Supreme Court Notes

by Anita Del Medico

PRACTICE & PROCEDURE - Effect of judgment in default of defence for damages to be assessed - Whether default judgment capable of giving rise to estoppel - *Supreme Court Rules* r21.03 (1)(b).

PRACTICE & PROCEDURE - Pleadings - Whether necessary to plead contributory negligence - Whether opportunity to raise contributory negligence at trial lost where application to set aside judgment in default of filing defence refused and no appeal made - Whether fact of default judgment raises an estoppel.

PRACTICE & PROCEDURE - Procedure for allowing a proposed amendment to raise a new defence - *Supreme Court Rules* rr1.10 and 3.02; *Supreme Court Act* s80.

NAALAS -v- Liddle

08.09.94 COA: Martin CJ, Angel & Mildren JJ

In 1975, the respondent ("R") had instructed CAALAS to issue proceedings for negligence as a result of injuries he had sustained that year in a motor vehicle accident. No proceedings were instituted by CAALAS within the then limitation period. In October 1982, R had instructed NAALAS ("A") to act on his behalf in relation to his personal injury claim and also to bring proceedings against CAALAS for negligence. R alleged that no steps were taken by A to pursue either matter; in March 1990 R instituted proceedings against A. Having failed to serve a defence within the prescribed statutory period, interlocutory judgment was entered against A for damages to be assessed in August 1991. In September 1991 the Master refused to set aside the judgment; R was put on notice at this time of A's intention to raise the issue of contributory negligence on R's part in relation to the motor vehicle accident. It was submitted by R that even if there were a properly founded claim against him for contributory negligence, this was not a defence and was insufficient to have the judgment set aside. The matter was set down for trial.

At the commencement of the hearing on the assessment of damages, the question arose as to whether A could properly raise the issue of contributory negligence in the course of cross-examination. It was held that this would not be permitted. A's application to set aside the default judgment was refused, as was an application for an extension of time to appeal against the Master's decision refusing to set aside the judgment.

The main appeal point concerned the trial judge's refusal to permit A to raise all of the issues of contributory negligence outlined by A in a notice served at trial.

The trial judge ruled that R would suffer an injustice by way of a delay in proceedings should the issue of contributory negligence be raised, and this could not be compensated for by an order for costs, bearing in mind the extraordinary length of time which had elapsed since the alleged injury and the hearing of this matter. It was further held that the issue of contributory negligence should have been pleaded, and the opportunity for doing that was lost when A's application to set aside the judgment entered in default of filing a defence was refused by the Master, no appeal having been made from that decision. The issue of contributory negligence not being properly before the court, the trial judge held that she had no jurisdiction to consider it as provided for by s16(1) of the *Law Reform (Miscellaneous Provisions) Act*. It was further reasoned that A was estopped from raising the question of contributory negligence because of the default of judgment entered against it.

HELD, per Martin CJ, Angel and Mildren JJ concurring allowing the appeal and ordering a retrial:

(1) The effect of a judgment in default of defence for damages to be assessed (r21.03 (1)(b) *Supreme Court Rules*) is final as to the right of the plaintiff to recover the damages (to be assessed) from the defendant, but interlocutory only as to the amount of those damages.

Gamble -v- Killingsworth & McLean Publishing Co Pty Ltd [1970] VR 161 at 172.

The effect of signing interlocutory judgment for damages to be assessed is that the facts pleaded in the Statement of Claim are deemed to have been admitted, and the plaintiff's right to recover damages, as effectively pleaded, is finally determined: Wickham -v- Tacey (1985) 36 NTR 47, per O'Leary CJ.

However, as held by the Privy Council in Kok Hoong -v- Leong Cheong Kweng Mines Ltd [1964] AC 993 at 1010-12 (quoting Lord Maugham LC in New Brunswick Railway Co -v- British & French Trust Corporation Ltd [1939] AC 1 at 21): "...a default judgment is capable of giving rise to an estoppel per rem judicatum. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand. For, while from one point of view a default judgment can be looked upon as only another form of a judgment by consent...from another a judgment by default speaks for nothing but the fact that a defendant, for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question...default judgments, though capable of giving rise to estoppels, must always to scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and...they can estop only for what 'must necessarily and with complete precision' have been thereby determined."

Effem Foods Pty Ltd -v- Trawl Industries of Australia Pty Ltd (1993) 115ALR 377, referred to.

There was no decision nor written reasons by the Master on file as to the merits of any defence to the matters raised in the Statement of Claim. Here, A did not attempt to put forward any defence, but sought only to raise the issue of contributory negligence (no longer a defence to a claim for negligence). This case is therefore distinguishable from Access Finance Corporation Pty Ltd -v- Golubovic and Anor (1991) ASC 56-089.

There was no res judicata or estoppel operating against A arising from the default judgment or the failure of its application to set it aside such as would prohibit it from raising the issue of contributory negligence.

(2) The question that arises in this case, is whether evidence revealing a degree of contributory negligence should be permitted to be given where contributory negligence has not been pleaded. [Although R had prior notice of alleged contributory negligence regarding his involvement in the 1975 motor vehicle accident, there appeared to be nothing on the Court record to indicate he had prior notice of his alleged contributory negligence in relation to his claim against CAALAS.]

