Prime v Colliers International (NT) Pty Ltd [2006] NTSC 83

PARTIES:	PRIME, David
	v
	COLLIERS INTERNATIONAL (NT) PTY LTD (ACN: 075 812 396)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 17 OF 2006 (20528796)
DELIVERED:	31 October 2006
HEARING DATES:	12 October 2006
JUDGMENT OF:	MILDREN J

CATCHWORDS:

ADMINISTRATIVE LAW – natural justice – application for summary dismissal – claim invalid – claimant seeks relief from invalidity – not pleaded – no requirement to plead – failure of court to adequately warn it required the matter to be pleaded

WORK HEALTH – Claim – requirement claim be accompanied by medical certificate – whether failure to lodge within time limits invalidates claim – whether subsequent proceedings are a nullity – whether worker can seek relief under s 182(3) or must start again – Appeal allowed

LEGISLATION:

Work Health Act (NT), s 62, s 63, s 73, s 80, s 80(1), s 82, s 82(1), s 82(1)(a), s 82(1)(b), s 82(2), s 85(1), s 85(1)(c), s 85(10), s 90B(2), s 103B, s 103B(a), s 103D, s 103D(1), s 103J(1), s 104(3), s 110A, s 182, s 182(1), s 182(3)

Work Health Rules (NT), r 8.03(a)

CITATIONS:

Applied:
Berowra Holdings Pty Ltd v Gordon (2006) 228 ALR 387
Fletcher & Ors v Federal Commissioner of Taxation (1988) 84 ALR 295
R v Lewis (1988) 78 ALR 477

Distinguished:
CTG Pty Ltd v Yamamori (Hong Kong) Pty Ltd (NT Court of Appeal, 9 December 1992, unreported)

Referred to:
Burns v The Commission for Railways [1939] WCR (NSW) 115
Johnston v Paspaley Pearls Pty Ltd (1996) 5 NTLR 199
Maddalozzo v Maddick (1992) 108 FLR 159
Murray v Baxter (1914) 18 CLR 622
Paspaley Pearls Pty Ltd v Johnston (1995) 120 FLR 377
Perfect v Northern Territory of Australia (1992) 107 FLR 428
Tracy Village Sports & Social Club v Walker (1992) 111 FLR 32

REPRESENTATION:

Counsel:

Appellant:	I Morris
Respondent:	B Mangan

Solicitors:

Appellant:	Maley's Barristers & Solicitors
Respondent:	Lavan Legal

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

Prime v Colliers International (NT) Pty Ltd [2006] NTSC 83
No. LA 17 of 2006 (20528796)

BETWEEN:

DAVID PRIME
Appellant

AND:

COLLIERS INTERNATIONAL (NT) PTY LTD (ACN: 075 812 396)
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 31 October 2006)

[1] This is an appeal from a decision of the Work Health Court to enter summary judgment for the respondent and to summarily dismiss the appellant's claim.

The factual background

[2] The appellant claims to have suffered an injury to his lower back on 5 February 2005 whilst moving furniture in the course of his employment with the respondent. The appellant claims to have continued to work in a limited capacity until his employment was terminated by the respondent on

or about 17 May 2005. Since then the appellant claims to have been incapacitated for work due to his injury.

[3] On 27 June 2005, the worker lodged a claim form with the respondent. The claim form does not have any provision on it for a claimant to indicate whether or not the claim is only for medical expenses or also for weekly compensation. The form does, however, have on it a statement as follows:

> "A claim for weekly benefits must be accompanied by 2 copies of the prescribed medical certificate. If these certificates are not attached, the claim for weekly benefits is not valid."

[4] The appellant did not lodge any medical certificate with the claim. I note that under s 82 of the Work Health Act, only one certificate is required and that the form of the certificate is not prescribed by regulation but approved by the Work Health Authority.

[5] Initially the employer deferred making a decision as to whether or not it would accept or reject the claim and arranged for the appellant to be medically examined. It is not clear whether or not the employer specifically advised the appellant of its decision to defer as required by s 85(1) of the Work Health Act, but this is not in issue in this appeal. On 2 September the employer sent by post a written notice to the appellant notifying him that the claim was disputed on the following grounds:

> "1. If you are suffering from an injury, which is denied, your employer disputes that your condition arose out of or in the course of your employment.

