CITATION:	*Maureen Jessie Heatley v James Sullivan* [2005] NTMC 001
PARTIES:	MAUREEN JESSIE HEATLEY
	v
	JAMES SULLIVAN
TITLE OF COURT:	Local Court at Katherine
JURISDICTION:	Local Court
FILE NO(s):	20321684
DELIVERED ON:	17 January 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	20 December 2004
JUDGMENT OF:	R J Wallace SM

CATCHWORDS:

Contract – Specific Performance – Limitation Act (NT) s 12, 13; s 20 "except so far as they [s 12, 13] may be applied by analogy".

REPRESENTATION:

Counsel:

Plaintiff:	P Tomkins
Defendant:	G Cole

Solicitors:

Plaintiff:	Cridlands
Defendant:	Graham Cole

Judgment category classification:	C
Judgment ID number:	[2005] NTMC 001
Number of paragraphs:	25

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

No. 20321648

BETWEEN:

MAUREEN JESSIE HEATLEY
Plaintiff

AND:

JAMES SULLIVAN
Defendant

REASONS FOR DECISION

(Delivered 17 January 2005)

Mr WALLACE SM:

1. The plaintiff has bought an interlocutory application (filed 26 November 2004) seeking leave to file and serve an Amended Statement of Claim – a draft, entitled "Substituted Statement of Claim" is annexed to the affidavit of Peter Tomkins sworn 25 November 2004. Further, the plaintiff seeks an order striking out the defendant's Defence if the defendant have not filed and served an Affidavit of Documents by 26 November 2004. Both parties were ordered to file and serve such an Affidavit within 14 days of 28 June 2004 by Mr Luppino SM. The defendant has not filed such an Affidavit. He did (on 20 December 2004) file a Supplementary list of Documents, not sworn to.

The "Substituted Statement of Claim"

2. The statements of claim by the plaintiff have a woeful history both in form and substance. There have, it seems, been four previous Statements of Claim: the original (filed 14 October 2003) an Amended Statement of Claim

(filed as of right on 10 December 2003), and two later, further amended statements, filed, apparently without leave, on 19 February 2004 and 30 August 2004 respectively. The latter was headed "Amended Further Amended Statement of Claim" so the proposed new title comes as something of a relief, as does the application for leave.

3. The Substituted Statement of Claim (hereafter the "SSOC") outlines an action in contract, or, more particularly, two contracts. The first contract – an oral agreement – ran from about February 1998 to about December 2001. It pertained to the farming of 100 hives of bees owned by the plaintiff, and placed under the terms of the contract with the defendant. The plaintiff was to contribute a small amount of the labour necessary – no more than one seventh – and there are various other terms pleaded about the creation of offspring hives. The plaintiff's claim is for her agreed share of the profits from the sale of honey produced from her hives (including offspring hives).

4. It is evident that, because of s 12 of the *Limitation Act*, which provides that "an action founded on contract …" is not maintainable after the expiration of "three years from the date on which the cause of action first accrues to the plaintiff", this claim is in difficulty for the period before 14 October 2000, i.e. three years before the first Statement of Claim was filed. Section 13 of the *Limitation Act* creates a similar difficulty in respect of actions for account, and that difficulty is relevant because the plaintiff will, it seems, require a remedy of that nature in order to establish what the profits, if any, were. Section 21 of the *Limitation Act* provides that: "Sections 12, 14, 15, 16, 18 and 19 do not apply, except so far as they may be applied by analogy, to a cause of action for specific performance of a contract or for an injunction or for other equitable relief".

5. It is the existence of these prescriptive provisions which no doubt explains the choice of the relief sought by the plaintiff in the SSOC, to which I will return.

6. The second contract, of which it is not pleaded that it was in writing, or oral, or partly one and partly the other, is said to have run from about December 2001 until at least May 2003. Under the terms of the second contract the defendant was to pay a reasonable rental for the plaintiff's hives (and the offspring hives) – the plaintiff asserts that a reasonable rental was $1.20 per hive per week – and to look after the hives properly and to deliver up the hives and offspring hives to the plaintiff on demand. She implies that no rental has been paid, and claims that on her demand only 60 hives were returned to her, in a degenerate, devalued condition, and that her other hives – it is not clear on the pleadings whether their return was attempted and refused, or not made at all – are worth nothing. She claims that her losses in that regard arise from a breach of a term of the contract requiring the defendant to take all reasonable steps in accordance with good beekeeping practice to maintain the plaintiff's hives and their offspring.

