MG Lines Pty Ltd t/as Coniston Station v Navi [2013] NTSC 20

PARTIES:	MG Lines Pty Ltd t/as Coniston Station v NAVI, Lior
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	130 of 2012 (21247118)
DELIVERED:	19 APRIL 2013
HEARING DATES:	18 APRIL 2013
JUDGMENT OF:	KELLY J

CATCHWORDS:

PRACTICE AND PROCEDURE – Stay of proceedings–Multiple proceedings–Case stated–Common law proceedings–Potential incompatible determinations–Stay granted

PRACTICE AND PROCEDURE–Case stated–Stay of proceedings–Multiple proceedings–Potential incompatible determinations–Stay granted

Workers Rehabilitation and Compensation Act s52

Sterling Pharmaceuticals Pty Ltd v Boots Co (Aust) Pty Ltd (1992) 34 FCR 287, applied

REPRESENTATION:

Counsel:

Applicant:	S Brownhill
Respondent:	D McConnel

Solicitors:

Applicant:	Hunt & Hunt
Respondent:	Povey Stirk

Judgment category classification:	B
Judgment ID Number:	KEL13005
Number of pages:	12

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

MG Lines Pty Ltd t/as Coniston Station v Navi [2013] NTSC 20
No. 130 of 2012 (21247118)

BETWEEN:

MG LINES PTY LTD t/as CONISTON STATION
Applicant

AND:

LIOR NAVI
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 19 April 2013)

[1] The applicant MG Lines Pty Ltd trading as Coniston Station ("Coniston Station") is the owner of Coniston Station, a pastoral lease near Alice Springs.

[2] In August 2007 the respondent, Mr Lior Navi, was gored by a bull in the cattle yards at Coniston Station and injured his leg.

[3] Mr Navi made a claim against Coniston Station for compensation under the *Workers Rehabilitation and Compensation Act* ("the Act") in relation to that injury.

[4] The employer, or rather the employer's work health insurer, rejected Mr Navi's claim and Mr Navi instituted proceedings in the Work Health Court. One of the bases upon which the employer contests Mr Navi's claim is that at the time he suffered the injury he was not an Australian citizen and had no entitlement to work in Australia under the *Migration Act 1958* (Cth). As a result, the employer submits that the agreement between Mr Navi and Coniston Station, whereby Mr Navi was to perform work for Coniston Station, was void for illegality and, accordingly, Mr Navi had no entitlement to any compensation under the Act.

[5] On 7 December 2012 the Work Health Court reserved questions of law arising out of the Work Health proceedings for consideration by this Court and stated a special case for the opinion of the Court. The special case stated sets out a number of facts which are to be assumed for the purposes of providing the opinion and then poses the following questions of law for the opinion of the Court.

> "A. Is the agreement between the Worker and the Employer prohibited and rendered void by:
>
> a. section 235 of the *Migration Act*? Or
>
> b. section 245AC of the *Migration Act*?
>
> B. If the answer to Question A is "yes", does that mean the Worker is not a worker within the meaning of the *Worker's Rehabilitation and Compensation Act*?

C. Is the Worker denied any entitlement to compensation under the Act at all on public policy grounds arising from the prohibitions on non-citizens undertaking work in Australia in sections 235 and 245AC of the *Migration Act*?

D. For each of the following periods:

a. the date the Worker left Australia to 30 June 2012; and

b. 1 July 2012 and thereafter,

does section 65B of the Act apply to the Worker:

c. in its form prior to the substitution effected by section 7 of the *Workers Rehabilitation and Compensation Legislation Amendment Act 2012* on 1 July 2012? Or

d. in its form after that substitution?

E. If any of the answers to Question D are that section 65B applies in its form prior to 1 July 2012, does section 65B in that form require that, to be entitled to compensation under section 64 or 65, the Worker's rehabilitation had to have been completed before he departed to reside outside Australia?

F. If any of the answers to Question D are that section 65B applies in its form on and after 1 July 2012, what is the appropriate standard for the employer's satisfaction in section 65B(2)(b) about the worker's continued incapacity?"

[6] The case stated proceeding has been listed for hearing on Wednesday 24 April 2013.

[7] In response to the employer's contention that he was not a worker within the meaning of the Act and therefore not entitled to compensation under the Act, on 13 November 2012 Mr Navi commenced a common law action for

damages against Coniston Station and two others in this Court. A defence to that proceeding has been filed.

[8] By summons dated 16 April 2013 Mr Navi applied for an order that the special case stated be stayed pending the outcome of the respondent's common law action.

[9] The primary basis for Mr Navi's application for a stay of the special case stated proceeding is that, unless the common law action for damages is determined first, there is a risk of two incompatible determinations by two different courts on the same subject matter.