2. If you are suffering from an injury, which is denied, your condition was not materially contributed to by your employment."

[6] Following this advice, the appellant sought mediation. A mediation conference was held on 9 November 2005. On that date the mediator issued a certificate to the effect that the employer would pay only reasonable medical expenses at this stage and would consider payment for "loss of wages on supply of appropriate worker's compensation medical certificates."

[7] After a certificate of mediation is issued, a worker who is dissatisfied with the result of the mediation has 28 days to commence proceedings in the Work Health Court vide s 104(3) of the Act. The worker lodged an Application in the Work Health Court within that time. A Statement of Claim was filed on 17 February 2006. The claim, as pleaded, is for weekly payments, medical expenses, "payment of permanent impairment compensation", costs and interest.

[8] The respondent filed its Defence in May 2006. In its Defence it raised a number of issues, including, by paragraph 10 of the Defence, a plea to the effect that the claim form was not accompanied by a medical certificate and no certificate was given or served on the employer within 28 days.

[9] On 15 May 2006, the respondent applied for summary judgment on the ground (inter alia) of a failure by the appellant to comply with s 82(1) and s 82(2) of the Act.

[10] Section 82 of the Act provides:

> "**82. Form of claim**
>
> (1) A claim for compensation shall –
>
> (a) be in the approved form;
>
> (b) unless it is a claim for compensation under section 62, 63 or 73, be accompanied by a certificate in a form approved by the Authority from a medical practitioner or other prescribed person; and
>
> (c) subject to section 84(3), be given to or served on the employer.
>
> (2) If the claim and certificate are not given or served at the same time, the remaining document shall be given or served on the employer within 28 days after the first document is given or served and the claim for compensation shall be deemed not to have been made until the day on which the remaining document is given to or served on the employer.
>
> (3) A defect, omission or irregularity in a claim or certificate shall not affect the validity of the claim and the claim shall be dealt with in accordance with this Part unless the defect, omission or irregularity relates to information which is not within the knowledge of or otherwise ascertainable by, the employer or his or her insurer.
>
> (4) A worker shall authorise the release to his or her employer and the employer's insurer of all information concerning the worker's injury or disease, if the claim form specifies that the worker is required to authorise the release of that information, and the claim for compensation by the worker shall be deemed not to have been made until the authorisation is given.

(5) An authorisation under subsection (4) is irrevocable.

(6) A certificate referred to in subsection (1)(b) has effect only for the prescribed period."

[11] The respondent's application was heard by the Work Health Court on 25 May 2006. The Court ordered that summary judgment be entered in favour of the employer and that the worker's Statement of Claim be dismissed. The Court published written reasons for its decision on 28 June 2006. In summary, his Honour found that no valid claim had been made because of the lack of a medical certificate accompanying the claim form or being served within 28 days from the date of service of the claim form and that this defect could not be cured except that the worker must start again and make his claim afresh. The Court rejected the worker's argument that the worker could salvage the proceedings by seeking to invoke s 182(3) of the Act. Section 182 provides:

"**182. Time for taking proceedings**

(1) Subject to subsections (2) and (3), proceedings for the recovery under this Act of compensation shall not be maintainable unless notice of the injury has been given before the worker has voluntarily left the employment in which he or she was injured and unless the claim for compensation has been made –

(a) within 6 months after the occurrence of the injury or, in the case of a disease, the incapacity arising from the disease; or

(b) in the case of death, within 6 months after advice of the death has been received by the claimant.

(2) The want of notice or a defect or inaccuracy in the notice shall not be a bar to the maintenance of the proceedings referred to in subsection (1) if it is found in the proceedings for the settling of the claim that the employer is not, or would not if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his or her defence by the want, defect or inaccuracy, or that the want, defect or inaccuracy was occasioned by mistake, absence from the Territory or other reasonable cause.

(3) The failure to make a claim within the period specified in subsection (1) shall not be a bar to the maintenance 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.