7. The relief sought by the plaintiff in the SSOC is:

> "A. An order by way of specific performance of the 1998 agreement that the defendant pay to the plaintiff one seventh of the profits from the sale of honey produced from the plaintiff's hives, the defendant's hives and the additional hives from June 1998 to December 1999;
>
> B. An order by of specific performance of the 2001 agreement that the defendant pay to the plaintiff the sum of $13,680.00 for rental of the plaintiff's hives and the additional hives from December 1999 to May 2003;
>
> C. Damages in the sum of $8,800.00 for the loss in value of the plaintiff's hives and the additional hives or in the alternative a reasonable sum…. "

8. The defendant opposes the amendment. Mr Cole, counsel for the defendant argued that the plaintiff's use of the equitable remedy of specific performance was no more that a mask for what is essentially an action in

contract, and that the mask had been put on only to evade the *Limitation Act*. I do not understand Mr Tomkins, counsel for the plaintiff, to be denying that such was the motive behind the plaintiff's choice of remedy, but Mr Tomkins argued that the choice was properly the plaintiff's. In my opinion that argument is correct. Mr Cole went on to argue that this is not a case in which the court would ever make an order for specific performance. He argued that the general rule is that specific performance is only available where damages are not an adequate remedy.

9. It is clear that, the claim being for various amounts of money, damages would be an adequate remedy.

10. Mr Cole further argues that specific performance is particularly inapposite as a remedy to contracts which have been terminated. In respect of the first contract, he describes it as "a nonsense to seek an order for specific performance of an agreement that no longer exists, that was replaced/terminated by consent". In respect of the second contract, he argues that "it is incorrect to seek specific performance of a leasing agreement that has been terminated lawfully in accordance with the agreement" [i.e. in May 2003]. (I quote from Mr Cole's written submissions, paragraphs 7 and 9 respectively.)

11. Mr Cole's "nonsense" and "incorrect" would appear to be echoes of the distinction drawn by Lord Selborne LC in *Wolverhampton and Walsall Railway Co v Landon and North-Western Railway Co* (1873) LR 16 Eq 433 at p439, saying that the availability of the remedy in the strict and proper sense:

> "presupposes an executory as distinct from an executed agreement, something remaining to be done, such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other in which by the preliminary agreement they were intended to be placed".

12. This distinction was also alluded to by Dixon J (as he then was) in *JC Williamson Ltd v Lukey* (1931) 45 CLR 252 at p297. A distant awareness of this distinction may go some way to explaining why it seems so bizarre that the plaintiff should be claiming this relief to secure an amount of money in a contract case of this sort.

13. Mr Tomkins argues that, bizarre or not, rare or not, the plaintiff's choice must be respected and that the amendment ought to be allowed so long as there is seen to be an arguable case for it: that is, unless it can be demonstrated that the claim for relief in hopeless. He cites the judgement of Asche CJ in *Woodhead Australia (South Australia) Pty Ltd v The Paspalis Group of Companies* (1991) 103 FLR 122, which, on the relevant points, is accurately summarised in the headnote:

> "(1) In this case the onus was on the plaintiff to establish that these amendments should be allowed, but in such interlocutory proceedings a court should be very cautious about how far it confined a party's freedom of movement in the future
>
> (2) If the facts alleged set up at least an arguable case for the cause of action relied on, the judge, on interlocutory proceedings should not have that case argued before him and determine the result. Otherwise he usurps the function of the trial judge".

14. As is evident from paragraph (2), that case concerned a proposed amendment which, the defendant contended, did not disclose a cause of action. The present case is concerned not with the question of cause of action, but with the claimed remedy. In the former case, the course of evidence can flesh out an apparently feeble pleading. In the present case, where there is obviously an arguable cause of action, I am able to consider whether the remedy sought would conceivably be granted by the court on the assumption that all the matters pleaded and implied by the pleadings are proved. I proceed on the basis that I should only disallow the prayer for relief if I am satisfied that it is utterly hopeless of success, completely futile.

