Johnson v Northern Territory of Australia [2014] NTSC 18

PARTIES:	JOHNSON, Stuart Douglas v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 22 of 2013 (21310090)
DELIVERED:	23 May 2014
HEARING DATES:	16 April 2014
JUDGMENT OF:	RILEY CJ, BLOKLAND and BARR JJ

CATCHWORDS:

LIMITATION OF ACTIONS – Extension of time – Jurisdiction of the Court to grant an extension of time for instituting an action – Statutory cause of action – Prescribed time limit – No clear legislative intent to exclude *Limitation Act 1981* (NT) s 44 –*Police Administration Act 1978* (NT) s 162.

Australian Iron and Steel Ltd v Hoogland (1962) 108 CLR 471; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394; *Drover v Northern Territory of Australia and Ebatarinja* (2004) 14 NTLR 140; *Enever v The King* (1906) 3 CLR 969; *Lackersteen v Jones* (1988) 92 FLR 6; *Maxwell v Murphy* (1957) 96 CLR 261, *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628, *Verschuuren v Tom's Tyres Corporation Ltd* (1992) 110 FLR 170, referred to.

Baulderstone Pty Ltd v WorkCover Corporation (1995) 64 SASR 519; *General Motors Holden's Ltd v Di Fazio* (1979) 141 CLR 659, applied.

Timeny v British Airways PLC (1991) 56 SASR 287, distinguished.

Limitation Act 1981 (NT) ss 44(1), 44(2), 44(3)(aa).
Police Administration Act 1978 (NT) ss 148B, 148C, 162(1).
Supreme Court Act 1979 (NT) s 21.

REPRESENTATION:

Counsel:

Plaintiff:	A Wyvill SC with M Johnson
Defendant:	R Bruxner

Solicitors:

Plaintiff:	Midena Lawyers
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	A
Number of pages:	11

IN THE FULL COURT
OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Johnson v Northern Territory of Australia [2014] NTSC 18
No. 22 of 2013 (21310090)

BETWEEN:

STUART DOUGLAS JOHNSON
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: RILEY CJ, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 23 May 2014)

The Court:

[1] The following question has been referred to the Full Court pursuant to s 21 of the *Supreme Court Act 1979* (NT):

> Can the two month time limit specified in s 162(1) of the *Police Administration Act* (NT) be extended by a court pursuant to s 44(1) of the *Limitation Act* (NT)?

[2] The question arises in proceedings in which the plaintiff claims that he was assaulted by two members of the Northern Territory Police Force on 14 July 2005 and suffered injury as a result. For reasons which are not presently of concern, the proceeding was not commenced against the defendant until 8

March 2013. The defendant has applied for summary judgment and the referred question arose as a preliminary issue in relation to the application. The defendant contends that the plaintiff's claim is barred by s 162(1) of the *Police Administration Act 1978* (NT) ('the *Police Administration Act*').

The relevant provisions of the *Police Administration Act*

[3] Part VIIA of the *Police Administration Act* provides for the protection of members of the Police Force from civil liability for damages for an act done or omitted to be done in good faith in the performance or purported performance of duties as a member of the Police Force.[1] Section 148C of the Act goes on to provide for the vicarious liability of the Northern Territory in the following terms:

> (1) The Territory is vicariously liable for a tort committed by a member in the performance or purported performance of duties as a member in the same way as an employer is liable for a tort committed by an employee in the course of the employee's employment.

[4] Section 148F of the Act then provides that a person cannot make a tort claim against a police officer but instead may make the claim against the Territory.

[5] The effect of the provisions of the *Police Administration Act* is to remove the civil liability which may attach to a police officer acting in good faith in the performance or purported performance of his or her duties and replace it

[1] *Police Administration Act 1978* (NT) s 148B.

with a cause of action against the Northern Territory based upon vicarious liability for any tort committed by the police officer.

[6] Section 162(1) of the *Police Administration Act* then provides that:

> … an action against the Territory under Part VIIA or a prosecution against a member for an offence against this Act must be commenced within two months after the act or omission complained of was committed, and not otherwise.

[7] In the present case, proceedings were not commenced within two months of the act complained of and the defendant submitted that the court does not have power to extend the time for instituting the proceedings. The defendant argued that the cause of action was conditional upon compliance with the two month time limit in s 162(1) of the *Police Administration Act* and was extinguished upon the expiry of that period.

[8] The plaintiff relied upon s 44 of the *Limitation Act 1981* (NT) ('the *Limitation Act*') to seek an extension of time. The relevant parts of the section are in the following terms:

> (1) Subject to this section, where this or any other Act, or an instrument of a legislative or administrative character prescribes or limits the time for:
>
> (a) instituting an action;
>
> (b) doing an act, or taking a step in an action; or
>
> (c) doing an act or taking a step with a view to instituting an action,

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

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

(a) has jurisdiction to entertain; or

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

(3) …

The submissions

[9] The defendant submitted that the plaintiff's cause of action against the defendant was a statutory cause of action created by Part VIIA of the *Police Administration Act*. Apart from the provisions of the *Police Administration Act*, the Northern Territory is not vicariously liable for the torts of police officers.[2] The cause of action created by the Act is conditional upon compliance with the two month time limit and is extinguished if there is non-compliance. This, it was submitted, is made clear by the requirement that the action "must be commenced within two months after the act or omission complained of was committed, *and not otherwise*" (emphasis added).

