1984-060

JL

BOEHM

v.

HAYES & ORS

JUDGMENT

DAWSON J.

27.7.1984

BOEHM

v.

HAYES & ORS

This is an application under Order 26, Rule 18 of the Rules of Court for an order striking out the plaintiff's Amended Statement of Claim on the ground that it does not disclose a reasonable cause of action and for an order that the action be dismissed and judgment entered for the defendants. There is an alternative application under Order 63, Rule 2 that the proceedings be stayed on the ground that there is not a reasonable or probable cause of action or suit, but it was not suggested that the alternative application was based upon any different considerations to the application under Order 26, Rule 18 and, upon the view which I have formed, it is unnecessary to pursue the alternative application separately.

The application under Order 26, Rule 18 is an application upon the pleadings and does not seek to invoke the inherent jurisdiction of the Court to prevent abuse of its process. It is an application which involves two steps, the first of which is to show that there is no reasonable cause of action disclosed and the second of which is to show that the cause of action alleged is frivolous or vexatious.

No doubt in many cases the two steps may be considered together because, having regard to the sparing use which is made of the first step, if there is no reasonable cause of action this fact will provide a sufficient indication that further pursuit of the action is frivolous or, at least, vexatious.

A statement of claim should only be struck out under the rule where it is clear that no cause of action is disclosed. The procedure is not a substitute for demurrer or raising a question of law under Order 26, Rule 16. Various expressions have been used to describe what constitutes a clear case justifying the summary dismissal of an action and they are collected together by Barwick C.J. in General Steel Industries Inc. v. Commissioner for Railways (N.S.W.) (1964) 112 C.L.R. 125 in a passage at p.129:

> " . . . the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action - if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated. The test to be applied has been variously expressed; 'so obviously untenable that it cannot possible succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'."

See also Dey v. Victorian Railways Commissioners (1949) 78 C.L.R. 62 per Dixon J. at p.91.

I have reached the conclusion that this is not a sufficiently clear case to warrant my striking out the plaintiff's Amended Statement of Claim. That is, of course, to express no confidence in the ultimate success of the action. It means, however, that there is no point in any detailed examination of the case which the plaintiff seeks to put. That must be the subject of evidence and of full argument in the ordinary course. It is sufficient if I indicate briefly and in broad outline why I have reached the conclusion which I have, but before doing to is it necessary to outline briefly the claims made by the plaintiff.

He alleges that in November 1973 the Commonwealth Government in Cabinet decided to restructure the electronics components industry in Australia, presumably by, amongst other things, the re-arrangement of tariffs. At that time the plaintiff carried on a business manufacturing electrical components and loud speakers for radios. He carried on that business in a factory erected upon land purchased by him for that purpose at Terang. The Government's decision, so the plaintiff alleges, involved setting up a "Structural Adjustment Assistance Scheme" in order to compensate those manufacturers who were adversely affected by the decision. This was done by the Prime Minister publicly announcing the creation of the Structural Adjustment Assistance Scheme and

declaring that where structural change took place the Government and not the individuals who suffered "should foot the bill". Details of the terms and conditions upon which compensation would be paid are alleged, but it is unnecessary to set them out.

The plaintiff claims that the Commonwealth invited him to seek compensation "in consideration of forever ceasing to operate" his business. He says that an application by him for compensation was accepted by the relevant minister, who admitted that the plaintiff was eligible for "closure compensation in relation to fixed assets and stocks rendered unproductive and incapable of economic use".

The plaintiff alleges that his factory premises, plant, stocks and tooling were rendered valueless by the goverment decision and that, although the Commonwealth paid him compensation in the sum of $57,890.95, he is entitled to the further sum of $103,736.35 in accordance with the formula laid down by the Structural Adjustment Assistance Scheme.

The defendants, apart from the Commowealth, are alleged to be servants of the Commonwealth and responsible for the administration of the Structural Adjustment Assistance Scheme and for the proper assessment of compensation to be paid to the plaintiff.

The principal claim against the Commonwealth appears to be based upon an estoppel whereby the Commonwealth is precluded from denying the plaintiff's entitlement to the amount claimed by him. There are obvious difficulties in the way of such a claim. However, promissory estoppel has received some recognition in this Court at least between parties in a pre-existing contractual relationship and there are authorities in England which state the doctrine in a wider form. See Legione v. Hateley (1983) 57 A.L.J.R. 292, esp. at pp.253, 302; Central London Property Trust, Ltd v. High Trees House Ltd [1947] K.B. 130; Robertson v. Minister of Pensions [1948] 1 K.B. 226; Combe v. Combe [1950] 2 All E.R. 1115; W. J. Allen & Co. Ltd v. El Nasir Export and Import Co. [1972] 2 Q.B. 189. Cf. Howell v. Falmouth Boat Construction Co. Ltd [1951] A.C. 837 at p.845; Salemi v. MacKellar [No.2] (1977) 137 C.L.R. 396 at p.442. The limits of promissory estoppel have not been fully considered in this country and although it would seem to me that the plaintiff may encounter difficulty in establishing the existence of a contractual relationship with the Commonwealth, if that is necessary, and in proving that he acted to his detriment or material disadvantage on any promise made by the Commonwealth, if that is necessary, he should not be shut out from arguing that his case lies

within the limits of the doctrine or that those limits should be extended as a matter of principle to embrace his case.

