ACORI v. ALGOL MARITIME LIMITED

COURT OF APPEAL (Fieldsend, P., Huggins and Davis, JJ.A.):
September 27th, 1993

Limitation of Actions—tort actions—personal injury—claim against employer for breach of contractual duty to compensate for injury at work is contract action, not personal injury action, for purposes of Limitation Ordinance, s.4(1), proviso—limitation period therefore six years, not three

The appellant brought proceedings in the Supreme Court to recover damages for breach of contract.

The appellant was injured in the course of his employment as a seaman on board the respondent's ship. He claimed entitlement to an annuity, payable without proof of fault on the part of the respondent, under a collective agreement the terms of which were incorporated into his contract of employment. The respondent declined to pay, and the appellant commenced proceedings within the six-year limitation period for actions founded on contract or tort but outside the three-year period for personal injury actions. The respondent applied to strike out the writ as statute-barred under the proviso to s.4(1) of the Limitation Ordinance. The Supreme Court (Pizzarello, A.J.) acceded to this application, dismissing the claim on the ground that the damages claimed by the appellant consisted of or included damages in respect of personal injury.

On appeal, the appellant submitted that his claim did not consist of damages in respect of personal injury, since his injuries had not been caused by the breach of contract giving rise to his cause of action, namely, the respondent's failure to pay the annuity.

The respondent submitted in reply that the Supreme Court had applied the proper test for deciding whether the proviso to s.4(1) applied, by considering the content of the action and concluding that the injury sustained on board the respondent's ship was the essence of the appellant's claim.

Held, allowing the appeal:

The appellant's claim was not statute-barred, since the alleged breach of contract was not the cause of his injuries. For the purpose of the proviso to s.4(1) of the Limitation Ordinance, prescribing a three-year limitation period for personal injury actions, damages "consisting of or including damages for personal injury" could be paraphrased as "compensation for a wrong consisting of those injuries." Here, the respondent's liability under the collective agreement was purely contractual and independent of any

fault on its part. The fact that the claim was against the appellant's employer and closely related to the injuries sustained in its employment did not determine its proper nature (page 124, lines 8–15; page 125, lines 6–41; page 126, lines 15–22; page 126, line 37 – page 127, line 17; page 131, lines 7–20; page 132, lines 1–12).

Cases cited:

(1) *Ackbar* v. *Green (C.F.) & Co. Ltd.*, [1975] Q.B. 582; [1975] 2 All E.R. 65, followed.

(2) *McGahie* v. *Union of Shop Distrib. & Allied Workers*, 1966 S.L.T. 74, followed.

Legislation construed:

Limitation Ordinance (1984 Edition), s.4(1): The relevant terms of this sub-section are set out at page 126, lines 24–36.

P.J. Isola for the appellant;
L.E.C. Baglietto for the respondent.

FIELDSEND, P.: The appellant was a seaman employed by the respondent on the *M.V. Meonia*. It is alleged that on January 31st, 1987 in a Swedish port the appellant suffered an accident whilst working on the ship, for which he was not responsible in part or at all. As a result he alleges that his degree of disability is 100%.

He alleges that his contract of employment incorporates the terms and effect of the International Transport Workers' Federation Collective Agreement ("the ITWF Collective Agreement"). Article 18 provides:

> "A Seafarer who suffers an accident whilst in the employment of the Owners through no fault of his own, including accidents occurring whilst travelling to or from the ship or as a result of marine or similar peril, and whose ability to work is reduced as a result thereof, shall receive from the Owners in addition to his sick pay (Articles 13 and 14 above), an annual annuity calculated on his basic pay at the rate given in the table below:
>
> | Degree of disability | Rate of Compensation |
> |---|---|
> | % | % of basic pay |
> | 100 | 86" |

On January 29th, 1993 the appellant issued a writ claiming damages for breach of contract, alleging that in breach of Article 18 the respondent has failed to pay an annuity in part or at all.

The respondent contends that the action is statute-barred by the terms of s.4(1) of the Limitation Ordinance. This provides a limitation period of six years for actions founded on simple contract or tort, with a proviso that the period shall be three years—

> "in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of

> provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person…"

This contention the learned judge held was sound and, the writ having been issued after a lapse of three years, he dismissed the claim as statute-barred.

It is apparent that the appellant's claim is not a claim for damages for an injury wrongfully caused by the respondent. Article 18 of the agreement relied upon provides for the payment of compensation in respect of an injury occurring to the appellant without fault on the part of the respondent. The only limitation is that the accident must have been suffered through no fault of the appellant. The short issue in the appeal is whether the damages claimed "consist of or include damages in respect of personal injuries."

The import of the English and of the Scottish provisos (which are in identical terms to that of Gibraltar) was considered in *Ackbar* v. *C.F. Green & Co. Ltd.* (1) and in *McGahie* v. *Union of Shop Distrib. & Allied Workers* (2). In the former case the claim was for an alleged breach of contract by the defendant insurance brokers, who had failed to insure the plaintiff whilst travelling as a passenger in his own van. It was held, according to the headnote to the case in the *Law Reports* ([1975] Q.B. at 583), that—

> "the action was for an alleged breach of contract by the defendants, whereby the plaintiff lost the chance to recover his losses from the driver or his own insurers [following injuries sustained as a passenger in the van]; that the damages which the plaintiff might have recovered were only the measure of damages claimed in the present action and the present claim did not consist of or include damages for personal injuries…"

And hence it did not fall within the three-year limitation period.