[10] In relation to s 44(1) of the *Limitation Act*, the defendant argued that the two month time limit contained in s 162(1) of the *Police Administration Act* was not a provision that "limits the time for… instituting an action" but, rather,

[2] *Lackersteen v Jones* (1988) 92 FLR 6 at 45 per Asche CJ adopting *Enever v The King* (1906) 3 CLR 969.

was a condition that is of the "essence of the right" to sue the defendant being "a limitation period annexed by a statute to a right which it creates".[3] The limitation "does not bar an existing cause of action… It imposes a condition which is of the essence of a new right".[4] The limited time "within which the new right of action may be enforced is of its essence" and "goes to its very survival".[5] The defendant submitted that in the present case, the time limit having expired, the cause of action was extinguished.

[11] The defendant submitted that the cause of action, having been extinguished, was not capable of revival by an extension of time under s 44(1) of the *Limitation Act*. Reliance was placed upon the judgment of the Full Court of the Supreme Court of South Australia in *Timeny v British Airways PLC*[6] which dealt with the equivalent South Australian provision, s 48 of the *Limitation of Actions Act* 1936 (SA). That case involved a consideration of whether the South Australian statute of limitations had application to rights and obligations created under a Commonwealth statute. In particular it considered whether s 48 of the South Australian Act could be used to extend time where the Commonwealth provision stated that the "right to damages shall be extinguished if an action is not brought within two years". The Full Court held that the right to damages, having been extinguished, was incapable of being revived.

[3] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 497 per McHugh J.
[4] *Australian Iron and Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488 per Windeyer J.
[5] *Maxwell v Murphy* (1957) 96 CLR 261 at 283 per Williams J.
[6] (1991) 56 SASR 287.

[12] *Timeny* was decided primarily on the basis that a State law could not enable a State court to extend time limits imposed directly by Federal law, and could not be relied on to revive a right which had been validly extinguished by Federal law, since that would result in invalidity to the extent of the inconsistency by virtue of s 109 of the Constitution (Cth). However, in the alternative, both King CJ and Bollen J[7] determined that s 48 was limited to situations where the remedy rather than the right was barred; it could not operate to revive a right which had been extinguished.

[13] It seems the attention of the Full Court was not drawn to *General Motors Holden's Ltd v Di Fazio*[8] where the High Court considered the application of s 48 of the *Limitation of Actions Act* 1936 (SA) in relation to s 15(1) of the *Industrial Conciliation and Arbitration Act* 1972 (SA) which included a right to seek certain relief and went on to provide that:

> … the Court shall not exercise the jurisdiction conferred on it by this paragraph unless an application invoking that jurisdiction is made, by or on behalf of the dismissed employee, within twenty-one days from the day on which it is alleged that the employee was so dismissed from his employment.

[14] In *Di Fazio,* Mason J observed that the "most common illustration of the statutory limitation of action is that which operates to bar the remedy or to bar the right and the remedy unless an action is commenced within a

[7] (1991) 56 SASR 287 at 289-290 and 297.
[8] (1979) 141 CLR 659.

prescribed time".[9] His Honour went on to say of the South Australian provision:

> The language of s 47(1) and s 48(1) is apt to apply to any statutory limitation fixing the time within which proceedings may be brought, whether the limitation bars the right or the remedy, whether it deprives the Court of jurisdiction or, I would add, of power to make an order. That s 48 applies to a limitation which conditions the existence of jurisdiction on an application made within the time prescribed is made clear by s 48(2)(b).[10]

[15] *Di Fazio* was followed by the Full Court of South Australia in *Baulderstone Pty Ltd v WorkCover Corporation*[11] where it was held that s 48 of the *Limitation of Actions Act* 1936 (SA) permitted an extension of time even in cases where the limitation would otherwise bar the right, or the remedy or whether it would otherwise deprive the court of jurisdiction. Duggan J expressed the view that s 48(1) operated even where limitation provisions bar the right of action. His Honour observed:[12]

> The key to the resolution of the issues raised lies in the operation of s 48 of the *Limitation of Actions Act 1936* (SA). The plaintiffs' argument that there could be no extension of the three-year period for commencing the action for recovery of compensation was based on the assertion that the time limit prescribed by s 54(7)(g) of the *Workers Rehabilitation Compensation Act 1986* (SA) was an element in the right to recover and not merely procedural in character. The significance in that distinction in certain circumstances is well known: see *Maxwell v Murphy* (1957) 96 CLR 261; *R v McNeil* (J 922) 31 CLR 76; *White v Eurocycle Pty Ltd* (1995) 64 SASR 461. However, there is nothing to prevent Parliament from legislating so as to permit an extension of time even in those cases where the limitation would otherwise bar the right and in *General Motors-Holden's Ltd v Di Fazio* (1979) 141 CLR 659 the High Court

[9] (1979) 141 CLR 659 at 668.
[10] (1979) 141 CLR 659 at 668.
[11] (1995) 64 SASR 519.
[12] (1995) 64 SASR 519 at 521.

