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| PARTIES: | ANTHONY JOHN O'BRIEN and ANOR<br>v<br>MORRIS FLETCHER & CROSS |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA |
| JURISDICTION: | Interlocutory Application |
| FILE NO: | 14/96 (9602146) |
| DELIVERED: | 25 September 1997 |
| HEARING DATES: | 28 August; 6 September 1997 |
| JUDGMENT OF: | The Master |

**CATCHWORDS:**

PRACTICE - Northern Territory - order - inherent power - trial of preliminary issue - change of circumstances - discharge of order

PRACTICE - Northern Territory - trial of preliminary issue - clear demarcation of issues

CASES FOLLOWED

Dunstan v Simmie & Co. (1978) VR 669
Hutchinson v Nominal Defendant (1972) 1 NSWLR 443
Re Deisara Pty Ltd, unreported decision of Mildren J delivered 15 May 1992

**REPRESENTATION:**

*Counsel:*

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| Plaintiffs: | Mr Parish |
| Defendant: | Mr Bruxner |

*Solicitors:*

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| Plaintiffs: | Parishs |
| Defendant: | Clayton Utz |

Judgment category classification:
Judgment ID Number: mas9720
Number of pages: 4

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

14/96 (9602146) Between:

ANTHONY JOHN O'BRIEN and ANOR
Plaintiffs

and

MORRIS FLETCHER & CROSS
Defendant

MASTER COULEHAN: REASONS FOR DECISION
(Delivered 25 September 1997)

The plaintiffs seek damages for negligence and breach of contract between May and September 1984 arising out of the purchase of a house and land at Nightcliff. It is alleged that the defendants failed to make appropriate enquiries and ascertain and advise the plaintiffs as to failures to comply with the Building Code. Defects in the house were subsequently discovered and the plaintiffs claim damages including the cost of rectification.

There are alleged to be three broad areas of non-compliance, the plumbing, which was discovered by the plaintiffs around July 1988, the walls and footings, discovered around April 1990, and the roof and reinforcing, discovered around June or July 1995.

The writ was issued on 30 January 1996 and the plaintiffs have sought an extension of time pursuant to s.44 of the Limitation Act. The defendants have pleaded the time bar pusuant to s. 12.

On 30 May 1996 it was ordered, by consent, that there be a separate and early trial of the question of extension of the limitation period pursuant to s44. The order has not been authenticated, but the parties have not taken this point. They prepared for the trial of this issue and on 23 June 1997 the proceeding was tentatively listed for trial.

Subsequently, the plaintiffs decided not to proceed and applied for the vacation of the order made on 30 May 1996.

According to the evidence of Mr. Parish, in his affidavit sworn 22 August 1997, it became apparent after the defendants filed their affidavits around 19 May 1997 that there were substantial areas of factual dispute and that the plaintiffs had first become aware, on 11 March 1997, that the defendants alleged that the plaintiffs had been informed as to the non-compliance with the Building Code prior to the exchange of contracts. Why this was not pleaded was not canvassed.

Mr. Parish further deposes that the plaintiffs have located several witnesses who will contradict the defendants' evidence as to whether the plaintiffs were so informed, and that both parties have indicated that evidence will be given by engineers on the limitation issue. He considers that the preliminary determination of the limitation issue is unlikely to save time and expense and may prolong the proceedings and he has been advised by counsel that it is not appropriate that the limitation question be determined separately.

The defendants oppose the vacation of the order. As I understand the defendants' submissions, the argument is not that the procedure by way of the trial of the preliminary issue is appropriate, but that it would be unfair to the defendants to vacate the order. Not unreasonably, it is pointed out that the defendants have expended much time and effort in preparation for the hearing which may already have been resolved but for the plaintiffs' application. Further, the defendants have, by exchanging affidavits, exposed their case, which they may not otherwise have had to do until after the plaintiffs had presented their case.

The court has inherent power to vary, discharge or suspend an interlocutory order by reason of a change of circumstances (see ***Hutchinson v Nominal Defendant (1972) 1 NSWLR 443,447-8*** and ***Re Deisara Pty. Ltd***., an unreported decision of Mildren J. delivered 15 May 1992 ).

The change of circumstance relied upon is that the plaintiffs have now become aware that the are more substantial issues in dispute and that the trial of the preliminary issue is unlikely to save time and expense. It has been suggested in ***Dunstan v Simmie and Co***. ***(1978) VR 669*** at page 671 that:

"..... although every case must depend upon its own facts, it will as a general rule only be appropriate to order that a preliminary issue be isolated for determination before trial where the determination of the issue in favour of the plaintiff or the defendant will put an end to the action or where there is a clear demarcation between the issues and the determination of one issue in isolation from the other issues in the case is likely to save inconvenience and expense."

It seems that there is now no clear demarcation of issues, which are complicated by considerations as to when the cause of action arose. It may be necessary for the Court to hear much of the evidence before deciding the questions relating to the extension of the limitation period. I conclude that it would be undesirable that the limitation issue be tried separately.

The question remains as to whether the plaintiffs are entitled to relief from the consequences of the order. This involves consideration of any detriment suffered by the defendants.

It does not appear that the work done to date in preparation for the trial of the preliminary issue has been wasted because it may be utilised at trial in any event. It is not clear as to the extent, if any, of costs thrown away. As to the exposure of the defendants' case, I do not regard this as a significant detriment, the trend is that litigation is to be conducted openly and parties may be ordered to exchange witness statements prior to trial.

Of more concern is the delay to the resolution of this proceeding. However, it is no longer clear that the preliminary hearing of the limitation issue will result in the determination of this proceeding effectively, completely, promptly and economically (see O.1.10 Supreme Court Rules)..

I conclude that it is appropriate that the order dated 30 May 1996 be vacated,
and I so order.