(4) For the purposes of subsection (1), where a worker left his or her employment only by reason of the fact that, because of an injury received in that employment, he or she was unable to continue in that employment, he or she shall be taken not to have voluntarily left that employment.

(5) Without limiting the generality of the meaning of "reasonable cause" in subsection (3) –

(a) the making of a payment to a person which the person believes to be a payment of compensation; or

(b) any conduct on the part of the employer or his or her insurer or agent, or on the part of an employee of any of them purporting to act on behalf of the employer, by which a person is led to believe that compensation will or will probably be paid to him or her or by which he or she is led to believe that he or she is not entitled to compensation,

shall be taken to be a reasonable cause within the meaning of that expression."

[12] Alternatively, the Work Health Court found that even if the appellant could salvage the proceedings by relying on s 182(3), there was no material obliging the Court to consider that argument because there was no application before the Court to amend the pleadings to include a claim for relief under s 182(3) and, notwithstanding a suggestion from the bench that such an application ought be made, nothing was done about it. I would add that the appellant provided no affidavit material to show that there were grounds on which such an order could have been made.

Grounds of appeal

[13] The grounds of appeal as stated in the Notice of Appeal are as follows:

> "1. The Learned Magistrate erred in Law in granting summary judgment to the Respondent.
>
> 2. The Magistrate misconstrued the operation of sections 82 and 182(3) of the Work Health Act.
>
> 3. The Learned Magistrate erred in Law in refusing the allow the Appellant leave to amend his Statement of Claim in the Work Health Court to plead section 182(3) of the Work Health Act."

Ground 2

[14] Counsel for the appellant, Mr Morris, submitted that, to the extent that the Court below relied on decisions of this Court such as *Johnston v Paspaley Pearls Pty Ltd* (1996) 5 NTLR 199, *Perfect v Northern Territory* (1992) 107 FLR 428 and *Maddalozzo v Maddick* (1992) 108 FLR 159, the scheme of the

Act had changed since those cases were decided and that the pathway to the bringing of proceedings in the Work Health Court is now different.

[15] In *Maddalozzo v Maddick* (supra) at 165, I said:

> "… unless a claim has been made under s 82, which is deemed to be a notice of injury by virtue of s 80(2), and liability is disputed vide s 85, no proceedings can be validly commenced. The right to commence proceedings, is, as I have explained in *Perfect v Northern Territory* (1992) 107 FLR 428, conferred by s 85(10) of the Act, and arises therefore relevantly for these purposes at the time when the employer disputes liability."

[16] Mr Morris submitted that s 85(10) has now been repealed. Now, if a claim is rejected, the worker must, within 90 days of being notified of the employer's decision, first apply to the Work Health Authority to refer the dispute to mediation: s 103D. Subject to an exception not relevant to this case, it is only if the mediation is unsuccessful that a worker is entitled to apply to the Court: s 103J(1). This the worker must do within 28 days: s 104(3). The "pathway" to the Court is longer and more tortuous than ever. The minefield of time limits to which I referred in *Maddalozzo v Maddick* (supra) at p 162 has become more extensive, not less so.

[17] In *Johnston v Paspaley Pearls Pty Ltd* (supra) at 204, the Court of Appeal said:

> "The question can be narrowed down to whether the requirement upon the worker that he serve the second document within 28 days of the first is of such importance to the object of the statute as to disclose an intention that its complete non-observance should invalidate the making of a claim. We think that the answer to this question must be yes. Until a claim has been validly given or served

> on the employer, the important mechanism of s 85 is not triggered. One purpose of the time limit seems to have been to encourage workers to pursue their claims in a timely manner and not leave employers in doubt for periods of up to 6 months about the nature of their claims or whether they intend to pursue them. Another is so that there can be certainty as to when the 10 day time limit commences to run. Ordinarily, there are no serious consequences to a worker who fails to strictly comply with the subsection in that all he or she has to do to remedy the position is to start afresh. This could be done, for instance, by lodging a second claim form within 28 days of the lodging of his medical certificate."

