Patten v Lend Lease Funds Management [2009] NTSC 51

PARTIES:	Agnes Martha Patten v Lend Lease Funds Management Pty Ltd and Vai Queensland Pty Ltd
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	16/08 (20804544)
DELIVERED:	28 October 2010
HEARING DATES:	7 October 2010
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Limitation of actions – Extension of time – Whether extension should be granted – Material facts – Residual discretion – Whether extension necessary.
Practice and Procedure – Joinder of parties – Addition of a party after the expiration of the limitation period.

Limitation Act s 44
Supreme Court Rules O 9.06, 43.03

Merton Enterprises Pty Ltd v Nelson (1998) 13 NSWLR 454; *Patterson v Northern Territory of Australia* (2001) NTSC 93*; Bradley v Eagle Star*

Insurance Co Ltd [1989] AC 957; *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628; *Fersch v Power and Water Authority* (1990) 101 FLR 78; *Berno Bros Pty Ltd v Green's Steel Constructions Pty Ltd* (1992) 107 FLR 279; *Cubillo v Commonwealth of Australia* (2000) 103 FCR 1; *Ulowski v Miller* [1968] SASR 277; *Forbes v Davies* [1994] Aust Torts Reports 81-279.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Young
Defendant:	Not Represented
Third Party:	Mr Francis

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Hunt & Hunt
Third Party:	David Francis & Associates

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

Patten v Lend Lease Fund Management Pty Ltd [2009] NTSC 51
No. 16/08 (20804544)

BETWEEN:

Agnes Martha Patten
Plaintiff

AND:

Lend Lease Funds Management Pty Ltd
Defendant

AND:

Vai Queensland Pty Ltd
Third Party

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 28 October 2010)

[1] The Court is dealing with an interlocutory application seeking the joinder of a party pursuant to Order 9.06 of the *Supreme Court Rules* ("the Rules") as well as an extension of the applicable limitation period pursuant to section 44(3) of the *Limitation Act* ("the Act").

[2] The substantive claim bought by the Plaintiff is for damages for injuries sustained in a fall at a shopping centre owned by the Defendant. The applicable limitation period expired on 6 August 2008 and the substantive proceedings were commenced before that date.

[3] Relevant to the current application, the Plaintiff alleges that the floor where she slipped was contaminated with a liquid substance. The Plaintiff alleges that she was owed a duty of care by the Defendant and the Defendant breached that duty.

[4] The Defendant's Defence admits ownership of the relevant property at the relevant time but denies any breach of duty on the basis that it delegated and discharged any duty of care by reason of entering into a commercial arrangement with the Third Party.

[5] The Defendant issued a Third Party Notice joining the Third Party on 20 January 2009.

[6] The current application now seeks to join the Third Party as a defendant. The current Defendant chose not to participate in the hearing of the Summons and will abide the Court's decision. Both the joinder and the extension of time are opposed by the Third Party.

[7] The relevant background facts in summary form are as follows:-

1. The relevant incident occurred on 6 August 2005.

2. On that date the Defendant was the occupier of the relevant premises.

3. In June 2005 the Defendant entered an agreement with the Third Party, a specialist cleaning company, to provide cleaning and maintenance services for the Defendant at the subject premises. Specifically the contract required minimum inspection and cleaning

of the relevant area to be conducted at least every 15 minutes during core business hours. The Plaintiff's fall occurred within these core business hours.

4. Discovery by the Defendant revealed a document which identified that Mary Fyall, who was then employed by the Third Party, was one of two persons who was responsible for cleaning and inspection of the relevant area on the relevant date. Further that document is to the effect that the relevant area had been cleaned and inspected 10 minutes prior to the Plaintiff's fall and had been cleaned and inspected every 15 minutes during that day.

5. In late August 2008 the Plaintiff's then solicitor took a written statement from Mary Fyall. In that statement, Mary Fyall contradicts the matters reported in the document referred to in the preceding sub-paragraph. Specifically she said that she was working alone on the day in question and only cleaned and inspected the relevant area less then once in every half an hour.

6. That statement was not acted upon until after 15 April 2009 when another solicitor took over the conduct of the Plaintiff's claim.

7. Steps were then taken to arrange a meeting between the Plaintiff and counsel to report to the Plaintiff regarding that statement and to obtain instructions.

8. That meeting did not occur as the parties were then engaged in preparations for a settlement conference. That conference was held on 20 November 2009. It appears that the Plaintiff attended that settlement conference with the Plaintiff's then solicitor and counsel.

9. Although the matter was not resolved at that settlement conference, negotiations continued for a number of months thereafter.

10. When it became apparent that the matter could not be resolved by negotiation attempts to arrange the meeting referred to in sub-paragraphs 7 and 8 were resurrected.

11. Owing to various difficulties that meeting did not occur until 28 May 2010.

12. The existence of the statement of Mary Fyall was brought to the attention of the Plaintiff on that date and it is alleged that this is the first time that it was brought to the Plaintiff's attention.

