White v Pink Batts Insulation Pty Ltd & Anor [2001] NTCA 3

PARTIES:	RICHARD WHITE v PINK BATTS INSULATION PTY LIMITED and COMMERCIAL UNION ASSURANCE
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP8 of 2000 (9315534)
DELIVERED:	3 MAY, 2001
HEARING DATES:	1, 2 May, 2001
JUDGMENT OF:	ANGEL, MILDREN AND BAILEY JJ

REPRESENTATION:

Counsel:

Appellant:	J. Rush Q.C.
First Respondent:	J. Tippett
Second Respondent	C. Kourakis Q.C.

Solicitors:

Appellant:	Turner Freeman
First Respondent:	De Silva Hebron
Second Respondent	Hunt and Hunt

Judgment category classification:	C
Judgment ID Number:	Mil01241
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

White v Pink Batts Insulation Pty Ltd & Anor [2001] NTCA 3
No. AP 8 OF 2000

BETWEEN:

RICHARD WHITE
Appellant

AND:

PINK BATTS INSULATION PTY LIMITED
First Respondent

AND

COMMERCIAL UNION ASSURANCE
Second Respondent

CORAM: ANGEL, MILDREN AND BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 3 May, 2001)

THE COURT*:*

[1] The appellant was the plaintiff in an action for damages for impaired respiratory function allegedly caused by his employment as a sand blaster in Darwin between May 1971 and August 1974. The matter proceeded to trial before Thomas J over a number of months in 1999 and in late February and early March 2000. There were a number of issues to be tried between the parties. Her Honour decided only two of the eight issues that were outstanding. The first of these issues was whether the system of work was

negligent. Her Honour found that it was. The second issue was whether the plaintiff thereby sustained damage, specifically through the development of small airways disease related to silicone exposure. Her Honour found adversely to the plaintiff on that issue and dismissed the claim. Her Honour's judgment was delivered on the 5th May, 2000.

[2] By notice of appeal lodged on 3 June, 2000 the appellant appealed against Her Honour's judgment. The appeal was as of right. We are told that there are some 106 grounds of appeal in the Notice of Appeal which the appellant personally prepared.

[3] The Registrar fixed an appointment to settle the Appeal Index for 24 August, 2000. The appellant appeared at the appointment by telephone. It is apparent that the appellant did not live in the Northern Territory and could not appear personally. The appellant had not prepared a draft Appeal Index prior to this time. No amendment was made to the Notice of Appeal prior to this time. The appointment to settle the Appeal Index was adjourned on a number of occasions for various reasons thereafter. The Index was not finally settled by the Registrar until 2 February, 2001.

[4] In the meantime the appellant had become legally represented once again. By letter dated 23 March, 2001 the respondents' solicitors were advised by the appellant's solicitors that the appellant had undergone a thorascopic open lung biopsy which had been performed on 20 September, 2000, the results of which indicated significant deposits of silica including deposition

in the area of the small airways. The appellant's solicitors requested further time to investigate the matter and asked that the hearing of the appeal which had been listed for the 1st, 2nd and 3rd May, 2001 be vacated and the matter be listed for hearing on the 7th, 8th and 9th August. The respondents responded by letter dated 23 March, 2001 that they opposed any attempt to vacate the hearing dates and opposed any application by the appellant to adduce fresh evidence in the appeal.

[5] Counsel for the appellant, Mr. Rush QC advised the court that the appellant is indigent and that as the appellant now proposes to abandon all of the grounds of appeal except the question of further evidence the appeal books had not been prepared as it was considered that they may not be required. A summons was taken out on 24 April, 2001 seeking the following orders

(1) That on 1 May, 2001 the appellant be granted leave pursuant to s 54 of the *Supreme Court Act,* to adduce fresh evidence on the appeal.

(2) That the hearing of the appeal on 1, 2 and 3 May, 2001 be vacated.

(3) That the hearing of the appeal be listed on 7, 8 and 9 August, 2001.

(4) Leave be granted to the appellant to file an amended Notice of Appeal.

(5) Such further or other order as this court deems appropriate in the case management of this matter.

The application was supported by an amended affidavit sworn by a solicitor in the employ of the appellant's solicitors. That affidavit annexed *inter alia* medical reports by Associate Professor Trevor Williams, Associate Professor David Bryant and Dr. Jessup as well as a draft of the proposed amended Notice of Appeal.