[18] Despite the changes made to the Act since that case was decided, I consider that the position has not significantly altered. The lodging of a claim form is still the triggering mechanism which brings to life the chain of events which will result in the claim being either accepted or rejected and, if rejected, mediated and, if that is unsuccessful, litigated. In my opinion the worker must still strictly comply with the requirements of s 82 and the time limits required by s 80 and s 182(1) (as well as other relevant time limits).

[19] Mr Morris submitted that it was possible to by-pass s 82 entirely because it was not the only pathway to the Work Health Court.

[20] Section 103D(1) provides that a claimant may apply to the Authority to have a dispute referred to mediation. Section 103B of the Act provides for when a dispute arises:

> **103B. Disputes**
>
> For the purposes of this Division, a dispute arises where a claimant is aggrieved by the decision of an employer –

(a) to dispute liability for compensation claimed by the claimant;

(b) to cancel or reduce compensation being paid to the claimant; or

(c) relating to a matter or question incidental to or arising out of the claimant's claim for compensation.

[21] Therefore, so the submission went, a worker could merely write a letter to his employer requesting payments of compensation and if the employer denied liability for the claim, the worker could go straight to mediation and, if that was unsuccessful, bring proceedings in the Work Health Court pursuant to s 103J(1).

[22] However, this would make much of the elaborate machinery provided by the Act for the bringing of claims and requiring them to be considered by employers within strict time limits otiose.

[23] Further, the expression “dispute liability for compensation” in s 103B(a) is so close to the expression “dispute liability for the compensation” found in s 85(1)(c) that I think it is clear that the draftsman had in mind, when referring to “dispute liability for compensation claimed by the claimant” in s 103B(a), that a claim had been made in accordance with s 82 which had been disputed in accordance with s 85(1)(c). A letter written to an employer is not a “claim” because s 82(1)(a) requires a “claim” to be in “the approved form”. Therefore, I reject this submission.

[24] Alternatively, it was submitted that a claim which is not supported by a medical certificate is not entirely invalid. Clearly this is so. Ms Mangan for the respondent did not contend otherwise. A claim does not have to be accompanied by a medical certificate if it is a claim under s 62 or s 63 (which deal with dependants' claims upon a worker's death) or if the claim is only for medical, surgical or rehabilitation treatment under s 73. The claim form, which the appellant lodged, and which I presume is in the approved form, does not spell out what the claim is for because, as I have already observed, there is no provision in the form enabling the claimant to state what it is that is being claimed. In this respect the claim form is a blanket form for whatever compensation the worker it entitled to receive: *Perfect v Northern Territory of Australia* (supra) at 434. Nevertheless, to the extent that the claim is for weekly benefits, the claim is invalid.

[25] In the Work Health Court the learned Magistrate considered that he was bound by the decision of the Court of Appeal or by Kearney J at first instance in *Paspaley Pearls Pty Ltd v Johnston* (1995) 120 FLR 377 to find that, as there was no valid claim, the ***only*** course open to the appellant was the start again. Ms Mangan relied on those decisions and submitted that as the proceedings were "invalid", the proceedings were a nullity.

[26] There is nothing in the decision of the Court of Appeal which goes so far as to hold either that the proceedings are a nullity or that the ***only*** remedy is to start again. Indeed, the Court of Appeal's reference to the dispensing power in s 182(3) makes it plain that the Court must have thought otherwise for

reasons which I will shortly address. The observations of Kearney J at first instance, *Paspaley Pearls Pty Ltd v Johnston* (supra) at pp 396-397, do lend some support to Ms Mangan's contention, but it must be remembered that unlike the present case, the claim in that case had been denied on the ground of a failure to comply with s 82(1)(b) and s 82(2) by the giving of the requisite medical certificate and that no application was made to excuse non-compliance under s 182(3).