[8] The evidence relied upon by the Plaintiff for the purposes of the application is the affidavit of her current solicitor, Mr Ashley Marsh sworn 21 July 2010 ("the Affidavit"). In the Affidavit it is asserted by Mr Marsh that the existence of the statement of Mary Fyall was first brought to the attention of the Plaintiff on 28 May 2010. The admissibility of the Affidavit was challenged on the basis that the source of that knowledge was not specified as required by O 43.03(2) of the Rules. Mr Marsh therefore was called and

gave oral evidence and was cross examined. That oral evidence clarified the position and the source of Mr Marsh's knowledge.

[9] Mr Francis, counsel for the Third Party nonetheless raises concerns as to the absence of direct evidence from the Plaintiff as to the date when she first became aware of the statement of Mary Fyall and its significance. Mr Francis submits that it is unlikely that the existence and significance of the statement was not discussed between the Plaintiff, her solicitor and/or counsel on the occasion of the settlement conference on 20 November 2009.

[10] Although an Affidavit from the Plaintiff would put the matter beyond doubt, evidence in the form provided is permitted in interlocutory applications (see O 43.03(2) of the Rules). An application for an extension of time is an interlocutory application. *Merton Enterprises Pty Ltd v Nelson*[1] and *Patterson v Northern Territory of Australia*.[2] The evidence of Mr Marsh, including in the Affidavit is clearly to the contrary. The evidence does not rely on memory recollection alone. It is based on recollection as well as file note entries which enhances the reliability of that evidence.

[11] The settlement conference in question occurred in November 2009 and were that to be the date that the Plaintiff first ascertained knowledge of the statement of Mary Fyall, it remains within the 12 month period referred to in section 44(3)(b)(i) of the Act. It makes no difference therefore to the satisfaction of the precondition in that section although it might remain

[1] (1998) 13 NSWLR 454
[2] (2001) NTSC 93

relevant in respect of the residual discretion that must be exercised once that precondition is satisfied.

[12] I accept the evidence of Mr Marsh and find that the Plaintiff was first aware of the existence of the statement of Mary Fyall on 28 May 2010. I am also satisfied with the explanation given for the delay between the obtaining of that statement by the Plaintiff's solicitor and it being brought to the Plaintiff's attention.

[13] The Third Party also opposes the joinder on the basis that it is unnecessary. Mr Francis submitted that as a result of the joinder of the Third Party by the Third Party Notice, the Third Party is liable to the Plaintiff in the same way as it would be were the application to be granted. Mr Francis argued that if the Plaintiff's loss results from any default on the part of the Third Party then the Plaintiff will be indirectly able to recover from the Third Party in consequence of the Third Party Notice.

[14] Mr Francis also argues that as it is proposed to allege in an amended Statement of Claim that the Defendant breached its duty to the Plaintiff in not properly supervising the performance of the contract by the Third Party, then in that event the Plaintiff will still be able to recover against the current Defendant.

[15] The foregoing however overlooks the possibility that the current Defendant will not be found to be in breach of any duty which exists. If that occurs then there will be no liability for the Defendant and therefore no liability on

Third Party. Most importantly however if, as the Defendant has pleaded, it is found that the Defendant has properly delegated its duty of care to the Third Party, then the Defendant will not be liable to the Plaintiff and in turn, no liability would attach to the Third Party as the liability of the Third Party to make contribution or indemnify the Defendant is contingent upon the Defendant being found liable to the Plaintiff. Bradley v Eagle Star Insurance Co Ltd.[3]

[16] An extension of time is required before the joinder of the Third Party as a Defendant can occur given the general rule that the addition of a defendant after the expiration of a limitation period is not allowed.

[17] Limitation period extensions are governed by the section 44 of the Act which provides as follows:-

> 44 Extension of periods
>
> (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:

[3] [1989] AC 957

(a) has jurisdiction to entertain; or

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

(3) This section does not:

(a) apply to criminal proceedings; or

(aa) apply to an action on a cause of action for defamation; or

(b) empower a court to extend a limitation period prescribed by this Act unless it is satisfied that:

(i) facts material to the plaintiff's case were not ascertained by him until some time within 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff; or

(ii) the plaintiff's failure to institute the action within the limitation period resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and other relevant circumstances,

and that in all the circumstances of the case, it is just to grant the extension of time.

[18] An extension of time pursuant to section 44(3) therefore requires the ascertainment of a material fact within a specified time frame, in this case 12 months up until the time of joinder, followed by the favourable exercise of a residual discretion.

[19] The parties are in agreement as to the applicable law in this case. The difference turns simply on the application of that law.

[20] As I have found that the existence of the statement of Mary Fyall was first drawn to the attention of the Plaintiff on 28 May 2010, the preliminary question therefore is whether the statement of Mary Fyall is a material fact within the meaning of section 44(3) of the Act.