There is a further allegation by the plaintiff, which would appear to extend to the Commonwealth, that, by reason of the matters pleaded, he has been denied natural justice. The foundation of this claim is a plea that the plaintiff had a legitimate expectation that he would be properly and fairly compensated for the loss suffered by him. However, there are no further facts pleaded which would identify what acts or omissions on the part of the Commonwealth amount to the denial of natural justice alleged. This is a defect which may be cured by pleading the appropriate facts and I think it is proper to give leave to amend the Amended Statement of Claim to do so. Clearly the relief claimed is inappropriate to a cause of action based upon a denial of natural justice as it is limited to a claim for damages and an order directing that proper compensation be paid. I think that I should also grant leave to amend the prayer for relief.

The remaining claim which extends to the Commonwealth is that by its servants or agents it fraudulently induced the plaintiff to sign a deed of release which purported to

release the Commonwealth from all claims in respect of compensation. Presumably this allegation of fraud is intended to found a claim for damages for it would otherwise be inappropriate for the plaintiff to plead it in his Statement of Claim rather than by way of defence. That being so, then clearly the cause of action is inadequately pleaded. It has long been a settled rule that "a charge of fraud . . . must be pleaded with the utmost particularity". See Blay v. Pollard and Morris [1930] 1 K.B. 628 at p.641; In re Rica Gold Washing Company [1879] 11 Ch. D. 36 at pp.43, 47. Moreover Order 29, Rule 5 requires particulars of an allegation of fraud to be given. It is an obvious rule because without details of the fraudulent behaviour alleged the defendant is unable to answer a charge of fraud. I think, therefore, that par.20 of the Amended Statement of Claim, which contains the allegation of fraud, is inadequately pleaded and that I should strike it out giving leave to replead the allegation with the necessary particulars.

The claim against the defendants other than the Commonwealth is that each of them was at all material times and from time to time a servant of the Commonwealth and responsible for the administration of the Structural Adjustment Assistance Scheme and for the proper assessment

of the compensation to be paid to the plaintiff and that in breach of their obligation to do so, each of them has failed to assess the compensation due to the plaintiff whereby the plaintiff has suffered damage. Here again there are obvious difficulties in the way of the plaintiff's claim. The difficulty of establishing a duty of care to the plaintiff on the part of the defendants or, if that can be done, of establishing any recoverable loss is immediately apparent. But a claim in negligence does, I think, sufficiently emerge, and since the application made to me is upon the pleadings and not to invoke the inherent jurisdiction of the Court (in which latter case the application might be based upon material outside the pleadings) it seems to me that the application cannot succeed in relation to this cause of action alleged against the first six defendants.

There is also an allegation against those defendants that they failed to supervise adequately or at all their subordinate officers in the proper administration of the Structural Adjustment Assistance Scheme and in the proper assessment of compensation to be paid to the plaintiff. There is no separate allegation of damage in relation to this claim but I think that that can be spelt out from what appears elsewhere in the Amended Statement of Claim. Otherwise this allegation of negligence stands upon the same footing as the other.

The allegation of fraud is made against the first six defendants as well as the Commonwealth and ought to be struck out in their case for the same reason as it ought to be struck out in the case of the Commonwealth, with leave to re-plead.

For these reasons I propose to order that the plaintiff have leave to amend the Statement of Claim further by re-pleading the allegation of denial of natural justice in par.19 of the Amended Statement of Claim so as to specify the matters relied upon as constituting the denial and to amend the prayer for relief in relation to this claim. I further propose to order that par.20 be struck out with leave to re-plead the allegation with the necessary particulars. I propose to order that these amendments be made within 14 days. Otherwise the applications should be dismissed. Since the applications before me were not entirely unsuccessful, having disclosed defects in the plaintiff's Amended Statement of Claim, I propose to make no order as to costs.

As this matter is an inappropriate one for the hearing and determination of this Court in the first instance, I propose to order that after the expiration of one month it be remitted to the Federal Court of Australia in Melbourne

and to make the formal orders which ordinarily accompany such an order.