> recognised that s 48 was such a provision. It was there held that s 48 could be applied whether the limitation bars the right, the remedy or whether it would otherwise deprive the court of jurisdiction (at 669). Once this view of s 48 is accepted, it becomes unnecessary to consider whether a particular limitation period comes under one or other of the above categories. *Munno Para District Council v Battersby* (1988) 66 LGRA 17 at 29; *South Australian Meat Corporation v Kipirtoglou* (1981) 48 SAIR 237.

[16] In his judgment Lander J said:[13]

> In my opinion it is not necessary to determine whether s 54(7)(g) is part of the right, or simply a bar to the exercise of the remedy, because whether it is either, s 48 can operate upon it and extend the time within which the proceedings can be commenced. That interpretation of s 48 is consistent, in my opinion, with the decision of the Full Court in *R v Di Fazio*, and as well with the reasons of the High Court in the same case, *General Motors-Holden's Ltd v Di Fazio*.

[17] Under the *Police Administration Act* the right to proceed against the Northern Territory is created by s 148C of the Act without reference to any time limit. Compliance with the time limit referred to in s 162 of the *Police Administration Act* is not expressed to be of "the essence of the right" created by s 148C. The time limit does not go to the survival of the right of action and it is not part of the right.

[18] In contrast to the legislative provision considered in *Timeny* there is no reference to the right being extinguished in the event of non-compliance with the time limit. The inclusion of the words "and not otherwise" in s 162 of the *Police Administration Act* do not advance the matter. In our opinion, the words do no more than make clear to a potential plaintiff the

[13] (1995) 64 SASR 519 at 532.

requirement that proceedings must be commenced within the time limit. The words do not assist in determining issues regarding the jurisdiction of the court to extend such a limitation period in appropriate circumstances.

[19] The time limit of two months from the date of the act or omission is obviously an extremely short period within which a potential plaintiff must commence proceedings. It is not difficult to think of many valid reasons why a potential plaintiff may not be able to commence proceedings in such a tight timeframe. For example, the potential plaintiff may be incapacitated throughout that period as a consequence of the act or omission of the police officer or may not, despite diligent effort, be able to ascertain a vital fact or, possibly, identify the police officer.

[20] Section 44 of the *Limitation Act* provides the power to extend a time limitation prescribed in "this or any other Act". In *Verschuuren v Tom's Tyres Corporation Ltd* [14] the Court of Appeal held that the "broadly expressed power should only be confined within narrow limits if there is a plain and unambiguous provision elsewhere in the Act which require this to be done".[15] The section will have application where an Act prescribes a limitation period but says nothing about an extension of time. It will apply to legislative time limits unless there is, in the particular piece of

[14] (1992) 110 FLR 170.
[15] (1992) 110 FLR 170 at 176 per Angel, Mildren and Morling JJ.

legislation, an expression of intent on the part of the legislature to the contrary.[16] In this legislation, there is no such expression of intent.

[21] As the plaintiff submitted, it would have been a simple matter for the legislature to have expressed an intention to exclude s 44(1) of the *Limitation Act* as it did, for example, in relation to defamation actions in s 44(3)(aa) of the Act.

[22] The purpose of provisions such as s 44(1) of the *Limitation Act* is the beneficial object of eliminating "the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced".[17] If the interpretation suggested by the defendant is accepted, the capacity for the limitation period to cause grave injustice is readily apparent. It is most unlikely that the legislature intended to create such a tight timeframe with no capacity for such grave injustices to be remedied. No reason for adopting such an approach was suggested by the defendant. Had that been the intention of the legislature, we would have expected some explanation to have been provided. The second reading speech is silent on the topic. We would also have expected the use of clear language in either s 162 of the *Police Administration Act* or s 44 of the *Limitation Act* to that effect.

---

[16] *Drover v Northern Territory of Australia and Ebatarinja* (2004) 14 NTLR 140 at 141[4] per Angel J, 147[25] per Riley J and 154[51] per Priestley JA.
[17] *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 at 635 per Wilson, Deane, Dawson, Toohey and Gaudron JJ.

[23] The limitation of action provided by s 162 of the *Police Administration Act* creates a bar to the remedy rather than extinguishing the right of action. In our opinion s 44(1) of the *Limitation Act* has application to this provision.

[24] It is unnecessary to consider the submission of the defendant that s 44(1) of the *Limitation Act* purported to operate to permit the granting of an extension of time to commence proceedings in respect of an extinguished cause of action and, therefore, was a law with respect to the acquisition of property otherwise than on just terms for the purposes of s 50 (1) of the *Northern Territory (Self-Government) Act* 1978 (Cth).

[25] In our opinion the answer to the referred question is, “Yes”.

****