[10] The starting point for this contention is that if the agreement between Mr Navi and Coniston Station is void as a result of s 235 and/or s 245AC of the *Migration Act* and Mr Navi is thereby precluded from any entitlement to compensation under the Act, then *ipso facto* s 52 of the *Workers Rehabilitation and Compensation Act* can not apply to deprive him of an action for damages against Coniston Station or any of its employees.

[11] Section 52 provides that no action for damages in favour of a worker shall lie against the employer of the worker (or any worker employed by the same employer) in respect of an injury to the worker.[1]

[12] A worker is defined by the Act to mean (with certain presently irrelevant exceptions) a natural person who under a contract or agreement of any kind

[1] Injury means a physical or mental injury arising out of or in the course of the worker's employment. (Section 3 *Workers Rehabilitation and Compensation Act*).

(whether expressed or implied, oral or in writing or under a law of the Territory or not), performs work or a service of any kind for another person.

[13] Hence, if whatever agreement there was between Mr Navi and Coniston Station is void as a result of the relevant provisions of the *Migration Act*, there was no "contract or agreement for the performance of work" and Mr Navi cannot be a worker. Hence s 52 of the Act can not apply to deprive him of his common law right of action for damages.

[14] Mr McConnel on behalf of Mr Navi submitted that if the case stated were to proceed and the questions were to be answered unfavourably to Mr Navi for the purposes of the Work Health proceeding, that is to say if the Court were to find on the basis of the assumed facts set out in the case stated, that the agreement between Mr Navi and Coniston Station is void and Mr Navi is therefore precluded from an award of compensation under the Act, that would not prevent the Court in the common law proceedings from nevertheless holding that s 52 <u>does</u> apply to deprive him of his common law action for damages.

[15] This is because the questions in the case stated are to be answered on the basis of assumed facts set out in the case stated. The answers to these questions would therefore not give rise to any issue estoppel between the parties should the Court hearing the common law action for damages find the facts to be different from those assumed facts.

[16] This, it was submitted, gives rise to the possibility of substantial injustice to Mr Navi. Although as a matter of law and logic (other defences aside) Mr Navi must have either rights under the *Work Health Act* or a common law action for damages, if the case stated proceeds before the hearing of the common law claim, Mr Navi may be found to have neither, being locked out of the Work Health remedies on the basis of assumed facts and locked out of the common law claim for damages on the basis of facts found by this Court.

[17] On the other hand, if I grant a stay of the case stated proceeding, the common law claim for damages will proceed to trial, evidence will be heard and findings of fact made. Any decision of the Court hearing the common law action on the question of whether or not Mr Navi is a worker within the meaning of the Act (and therefore precluded from succeeding in his action for damages) will give rise to an issue estoppel between Mr Navi and Coniston Station: there would be no possibility of inconsistent determinations in the two courts. It seems to me that this is a powerful argument in favour of staying the case stated proceeding.

[18] At present no defence in reliance on s 52 of the Act has been directly pleaded by Coniston Station in the common law proceeding. However, Coniston Station has not admitted that Mr Navi was present on the Station as an invitee, and it seems to me that there is every prospect that the defence will be amended to include a defence under s 52. If Coniston Station does plead s 52 in its defence to the common law action, then that will necessarily require the Court hearing that action to determine the issues

raised on the questions in the case stated. If it does so, those issues will be subject to an issue estoppel and it will not be necessary for the case stated proceeding to be determined.

[19] Even if a defence under s 52 is not raised, if Mr Navi succeeds in his common law action for damages, then that will put an end to his claim for compensation under the Act[2] and it will not be necessary for the questions in the case stated to be answered. There is therefore a real prospect that if the common law action is heard and determined first, it will not be necessary for the case stated proceeding to continue to hearing.

[20] Ms Brownhill for the applicant in the case stated proceeding (i.e. the Work Health Insurer of Coniston Station) does not necessarily challenge this analysis but says that if the common law action for damages proceeds first then there is the potential for injustice to her client. That is because, although the defendant in the Work Health proceeding is the same as the employer nominated in the Work Health proceeding, namely Coniston Station, the real defendant in the Work Health proceeding is Coniston Station's Work Health insurer which is subrogated to the rights of Coniston Station in that proceeding. I was informed from the bar table that the insurer who is subrogated to the rights of Coniston Station in the common law action is a different insurer. Mr Alderman of counsel, who has been briefed by Coniston Station's insurer to appear for Coniston Station in the common law action, was given leave to appear briefly on this application to

[2] Section 52

advise that his client supports the position adopted by the Work Health insurer in opposing the application for a stay of the case stated proceeding.