Prior to the enactment of s16 of the *Law Reform (Miscellaneous Provisions) Act*, contributory negligence was required to be pleaded. [The Chief Justice then examined the authorities on this issue; the application of Fookes -v- Slaytor [1979] 1 All ER 137 arose]. In Christie -v- Bridgestone Australia Pty Ltd (1983) 33 SASR 377, contributory negligence was

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not specifically pleaded by D, but the question of such negligence was never raised during the hearing of the action. The trial judge nonetheless found negligence on both sides and apportioned liability accordingly. Mitchell ACJ and White J held that the plea of contributory negligence would only be available if pleaded. The trial judge was not required by statute to reduce assessed damages regardless of the conduct of the parties before and at the trial. It was observed that "...if the Parliament intended that a judge should of his own motion, cut across the established rules of practice and procedure, it would have to say so in clear words..." (at 388).

However White J observed that although some judges take the view that it is not competent for the parties to adduce evidence of contributory negligence or to address argument on the point unless it has been pleaded and a contribution notice served, **"...I prefer the view that it is competent for the parties, by virtue of the force of the section, to examine and cross-examine with respect to contributory negligence and to contend at the end of the trial that there is evidence thereof *without any pleading or notice*, provided both counsel are on notice throughout the trial that it is an issue in the case. Notice that contribution is a live issue prevents injustice to the other side. Naturally it is desirable to raise the issue on the pleadings so as to give early and express notice to the plaintiff. Without pleadings, the defendant should advise the plaintiff that it is an issue in time for him to examine, cross-examine and address before the opportunity is lost" (at 389).** [Angel J expressed general agreement with White J's judgment in Christie.]

A defendant wishing to rely upon s16 must comply with the *Supreme Court Rules* as to pleading, including as to particulars. Failure to do so may well mean that all issues between the parties are not sufficiently defined as early as may be in the course of the proceedings so as to enable the rules to be employed in such a way as to assist the Court in ensuring that all questions in the proceedings are effectively, completely, promptly and economically determined. (r1.10 *Supreme Court Rules* and s19 *Supreme Court Act*). Trial judges should insist that before matters which go to a defence are permitted they be reduced to writing, in the form of a pleading, served and filed.

(3) As to whether A ought to have been allowed to file a defence raising the issue of contributory negligence, there is nothing in principle distinguishing a proposed amendment to raise a new defence, and the filing of a defence out of time pursuant to r3.02. Rule 1.10 applies to both as does s80 of the *Supreme Court Act*. The pleading envisaged should have been allowed unless it appeared that injustice would thereby have been occasioned to P, there being nothing to suggest fraud or improper concealment of the defence by D: Cropper -v- Smith (1884) 26 ChD700 at 710-11; Clough & Rogers -v- Frog (1974) 4 ALR 615 at 618, applied.

A having taken the view that it was not necessary to plead contributory negligence, the issue was not before the trial judge until the commencement of the trial. A should not have been deprived of the opportunity to raise the issue of contributory negligence simply because this was sought to be done 18 years after the accident; it had not been a party to proceedings until 1990. Further, A was in no position to raise the issues relating to R's contributory negligence in regard to the legal services negligence, until it had been sued.

Had R placed before the trial judge matters of prospective prejudice to him should a pleading of the type in question have been allowed, then it would have been proper for A to be given the opportunity to file a defence at the commencement of the trial, on condition it pay the costs of the application and R's costs thrown away, should an adjournment have been necessary upon R's application.

[The Chief Justice then considered cases dealing with late applications to amend where case flow management procedures are available and ruled on the date and which R's loss was to be assessed.]

Appeal against decision of trial judge refusing defendant leave to raise issues of contributory negligence at trial where not previously pleaded and where default judgment entered against it.

J Waters, instructed by NAALAS, for the appellant.

G Hiley QC, instructed by Cridlands, for the respondent.

LEGAL PRACTITIONERS - Qualifications and admission - Practical legal training - Whether Articles of Clerkship must be served wholly within the Territory - "master solicitor" - Whether a master solicitor should practise solely in the jurisdiction of the Territory - Discretion of Court to grant exemption - Legal Practitioners Rules - rr11(1)(a), (b) and (c), 11(3), 22(1)(a), 22(3)(a), (b) and (c), and 25(2).

Application for Admission to Practise as a Legal Practitioner - M J Nelson

09.09.94 Martin CJ & Kearney J

The applicant ("A") sought exemption under r11(3) from the requirements of r11(1)(a) of the *Legal Practitioners Rules*, and a consequential order that on the basis of other material adduced, she be admitted to practise. Rule 11(1)(a) provides:

"...the practical requirements for admission of a person who has obtained qualification and experience in Australia are the successful completion of -

(a) not less than one year's satisfactory service under Articles of Clerkship under these Rules..."

