Jape Furniture Pty Ltd v Bonifazio [2001] NTSC 48

PARTIES:	JAPE FURNITURE PTY LTD
	v
	JOHN BONIFAZIO
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM WORK HEALTH COURT
FILE NO:	LA 5 of 2001 (20014659)
DELIVERED:	21 June 2001
HEARING DATE:	15 June 2001
JUDGMENT OF:	BAILEY J

CATCHWORDS:

WORKERS' COMPENSATION –

Proceedings to obtain compensation – determination of claims – meaning of proceedings – whether interlocutory applications are to be characterized as "incidental applications" to the substantive proceedings - *Work Health Act* 1999 (NT) s 104 (1) – whether an Order made granting extension of time to bring the application was interlocutory in nature – *Work Health Act* 1999 (NT) s 116 (3) – legislative intent to exclude appeals in interlocutory matters until proceedings finally determined.

Work Health Act (NT), s 94(1)(a), s 103J, s 104(1), s 104(3), s 116(1), s 116(3)
Work Health Court Rules

Hall v Nominal Defendant (1966) 117 CLR 423 at 440 - followed
Ex parte Britt (1987) 1 Qd R 221 - referred
Dousi v Colgate Palmolive Pty Ltd (1987) 9 NSWLR 374 - referred

Merton Enterprises Pty Ltd v Nelson (1988) 13 NSWLR 454 – referred
Border Auto Wreckers (Wadonga) Pty Ltd v Strathdee [1997] 2 VR 49 - referred
Ramton v Cassin (1995) 38 NSWLR 88 - referred
Maddalozzo v Maddick (1992) 84 NTR 27 - considered

REPRESENTATION:

Counsel:

Appellant:	Mr Southwood QC
Respondent:	Mr Grove

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Ward Keller

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Jape Furniture Pty Ltd v Bonifazio [2001] NTSC 48
No. LA 5 of 2001 (20014659)

BETWEEN:

JAPE FURNITURE PTY LTD
Appellant

AND:

JOHN BONIFAZIO
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 21 June 2001)

[1] The appellant employer by a notice of appeal filed on 2 March 2001 sought to appeal from a decision of the Work Health Court which granted the respondent worker's application for an extension of time to commence proceedings claiming compensation under the *Work Health Act*.

[2] On 15 June 2001, I upheld a preliminary direction on behalf of the respondent that this Court has no jurisdiction to entertain the appeal and accordingly, dismissed the appeal with costs. I indicated that I would publish my reasons in due course and now seek to do so.

[3] On 1 September 2000, the respondent filed an application (Form 5A) seeking:

> "(f) order in respect of claim for compensation under Part V or determination of dispute between worker and employer following mediation under Part VIA: s 104
>
> (i) other: seek extension of time: s 182"

[4] On 3 October 2000, in addition to other orders, an order was granted with respect to (i) above in the following terms:

> "The worker have leave to amend the application to refer to s 104(3) instead of s 182".

[5] Section 104 of the *Work Health Act* ("the Act") provides:

> "(1) For the purposes of the Court exercising its powers under section 94(1)(a), a person may, subject to this Act, commence proceedings before the Court for the recovery of compensation under Part V or for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under that Part.
>
> (2) Proceedings under this Division may be commenced before the Court by application in the prescribed manner and form or, where there is no manner or form prescribed, in such manner or form as the Court approves.
>
> (3) Proceedings to which section 103J applies are to be commenced within 28 days after the claimant receives a certificate issued under section 103J(2).
>
> (4) The failure to make a claim within the period specified in subsection (3) shall not be a bar to the commencement of the proceedings if it is found that the failure was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause."

[6] Section 103J of the Act provides:

> "(1) A claimant is not entitled to commence proceedings under Division 2 in respect of a dispute unless there has been an attempt to resolve the dispute by mediation under this Division and that attempt has been unsuccessful.
>
> (2) At the conclusion of a mediation, the mediator must issue to each of the parties a certificate in the approved form -
>
> (a) stating that mediation has taken place;
>
> (b) listing the written information provided to the mediator by the parties during the mediation;
>
> (c) setting out the recommendations (if any) of the mediator; and
>
> (d) stating what the outcome of the mediation was."

[7] On 2 February 2001, the Work Health Court, subject to settlement of formal terms, ordered that the respondent's failure to make his claim for compensation within the 28 day time limit prescribed by s 104(3) was not a bar to the commencement of the proceeding on 1 September 2000 and "to the extent that it may be necessary" extended the time for the commencement of the proceeding to 1 September 2000. The Work Health Court held that the respondent's failure to make a claim within the period specified in s 104(3) was occasioned by "other reasonable cause".

[8] Mr Grove for the respondent submitted that an appeal from this decision of the Work Health Court was incompetent in the light of s 116(3) of the Act.