[21] Ms Brownhill points out that findings of fact may be made and a determination made by this Court on the question of whether Mr Navi is a worker within the meaning of the Act in a proceeding to which her client is not a party and in which it therefore has no right to be heard; yet because the named defendant is the same in both sets of proceedings, the determination of the common law proceeding would give rise to an issue estoppel binding on her client in the Work Health proceeding.

[22] One can readily understand why the Work Health insurer considers that to be an undesirable prospect. I do not know (and have not been asked to decide) whether there is a possibility of the Work Health insurer being granted leave to be joined as a party to the common law proceeding, given that it has a real financial interest in the outcome of that part of the case which concerns whether or not Mr Navi is a worker within the meaning of the Act. However, even if it is not so joined, the fact that that the Work Health insurer is not present to argue the case does not mean that the issue will not be thoroughly ventilated and fully argued. It is somewhat anomalous that if Coniston Station relies on s 52 in the common law proceeding, it will be in Mr Navi's interest to argue that he is not a worker within the meaning of the Act for the purpose of the common law proceeding. That would include, presumably, arguing that any agreement between the parties for the performance of work was void as a result of the

provisions of the *Migration Act*, the opposite argument to that which would be made by Mr Navi for the purpose of Work Health proceeding. Counsel for Mr Navi, Mr McConnel, pointed out that it is in Mr Navi's interest to succeed in the common law action for damages rather than the Work Health Court proceeding as the damages in the common law action are likely to be substantially higher than any compensation he may receive under the Act, particularly as Mr Navi is resident overseas and therefore not entitled to weekly payments of compensation under s 64 or s 65 of the Act.[3]

[23] Considerations to be taken into account in determining whether to stay one set of proceedings pending the outcome of another include, relevantly:

(a) which proceeding was commenced first;

(b) how far advanced the proceedings are in each court;

(c) whether work already done in preparation on one set of proceedings might be wasted;

(d) whether the determination of one proceeding is likely to have a material effect on the other;

(e) the undesirability of permitting multiplicity of proceedings in relation to similar issues; and

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[3] Section 65B(1)

(f) the undesirability of there being contradictory determinations in two different proceedings.[4]

[24] Here the Work Health proceeding was commenced first. However, I do not consider that to be a particularly significant factor.

[25] Mr McConnel pointed out that neither the Work Health proceeding nor the common law proceeding was particularly far advanced. No further steps have been taken in the common law proceeding beyond the filing of the statement of claim and defence. In the Work Health proceeding nothing further has been done other than to state a case for the opinion of the Supreme Court.

[26] Ms Brownhill points out that it is not the Work Health proceeding that is at issue. What is sought to be stayed is the case stated proceeding in this Court and that, she says, is well advanced. Considerable work has been done in preparing written submissions and the matter is due to be heard next Wednesday.

[27] This application for a stay has been brought at a very late stage in the case stated proceeding and it would certainly have been desirable for it to have been brought at a much earlier stage before all that potentially wasted work had been done. However, it seems to me that that is remediable by an order

[4] *Sterling Pharmaceuticals Pty Limited v The Boots Company (Australia) Pty Limited* (1992) 34 FCR 287 at 291.

for costs thrown away if, as a result of the common law action, it becomes no longer necessary to determine the questions on the case stated.

[28] I have already outlined the way in which the determination of the common law proceeding is likely to materially affect the case stated proceeding and ultimately the Work Health proceeding. There is a very real prospect that the determination of the common law action will render the case stated proceeding unnecessary and put an end to the Work Health proceeding.

[29] It seems to me that the undesirability of there being multiplicity of proceedings on the same issue is an important consideration. Most importantly, it seems to me to be most undesirable for there to be a possibility of inconsistent determinations in two separate sets of proceedings in this Court which is a possibility if the case stated proceeding is not stayed. It is not appropriate, in my view, for this Court to make determinations based on assumed facts which may later be found to be untrue when evidence can be called and relevant findings of fact made and a binding determination given on the same issues in the common law proceeding.

[30] Ms Brownhill for Coniston Station's Work Health insurer submitted that the prospect of incompatible determinations was, in reality, illusory since any agreement which might be found on the case pleaded by either party in either set of proceedings would necessarily be void and it was in the interest

of all parties for a determination to that effect to be made expeditiously. Mr McConnel did not agree.

[31] I do not consider that it is desirable for me to assess the likelihood of there being a finding that there was an agreement between Mr Navi and Coniston Station for the performance of work which is rendered void by the provisions of the *Migration Act*. That is properly a matter for the Court to determine after evidence has been heard and the matter fully argued. The fact that there is a logical possibility of such incompatibility, along with the fact that the case stated proceeding may well turn out to be unnecessary, leads me to the conclusion that the case stated proceeding should be stayed.

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