[27] In my opinion, a finding that the claim is invalid does not carry with it a finding that the proceedings in the Work Health Court are a nullity for two reasons. First, in so far as the proceedings may seek an order for medical treatment under s 73, the claim is not invalid. Secondly, the failure of a worker to make a valid claim, even if it affects the validity of the entire claim, does not necessarily have the consequence that any proceedings brought in the Court are null and void *ab initio*. In *Berowra Holdings Pty Ltd v Gordon* (2006) 228 ALR 387 at paras [13] – [16], the High Court, in a joint judgment of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, pointed out that even in the case of inferior courts, the failure to comply with procedural bars to the commencement of court proceedings does not have the consequence that the proceedings are a nullity. Procedural bars merely bar the remedy, not the claim itself. In *Maddalozzo v Maddick* (supra), I held that compliance with s 80(1) (the giving of notice) was a condition precedent to the right to compensation and that the time limits in s 182 were merely procedural bars. *Johnston v Paspaley Pearls Pty Ltd*

(supra) is authority for the proposition that the making of a claim in accordance with the time limits is required by s 82(2) is mandatory and non-observance results in an invalid claim. The effect of an invalid claim is that the employer is not bound to accept it. The employer may, as it did in *Johnston v Paspaley Pearls Pty Ltd* (supra), dispute liability for the claim, insofar as it is a claim for weekly payments, on the ground that no medical certificate accompanied the claim or was served within 28 days thereafter. But an employer may waive non-compliance and accept the claim notwithstanding that there is no medical certificate. The provisions of s 82(2) are merely procedural. That they are procedural is clear from the fact that the Court has power under s 182(3) to dispense with non-compliance.

[28] Consequently, in a case such as the present, where the worker has brought his claim in the Work Health Court seeking weekly payments, the respondent may seek to have that part of the claim struck out or it may waive its rights and allow the claim to be litigated. As was said in *Berowra Holdings Pty Ltd v Gordon* (supra) at 395 [36], "such proceedings are vulnerable to an application by the defendant to strike out the initiating process or to move for summary dismissal, but they are not a nullity". The outcome of such an application may depend upon whether the employer has waived non-compliance or is otherwise estopped by its conduct and it may also depend on other factors as the Court's procedural rules have been engaged and the power of the Court which is being invoked is discretionary: see *Berowra Holdings Pty Ltd v Gordon* (supra) at 395-396 [39]. In

exercising that power, there are a number of considerations. One consideration will be that if the six months period has not expired, the worker can start again by making a further claim: see *Johnston v Paspaley Pearls Pty Ltd* (supra). But if the six months period has expired, a further claim made in accordance with s 82 could be rejected on the ground that the claim is out of time. Consequently, it would be relevant to consider whether relief would be granted under s 182(3). Alternatively, it would be relevant to consider whether the employer would be prejudiced in its defence of the claim if the claim was to be allowed to proceed notwithstanding that relief might not be available under s 182(3). Relevant to that question might be the conduct of the employer after receiving the claim and whether (for instance) the employer has sought and received a medical report from the worker's medical practitioner in accordance with s 90B(2) of the Act which provided the employer with the same information as would have been provided by a medical certificate in the approved form. There may well be other relevant factors depending on the circumstances of the case.

[29] I therefore accept the appellant's argument that the Court does have a power to consider whether it ought to grant relief under s 182(3). I go further; the Court has a discretion to reject the respondent's application also on wider grounds. If relief is granted under s 182(3) the failure to comply with the making of a valid claim within the six month period can be excused. If so, there is no need to require the claimant to commence by lodging his claim all over again. The power to excuse under s 182(3) is a power to excuse not

only a failure to make a valid claim, but a power to excuse a complete failure to give a notice of claim at all. If the power to excuse is properly exercised in favour of the worker, the Court does not have power to attach conditions or to extend time: see *Maddalozzo v Maddick* (supra) at 168. Either the worker shows that he or she is entitled to relief under s 182(3) or he does not. In considering this question the relevant period of time is limited to the initial six months' period: see *Murray v Baxter* (1914) 18 CLR 622; *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32. If the Court rejects the application to dismiss on other discretionary grounds, it may attach conditions.

Grounds 1 and 3

[30] These grounds were argued together. It is necessary to consider them because although I have disagreed with the learned Magistrate's decision that the appellant could not salvage the proceedings by invoking s 182(3), the learned Magistrate went on to hold that no application was made to invoke that provision by seeking to amend the Statement of Claim and that, these being adversary proceedings, he did not have to consider that point.