[21] The leading decision on this issue is *Sola Optical Australia Pty Ltd v Mills*[4] (*"Sola Optical")*. That dealt with a provision of the South Australian Limitation of Actions Act which is in para materia to section 44(3) of the Act. In *Sola Optical* the High Court held that a fact, in order to be material, does not need to be decisive. It was held that a fact is material if it is both relevant to the issue to be proved and is of sufficient importance to be likely to have a bearing on the case. It was also held that these requirements are to be satisfied by an objective enquiry and without a subjective assessment of the plaintiff's decisions or intentions in respect of the decision to sue. There is specifically no requirement that there should be some interaction between the ascertainment of the fact said to be material for the purposes of this section and the decision to sue. The High Court said, at pp 636-637:

> "There is no warrant for writing into the Act the further qualification that, to attract the operation of s 48(3)(b)(i), there must be some interaction between the material fact and the plaintiff's decision to sue. It is materiality to the plaintiff's case that must be shown. This is a broad general requirement that is capable of satisfaction by an objective enquiry. To introduce notions related to the decision to sue, that would require an examination of the subjective workings of the plaintiff's mind which would complicate the Court's task and impede rather then advance the purpose of the Act. A fact is material to the plaintiff's case if it is both relevant to the issues to be proved if the plaintiff is to succeed in obtaining an award of damages sufficient to

[4] (1987) 163 CLR 628

> justify bringing the action and is of sufficient importance to be likely to have a bearing on the case. The *Shorter Oxford English Dictionary* defines the word "material" inter alia, to mean "Of such significance as to be likely to influence the determination of a cause". Although a definition attributed to the sixteenth century, in our opinion it provides apt guide to the intention of the legislature in choosing to refer, without any elaboration, to "facts material to the plaintiff's case".

[22] The High court also held that there is no obligation to have used diligence to discover the fact said to be material at an earlier time. It was also held that the material facts are required to be ascertained by the Plaintiff personally, not by an agent. Therefore the 12 month period referred to in section 44(3)(b)(i) of the Act only commences to run from the date that the Plaintiff personally ascertained the relevant fact and not the date that her solicitor took the statement containing that fact.

[23] Relevant also to the determination of whether a fact is material is the Northern Territory authority of *Fersch v Power and Water Authority*,[5] which, following *Lovett v Le Gall*,[6] held that the phrase "facts material to the plaintiff's case" took in the whole complex of evidence in argument which will be advanced at the trial on the Plaintiff's behalf.

[24] Applying the foregoing to the facts of the current case leads inescapably to the conclusion that the facts contained within the statement of Mary Fyall are material facts for the purpose of section 44(3) of the Act. Noting the allegation in the Defence that the Defendant has delegated its duty, the

[5] (1990) 101 FLR 78
[6] (1975) 10 SASR 479

Plaintiff's case will conceivably fail if facts consistent with the allegations referred to in sub-paragraph 7(3) above are found to be the case. Conversely if the findings are that the cleaning and inspection occurred less then once in every half hour, the Plaintiff's prospects for success are enhanced. In those circumstances those facts are central to the Plaintiff's case and that inescapably leads to the conclusion that they are material facts for the purposes of the precondition to the extension. I so find.

[25] There is a residual discretion which needs to be exercised in the Plaintiff's favour by reason of the concluding words to subsection 44(3). It must be just in all the circumstances of the case to grant the extension of time.

[26] The Third Party has not presented any evidence on the application. There is therefore no evidence of prejudice. Clearly the Third Party is in a quite different position to most parties who are the subject of a joinder application. It has been on notice of the claim for some time by virtue of the Third Party proceedings.

[27] In *Ulowski v Miller*,[7] the Full Court of the South Australian Supreme Court specified various matters relevant to the exercise of the residual discretion. These were said to be:-

1. The extent of the delay.

2. The explanation for the delay.

[7] [1968] SASR 277

3. The hardship to the applicant if the application is not granted.

4. The hardship to the defendant if the application is granted.

5. The defendant's conduct.

[28] *Lovett v Le Gall*[8] added two more factors namely the applicant's conduct and secondly the nature, importance and circumstances surrounding the ascertainment of the new material facts. Kearney J in *Forbes v Davies*[9] also added another circumstance namely, that the Court should also consider the extent to which, having regard to the delay, the evidence is likely to be less cogent then if the action had been brought within the time allowed.

[29] The last of these factors has particular relevance to the current case given that the Third Party, as the proposed party to be joined, has been on notice of the claim for some time.

[30] Having regard to all of the relevant factors and being satisfied of the explanation in relation to the lack of activity subsequent to the Plaintiff's solicitor interview of Mary Fyall, noting also the absence of any evidence of prejudice of the Third Party, the balance in relation to the exercise of the residual discretion is clearly in the favour of the Plaintiff given that denying the extension may well doom her claim to failure.

[31] In summary I find that the evidence disclosed in the statement of Mary Fyall amounts to facts material to the Plaintiff's case. I find that the Plaintiff

[8] (1975) 10 SASR 479
[9] [1994] Aust Torts Reports 81-279

ascertained those facts on 28 May 2010. Consequently all the preconditions are satisfied. I consider it just in all the circumstances that the extension be granted.

[32] I will hear the parties as to consequential orders.