15. I am so satisfied. Equity follows the law – most of the time. Where it does not, there is a reason. Why should it not follow the law enacted by Parliament in the *Limitation Act*? The plaintiff may look to comparable instances: perhaps the most promising, on the surface, is the line of cases in which Equity has found ways to do justice which would be denied by the statutory requirement that certain contracts be in writing. Among these ways is the remedy of specific performance, either in the strict sense (obliging the defaulting party to provide the necessary writing) or in the less strict sense of a sort of injunction – mandatory or prohibitive – to carry out a term or terms of the oral agreement. The trigger for such intervention is part performance by the plaintiff. Mr Tomkins might argue that what holds for the Statute of Frauds, should hold for a Statute of Limitations.

16. What there is lacking in such an argument by analogy is any equivalent to the rationale that arises from part-performance. Where a plaintiff has performed, or part performed his obligations pursuant to an oral agreement, it is unconscionable for a defendant to plead the Statute of Frauds and thus avoid the enforcement of obligations binding on him by his promise. See Dixon J (Gavan Duffy CJ concurring) in *JC Williamson v Lukey* at pp 300 – 301. No such rationale binds the conscience of a defendant to a claim that has been brought outside the period fixed by statute. There is no basis for the exercise of an extraordinary corrective remedy.

17. In any event, I am not condemned to consider the matter in the uncertain light of analogy. There is a mass of law, much of it quite old indicating that statutes of limitation which confine their prescriptions to actions at law nonetheless bar equitable remedies that might otherwise follow from such actions. A recent discussion of the further fringes of this relationship is contained in *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457.

18. More directly to the point, in *Firth v Slingsby* (1888) 58 LT 481 at p483 Stirling J held, according to the learned authors of the 4th edition of

Meagher, Gummow & Lehanes Equity: Doctrines and Remedies (Butterworths 2002, p 1015) "that a court exercising equitable jurisdiction cannot grant specific performance of a contract for a breach of which the plaintiff could not, owing to the operation of a Statute of Limitation, sue for damages".

19. However, s 21 of the *Limitations Act*, reproduced above, takes the question out of the area of judge made law. On the face of s 21, Equity, as represented by the remedy of specific performance, need not follow the Law, represented by s 12 etc of the Act "except so far as they may be applied by analogy". What does this mean? In my opinion the meaning is clear. As Lord Westbury LC said in *Knox v Gye* (1872) LR 5 HL 656 at p 674-5:

> "For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the Statute and imposes on the remedy it affords the same limitation …. Where a Court of Equity frames its remedy upon the basis of the Common Law and supplements the Common Law by extending the remedy to parties who cannot have an action at Common Law, there the Court of Equity acts in analogy to the Statute, that is, adopts the Statute as the rule of procedure regulating the remedy it affords [My emphasi]."

20. This is by no means an isolated statement – see *Equity: Doctrines and Remedies* p 1016.

21. I am therefore of opinion that s 21 of the *Limitation Act* does not permit the use of the remedy of specific performance to outflank the limitation period for the commencement of an action for breach of contract. There is, therefore, no reason, no practical advantage offered by this remedy. It being the case that damages do provide an adequate remedy for that part of the claim that may be maintained – that part arising since 14 October 2000 – it is inconceivable that the court would be moved to order specific performance.

22. I therefore decline leave for the plaintiff to file and serve a statement of claim in the form of the SSOC.

Discovery

23. There is nothing before me to excuse the defendant's failure to comply with Mr Luppino's order of 26 June 2004. In the circumstances where the exact shape of the plaintiff's claim is not known, I will not immediately strike out the defendant's Defence, although I am tempted to.

24. Instead I propose to make a self executing order, that unless the defendant file and serve an affidavit of documents on or before a reasonably proximate date, the Defence may be struck out. Mr Cole being on holidays today, and the defendant's availability being unknown to me, I will have to enquire as to what is practicable.

25. As to the question of costs of the application as a whole, the defendant is clearly in the wrong in relation to discovery, and the plaintiff's application to substitute a new statement of claim is clearly, in my opinion, wrong headed. The latter issue no doubt took up more of the lawyers' time: the former ought to be regarded more gravely by the Court. I think each party should bear its own costs of and incidental to this application.

Dated this 17th day of January 2005.

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STIPENDIARY MAGISTRATE