[9] Section 116 provides:

> "(1) Subject to subsection (3), a party to a proceeding before a magistrate of the Court who is aggrieved by a decision or determination of the magistrate may appeal against the decision or determination on a question of law to the Supreme Court within the time and in the manner prescribed by the Rules of the Supreme Court.
>
> (2) The Supreme Court shall decide the matter of appeal under this section and may either dismiss the appeal or reverse or vary the decision or determination appealed against and may make such order as to the costs of the appeal or the proceeding before the Court, or both, as it thinks fit.
>
> (3) A party may not appeal under subsection (1) until the proceeding in which the decision or determination was made has been finally determined by the Court."

[10] Subsection (3) of s 116 was inserted by Act No 59 of 1998, s 27. A perusal of the Parliamentary Record of the Legislative Assembly (*Hansard*) does not provide any assistance as to the legislative intent of this new provision. Neither counsel nor I are aware of any decisions of this Court which have had occasion to consider s 116(3).

[11] In Mr Grove's submission, the reference in subsection (3) of s 116 to "the proceeding" is a reference to the substantive proceeding commenced by the respondent's application in the Form 5A filed on 1 September 2000. Accordingly, it is argued an appeal is not available until that proceeding has "been finally determined by the (Work Health) Court". In Mr Grove's

submission, the clear intent of s 116(3) is to prohibit appeals against interlocutory orders in Work Health Court proceedings until such time as the substantive claim for compensation or other relief has been determined.

[12] For the appellant, Mr Southwood QC submitted that the Act does not provide any express provision prohibiting appeals against interlocutory orders until final disposition of a substantive action. He submitted that the application for an extension of time was an "incidental" proceeding in the course of a substantive proceeding and that such incidental proceeding had been "finally determined by the Court". In consequence, it was argued, an appeal against the order of the Work Health Court lay under s 116(1).

[13] Mr Southwood emphasised that, pursuant to s 94(1)(a), the Work Health Court has power to hear and determine "claims for compensation … *and all matters and questions incidental to or arising out of such claims …*" (emphasis added). Section 104(1) provides that for the purpose of the Work Health Court exercising its powers under s 94(1)(a), a person may "commence proceedings before the Court for the recovery of compensation … *or for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation …*" (emphasis added). In Mr Southwood's submission, the Act expressly provides for proceedings incidental to a claim for compensation and, pursuant to s 116, once "finally determined" such proceedings are subject to appeal.

[14] I consider that such an interpretation of ss 94, 104 and 116 cannot be sustained in light of the reference in s 116(3) to "*the* proceedings in which the decision or determination was made". The relevant proceeding in the present context is that set out in the respondent's Form 5A, ie a claim for compensation or determination of a dispute. The Work Health Court's order for an extension of time was a decision or determination in the course of **that** proceeding. Adoption of the appellant's submissions would deprive s 116(3) of the Act of any practical application – it is likely that any interlocutory application could be characterised as an "incidental proceeding" and so subject to appeal before final determination of the relevant substantive proceeding. It would be difficult, if not impossible, to envisage what work s 116(3) would have to do if the submissions of the appellant were correct. I agree with the submissions of Mr Grove that the legislative intent of s 116(3) is to prohibit appeals against interlocutory orders in the Work Health Court until such time as the substantive claim for compensation or other relief has been determined.

[15] The respondent's application for an extension of time was made in accordance with Part 6 of the Work Health Court Rules ("Interlocutory Applications") on the basis of affidavit material only. No oral evidence was called or sought to be called. The affidavits filed included statements of fact based on information and belief. It does not appear that the appellant objected to this course. I consider the course adopted was correct. The test of whether a judgment or order is final is whether it finally determines the

rights of the parties in a principal proceeding between them: *Hall v Nominal Defendant* (1966) 117 CLR 423. In the context of appeal, any other judgment or order is interlocutory: *Hall* at p 440.

[16] There are numerous authorities to support the proposition that an order made on an application to extend time under a limitation statute for the commencement of a proceeding is interlocutory: for example see, *Ex p Britt* [1987] 1 Qd R 221; *Dousi v Colgate Palmolive Pty Ltd* (1987) 9 NSWLR 374; *Merton Enterprises Pty Ltd v Nelson* (1988) 13 NSWLR 454; *Border Auto Wreckers (Wadonga) Pty Ltd v Strathdee* [1997] 2 VR 49; *Ramton v Cassin* (1995) 38 NSWLR 88.

[17] Mr Southwood sought to draw support from Mildren J's decision in *Maddalozzo v Maddick* (1992) 84 NTR 27 where it was held that the requirement in s 80(1) of the Act to give notice of an injury "as soon as practicable" is a condition precedent to entitlement to compensation, while s 182 of the Act places a limitation upon the maintenance of proceedings for compensation rather than the entitlement to compensation and accordingly is a procedural provision. Mr Southwood submitted that s 104(3) is a condition attached to the right to bring a proceeding for compensation and accordingly similar to s 80(1). However, a comparison of s 104(4) and ss 182(2) and (3) reveals substantially similar drafting has been adopted. *Maddalozzo*, far from supporting the appellant's submissions, provides strong support for the view that s 104(4) is procedural and as such, properly

the subject matter of an interlocutory application, not something which would "finally determine" the respondent's proceedings.

[18] For the above reasons, the appeal was dismissed on 15 June 2001.