Rule 11(3) allows the Court to grant an exemption from the requirements of r11(1)(a) if it is satisfied that an applicant "...has had experience in the practice of

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law in Australia...", other than as stipulated in the subrule. Whether such an exemption is granted depends on the circumstances of each case. Here, A had served as Judge's Associate for such time as to be given credit of 5½ months; she had served in the Territory approximately 8.3 months of the one year's Articles of Clerkship required by r11(1)(a). She had then served 3.7 months as a de facto articled clerk to a practitioner in Queensland. This practitioner held an unrestricted NT practising certificate. It had been contemplated at that time that his firm would amalgamate with the firm of her Territory master solicitor, but this did not occur. The assignment of Articles to the Queensland master solicitor had not been approved by the Board, on the grounds that it considered that the Rules required that the full year of Articles under r11(1)(a) be served in the N.T. Due to delay on A's part in complying with the approval provision (r27(2)), A was not aware until very late that her assignment would not be approved. As a result, she lacked 3.7 months' service as an articled clerk - hence this application to be exempted to that extent from the requirement of r11(1)(a).

HELD, per Kearney J, Martin CJ concurring, that A be granted exemption pursuant to r11(3) of the *Legal Practitioners Rules* and be admitted to practise as a legal practitioner in this jurisdiction:

(1) This application may more properly have been made under r25(2) to reduce the period of Articles by 3.7 months.

(2) [The Court considered the construction of Part 3 of the *Legal Practitioners Rules*, which deals with the admission of persons to practise law in the Territory.] In setting out the requirements for local applicants' qualifications and practical experience, Rules 9 -11 do not refer to any particular State or Territory; the reference is to "Australia". There is no explicit statement in the Rules that Articles of Clerkship entered into under r11(1)(a) must be served wholly within the Territory.

(3) When the Board is considering whether or not to approve an assignment of Articles under r27, the only matters about which it must be satisfied are identical with those specified in (a), (b) and (c) of r22(3). These are provisions applicable to an initial entry into Articles of Clerkship - that A have the required academic qualifications and be of good fame and character, and the master solicitor be qualified under r22(1)(a).

As to whether a "master solicitor" is required, by virtue of r22(1)(a), to practise solely in the jurisdiction of the Territory, it was held that it was not necessary that he/she do so. The fact that his name is on the roll means that disciplinary power may be exercised over him. The reference to "legal practitioner" in r22(1)(a) is clearly a reference to "legal practitioner" as defined by s6 of the *Legal Practitioners Act* (see s20(1) *Interpretation Act*). The master Solicitor must be qualified under r22(1)(a) and actually "carry on practice in the Territory".

The Board's interpretation of r22(1)(a) and conclusion that applicants for admission must serve Articles wholly within the Territory, is inconsistent with Rules 11(1)(b) and (c). These contemplate an applicant acquiring the necessary pre-admission practical legal skills outside the Territory in one of the institutions providing simulated practical training, considered by the Court to provide training appropriate for admission in this jurisdiction. In this context, the Board's interpretation of r11(1)(a) appears to involve an unnecessary restriction on the gaining of practical legal experience. It would be desirable for the Consultative Committee to put this important aspect of Admissions requirements beyond doubt for all jurisdictions.

(4) In the result, it was not necessary, in order to resolve this application, to decide whether or not the Board was correct in its view about where Articles should be served. There was no evidence that the Queensland master solicitor actually practised in the Territory - as is required under r22(1)(a). However, on the facts of this case, A had demonstrated that with the exception of full compliance with the one year requirement in r11(1)(a), she was well qualified for admission in all respects and meets the requirements of the rules. The primary consideration that the public be protected, was satisfied. The exemption pursuant to rr11(3) and 25(2) could therefore in the courts discretion be granted.

Re Mallett (1989) 95 FLR 63 at 68, applied.

Application seeking exemption pursuant to the Legal Practitioners Rules for admission to practise in the Territory.

J E Reeves, instructed by Breen Creswick De Silva, for the applicant.

N J Henwood, for the Law Society.

Northern Territory of Australia
Office of Courts Administration

INVITATION TO COMMENT

The Office of Courts Administration is developing it inaugural corporate plan. As part of the process it is keen to receive input from the community and the legal profession as to their perceptions of Courts Administration. It is likely that the plan could include the development of a Courts Charter.

You are invited to forward written submissions to the Chief Executive Officer, Office of Courts Administration, GPO Box 3547, DARWIN NT, by 4 November 1994. Telephone inquiries may be directed to Mary Robertson, Project Officer, on 89 5412. Your contribution is valued.

Obituary

Edward (Ted) Rowe

Edward (Ted) Rowe died on 17 October 1994 aged 74. Mr Rowe who was born at Sydney in New South Wales on 5 August 1920 was admitted as an attorney, solicitor and proctor of the Supreme Court of New South Wales on 26 August 1960.

He practised as Edward Rowe & Co in Sydney from 1960 until 1969.

"Ted" as he was known to all in the legal profession was appointed first Executive Officer of the Law Society of the Northern Territory in 1979 and held the position until he retired in 1991.

The Law Society owes a great debt to Ted for his hard work and dedication in managing the affairs of the Society during its formative years. He will be missed by all that knew him. Ted is survived by his wife The Hon Justice Sally Thomas and his children Penny, Phillip, Edward, Chris and Nick.