[31] I do not consider that the learned Magistrate was correct to require the Statement of Claim to be amended. This is not a matter to be pleaded in the Statement of Claim. Procedural bars, such as time bars, are matters which must be raised in the Defence: see r 8.03(a) of the Work Health Court Rules. If not pleaded by the respondent, the respondent cannot rely on the matter

until the pleading is amended. So much is elementary. There is nothing in the Work Health Court Rules which would require the applicant to raise an application for relief against a procedural bar in the Statement of Claim. If the matter is raised by the Notice of Defence, the applicant may choose to apply by interlocutory summons for the matter to be dealt with before trial of the main application, or the applicant may choose to allow the matter to go to trial and seek relief at the trial. If the latter course is chosen, the applicant would be well advised to file a Reply (I note the Work Health Court Rules do not specifically deal with pleadings subsequent to a Notice of Defence, so leave may be required), or at least informally give written notice to the respondent and to the Court of the application which it is proposed be made.

[32] In this case, the learned Magistrate may have been exercising his powers under s 110A of the Act. That section provides that the procedure of the Court is subject to the Act, the Regulations and any rule or practice directions made within the discretion of the Court. The appellant not having made any application under s 182(3) by interlocutory summons, I agree with the learned Magistrate that the Court was not ***bound*** to deal with it, particularly as no affidavit had been filed. It was open at that stage (notwithstanding that the pleading Rules do not require it) for the Court to have required the appellant to formalise his application in which ever way the Court required it to be done and if the Court required it to be done by an amendment to the Statement of Claim it could have so ordered. If I had been

dealing with the application I would have required, at the very least, an affidavit and would have adjourned off the application to give the appellant a chance to put his house in order. It is clear that the learned Magistrate thought that, having made a suggestion that the pleadings should be amended, he was not required to do more by, for example, indicating to the worker that unless the pleadings were amended he would not consider any argument based on s 182(3). The question is, however, not what I might have done, but whether the learned Magistrate was obliged to advise the worker in these terms and that the failure to do so is an error of law.

[33] Mr Morris submitted that the course adopted by the learned Magistrate was unfair and vitiated the learned Magistrate's discretion. In support of that submission, Mr Morris referred to *CTG Pty Ltd v Yamamori (Hong Kong) Pty Ltd* (NT Court of Appeal, 9 December 1992, unreported), but that case is not strictly on point. I take the submission to mean that the Court denied the appellant procedural fairness or natural justice. It is well established that neither a Court nor a Tribunal should decide matters which are of importance to the outcome of proceedings unless the party concerned is on notice and has been given an opportunity to be heard. If notice has not been given by the other party, it is the duty of the Court or Tribunal concerned to ensure that it does not proceed in the absence of such notice: see *R v Lewis* (1988) 78 ALR 477 at 481; *Fletcher & Ors v Federal Commissioner of Taxation* (1988) 84 ALR 295 at 308-310. I do not think it is enough in the circumstances of a case like the present to drop hints or make suggestions. If

the Court intends to take such an important step as to enter summary judgment for the defendant it should have indicated its position to the plaintiff clearly so as to give the plaintiff a proper opportunity to deal with the point. I am unable to say that the appellant had no prospects of success if the appellant had been given a proper opportunity to seek relief under s 182(3) by, for example, amending his Statement of Claim, if that were necessary. I note also that there is some material already on the file of the Work Health Court which the appellant could have relied upon to show "reasonable cause": *c.f. Burns v The Commissioner for Railways* [1939] WCR (NSW) 115.

Conclusions

[34] In the result, the appeal must be allowed. Having regard to the fact that the claim was also for medical expenses, the Court ought not to have dismissed the claim altogether based solely on the failure to give a medical certificate. Whether or not the Court should have exercised its discretion differently in respect of the claim for weekly compensation or should have found that there was "reasonable cause" vide s 182(3) is a matter which should be determined by the Work Health Court in accordance with these reasons. The respondent's application is remitted to the Work Health Court to hear further argument and for further consideration. I will hear the parties as to costs.