[6] The procedure adopted in this case did not comply with provisions of order 84.23 of the *Supreme Court Rules.* The affidavit in support of the application is required by sub-rule 5 to be filed not later than 21 days before the hearing of the appeal. The affidavit in this case was filed late. Sub-rule 2 requires that the application to be made by motion on the hearing of the appeal without filing or serving any form of application. Instead of applying in that manner the appellant has sought to proceed in the manner above indicated. Further the appeal books have not been prepared. Consequently, this court has been asked to determine the issues by reference to a copy of her Honour's judgment which was handed up to us as well as by reference to some transcript pages of the evidence before her Honour as well as a small amount of other material handed up in the course of the hearing.

[7] It is obvious that this court could not grant the relief sought in paragraph 1 of the summons without having regard to the whole of the evidence and hearing the appeal on its merits. If this court were to make an order granting leave to adduce further evidence on the appeal, this court would be seized of the matter. It may not be possible for the three judges who constitute this court to reconstitute the court in August of this year. It is

clearly not appropriate that questions as to the admissibility of further evidence be decided as a preliminary matter. Mr. Rush QC accepted that and limited the relief sought to the other matters set out in the summons.

[8] The present situation therefore is that if leave to amend the Notice of Appeal is granted, and the application to adjourn is granted, the matter will then proceed probably before a differently constituted court to determine whether or not the further evidence should be admitted, and if so, the appellant will be seeking an order for a new trial. In fact that may not be the appropriate order in this case, even if the appellant is successful, as it may be that the court would order that the matter to be remitted to the trial judge for further hearing and determination but it is not necessary to canvas that possibility any further at this time. On the other hand, if the application is refused, the respondents are seeking an order that the appeal be dismissed for want of prosecution.

[9] The appellant's case at trial was that his exposure to silica dust in the course of his employment resulted in small airways disease and resulting incapacity, but her Honour dismissed his claim because he failed to prove that he has silica induced small airways disease or any condition which is related to his exposure to silica dust between 1971 and 1974 when he was allegedly employed by the respondent Pink Batts Insulation Pty Ltd. A lung biopsy was not performed until some time after the trial. Professor Bryant who gave evidence at the trial told her Honour that he advised the appellant against having a lung biopsy because he did not consider that it

ought to be done purely for medico legal purposes given the risks attached to such a procedure and the possibility that the biopsy may effect the appellant's prospects for a successful lung transplant operation in the future and that he so advised the appellant.

[10] The decision to undergo the lung biopsy was made as the result of the recommendation of Professor Williams on 28 July 2000. The biopsy was performed on 20 September, 2000. It is the result of this biopsy and the conclusions to be drawn from it by Professor Williams and Professor Bryant that the appellant now hopes to obtain leave to lead by way of further evidence at the hearing of the appeal.

[11] Stated simply the appellant contends now that there is solid evidence that the appellant has lung disease due to silica exposure which is not due to other causes such as cigarette smoking or asthma. In short the appellants case in support of the application for leave to amend is that the appellant has an arguable case that the fresh evidence ought to be admitted with the result that the appeal should be allowed, the judgment set aside and a new trial ordered. The position of the respondents is that the further evidence which the appellant seeks to rely upon is so weak and flimsy that the appellant has no prospects of success bearing in mind the manner in which the discretion to admit further evidence in a case such as this is likely to be resolved by the Court of Appeal and that the application to amend would therefore be futile.

[12] In particular counsel for the respondents principally relied upon the following matters. First, the learned trial judge found the appellant's evidence was unreliable in a number of material respects, particularly as to the level of his cigarette smoking. Secondly, the learned trial judge rejected the opinion of Professor Bryant given at trial for a number of reasons which are set out in paragraph 208 of the learned trial judge's judgment. This included in part, the unreliable history given to Professor Bryant by the appellant as well as a number of other peripheral matters affecting Professor Bryant's credibility. Thirdly, it was submitted that the conclusions drawn by Professor Williams are false because he too relies on the history of the appellant in arriving at his ultimate conclusion that the most likely cause of the appellant's disability is silica related lung injury. One of the matters for instance that Professor Williams relies upon is the absence of any history of suffering from asthma when it is submitted that in fact there was a history of that condition. Fourthly, it was submitted that there is nothing in the biopsy report to indicate any significant disease. Fifthly, to the extent that Professor Williams and Professor Bryant relied upon lung function tests showing significant air flow obstruction, her Honour apparently rejected those tests as being unreliable.

