44(3)(b)(i) of the Limitation Act. In this, I respectfully think the learned Judge was in error. I do not think he adverted to the significance of the termination by the second or third respondent of the appellant's employment on or about 26 June 1986. Irrespective of the cause of the termination of employment, and in particular whether such termination (in contrast to his inability to work thereafter) was caused or contributed to by the appellant's alleged impaired working capacity, and irrespective of whether the appellant's alleged loss is to be adjudged, if at all, at the date of the tort or the date of the hearing (Johnson v Perez (1988) 166 C.L.R. 351), and irrespective of whether the appellant's alleged pre-trial loss is to be characterised as loss of earnings or loss of earning capacity (Freudhofer v Poledano [1972] V.R. 287, Todorovic v Waller (1981) 150 C.L.R. 402), I am of the view that what the appellant earned between the date of the accident and the date of the hearing, necessarily

ascertained by reference to, inter alia, when his employment was terminated, is material to any assessment of the appellant's damages.

The damages claimed by the appellant include "loss of income" and "loss of earning capacity" - see the particulars to paragraph 11 in the appellant's statement of claim. The appellant was put off work on or about 26 June 1986 and that fact was ascertained or found out by him when it occurred. It is a fact material to the assessment of damages which is part of the appellant's case. It is a fact relevant to an issue to be proved (pre-trial loss) and one which plainly has a bearing on his case, cf. Sola Optical Australia v Mills (1987) 163 C.L.R. 628 at 636.

There being material which called for an exercise of the learned Judge's discretion as to whether time within which to take proceedings might be extended pursuant to s.44 of the Limitation Act, it is appropriate to allow the appeal and refer the matter back to the learned Judge for further consideration.

The appellant should have his costs of the appeal.