[13] Further, her Honour did not accept the level of exposure to silica dust which the plaintiff claimed but that even if he were exposed to silica to the extent claimed the effluxion of time between his exposure and his complaints of

respiratory problems precluded a finding of small airways disease as a result of silica.

[14] Pursuant to rule 84.05(1) the appellant might have amended his Notice of Appeal without leave at any time before the date of the appointment to settle the appeal papers by filing a supplementary notice. This application is therefore in reality an application for leave for an extension of time within which to file an amended Notice of Appeal. The reason for the delay has now been explained. At the time of the first appointment to settle the appeal papers in August, 2000 the biopsy had not even been performed. It has also been explained why the biopsy was not performed prior to trial in that the appellant was advised against that procedure by his treating specialist. There is in particular no evidence that he received contrary advice from any other specialist, or that if he did receive any such advice that the risks of the procedure were explained to him. The delay in applying to the court after the biopsy is explained by the fact that the appellant's new advisers had to obtain further reports and counsel's opinion on this new material.

[15] The appropriate test to be applied in this case is that set out in the judgment of the High Court in *Jackamarra v Krakouer & Another* (1998) 195 CLR 516. Here the appellant has a valid appeal already on foot. The respondents are therefore not in the position of having a vested right to retain the judgment. The application is to amend the Notice of Appeal. It is true that the effect of the application will be to discard the existing 106 grounds of appeal and replace them with a new ground, namely, the further evidence

point. However, that does not alter the fact that an application of this kind must be determined in the light of the principles set out in *Jackamarra v Krakouer & Another*. As Brennan CJ and McHugh J said at page 521:

> But once an appeal has been lodged, different considerations apply. An appeal, honestly lodged by a suitor within time "must be investigated and decided in the manner appointed". If the appeal is frivilous, it can be disposed of summarily. If there is gross delay in prosecuting the appeal it may be dismissed for want of prosecution. If it fails to comply with a particular rule the rules of court may entitle the respondent to strike it out. But the merits of the appeal are not a relevant consideration where the application concerns an extension of time for taking a step in prosecuting the appeal unless, unusually, the court can be satisfied that the appeal is so devoid of merit that it would be futile to extend time.

[16] In the same case Kirby J said at page 540:

> The party seeking indulgence bears the burden of persuading the decision maker to grant this request. A consideration relevant to that exercise is whether the case is arguable. If it is hopeless, unarguable or bound to fail, the request for an extension of time will be refused. However, this is basically because to grant it would be futile. The practice ordinarily adopted in judging the arguability of a point was described by Lord Denning MR for the English Court of Appeal in *R v Secretary* for the Home Department; *ex parte* M*ehta*. It ordinarily involves consideration of "the outline of the case":
>
> > "We never go into much detail on the merits, but we do like to know something about the case before deciding whether or not to extend the time."

[17] Although the application before us has taken over two days and at one time, the parties agreed to this court hearing the whole appeal on the merits, it became later apparent that this course could not be followed. In particular, we are told we do not have all of the transcript pages that are relevant for our consideration.

[18] It is important, of course to bear in mind the observations of the majority of the court in *CDJ v VAJ* (1998) 197 CLR 172 at 202 that ordinarily, "where it is alleged that the admission of new evidence requires a new trial, justice will not be served unless the Full Court is satisfied that the further evidence would have produced a different result if it had been available at the trial". This is necessarily a high test. The question to be asked then, is whether the appellant's case is so weak and flimsy that the case is bound to fail so that the granting of leave to amend out of time would be futile.

[19] It is difficult to see how this court can arrive at a conclusion that the granting of the application would be futile based on the material which is before us. It is apparent that we do not have all the evidence before us that was available to the trial judge. As to that consideration it was held in *Jackamarra v Krakouer & Another* that the Full Court could not come to the conclusion that the appeal had no prospects of success without examining all the evidence. It seems that we are in a similar position. In any event, on the material that has been presented to us so far, including the further report of Dr. Field in which he states that the results of the biopsy do not change his opinion we consider that the appellant has an arguable case in the sense that it is not possible to draw the conclusion that the granting of the appellant's application would be futile.

[20] We have already adverted to the failure of the appellant to comply with the rules in other respects. In the particular circumstances of this case, we are prepared to waive non compliance. The application to amend out of time

should be granted. The hearing of the appeal should therefore be adjourned to a date to be fixed by the Registrar. The matter is also referred back to the Registrar for reconsideration of the appeal book index. The parties should be heard further on the question of costs.