The latter case concerned a claim by a worker against her trade union for failing to pursue her claim against her employers for a personal injury sustained at work. There it was held that the loss she suffered was the right to sue her employers and that this had not caused her any personal injury. It was said (1966 S.L.T. at 75) that "the expression 'damages in respect of personal injuries' may be paraphrased as 'compensation for a wrong consisting of personal injuries'" and that while an inquiry into her personal injuries would be necessary this was "only for the purpose of evaluating the right she has lost…"

Mr. Baglietto, for the respondent, contended that these cases were distinguishable on the basis that there was no link between the defendants and the injuries sustained by the plaintiffs, whereas here the injury was closely connected with the respondent on whose ship the appellant was working and is the very essence of the appellant's claim under Article 18.

He says that therefore the learned judge correctly applied the test propounded by Croom-Johnson, J. in *Ackbar* v. *C.F. Green & Co. Ltd*. ([1975] Q.B. at 588), namely: "[W]hat is this action all about?" when he decided it was "a claim for damages for personal injuries or in other words a personal injury action."

It is true that there are distinguishing features between the two authorities and the case now before us, but one thing is clear and that is that this is not a claim for damages for personal injuries. It is a contractual claim for compensation as provided for in Article 18. It is not a claim which for its success depends upon any fault of the respondent being established, and while there will have to be established a degree of disablement, it will not be necessary to establish a quantum of damages—that flows from the terms of Article 18.

In my view, it is correct to say, as Lord Fraser said, that "the expression 'damages in respect of personal injuries' may be paraphrased as 'compensation for a wrong consisting of personal injuries.'" This is consistent with what Croom-Johnson, J. says ([1975] Q.B. at 588), namely, that the "damages in respect of personal injury … must be the same damages as are claimed for the negligence, nuisance, or breach of duty…" He goes on to say that "when the words 'claimed by the plaintiff for' occur, the word 'for' is to be read [as] 'having been caused by,'…" It is true he may be recounting counsel's argument but he does so without dissent. But even if it is merely recounting counsel's argument, it seems to me to be a convincing argument and one which I adopt.

I would go further and say that the proviso should be read as follows:

> "Provided that in the case of actions for damages *caused by* negligence, nuisance or breach of duty … where the damages claimed by the plaintiff *having been caused by* the negligence, nuisance or breach of duty consist of…"

That is, substituting the words emphasised for the word "for" in each case. This would also coincide with the reasoning of Lord Fraser quoted above.

On that basis, this was not an action for damages caused by negligence, nuisance or breach of duty—even of a contractual duty. This was not a claim truly based on a contractual duty the breach of which caused damage, let alone on a breach of contractual duty which caused a person injury. It was a claim for money due under a contract to pay compensation in the event of an accident causing a disability. This is a long way from being a claim for personal injuries and for that reason is not a claim "all about" damages in respect of personal injuries, if that is the test to be applied.

An example may clarify my view. Assume that a person takes out an accident policy providing, say, for an indemnity of £500 for the loss of an arm. An action for the indemnity which the insurer has wrongfully declined to pay would not be an action for damages caused by a breach of

duty: it would be, as here, merely a contractual claim for payment under the contract, whether characterized as damages, as here, or not.

In my view the appellant's claim was not statute-barred and the appeal should be allowed and the learned judge's order set aside.

HUGGINS, J.A.: It is conceded that the judge correctly held that the case was governed by *Ackbar* v. *C.F. Green & Co. Ltd.* (1) and asked himself the question: "[W]hat is this action all about?" The judge did not answer that question directly but said it was clear that the case was one for damages for personal injuries. With respect, I cannot agree. I think the judge was misled by the form of the question which had been posed by Croom-Johnson, J., for, as was said in McGee, *Limitation Periods*, at 56 (1990), that learned judge was reiterating "the basic rule that the essential task in categorisation is to identify the true basis of the action."

This was not a claim for damages for personal injuries but a claim for damages for breach of contract, and the personal injury was merely an event without which there would probably not have been a breach of contract. Counsel for the respondent put the test in the form: "What made the plaintiff issue these proceedings?" The answer to that must be not that he had suffered damage by reason of the personal injury but that the defendant had failed to honour its undertaking to pay an annuity in the circumstances which had arisen.

The material part of s.4(1) of the Limitation Ordinance reads:

> "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—
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> (*a*) actions founded on simple contract or on tort;
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> …
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> Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision), where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years."

Accepting that this was an action for breach of duty (a duty which existed by virtue of a contract), it was not an action where the damages claimed for that breach included damages in respect of the personal injury. On the factual basis adopted by the judge, there could be no damages for this personal injury: the injury did not result from any negligence, nuisance or breach of duty. The claim for damages was based upon a breach of contract which arose after the personal injury, although, of course, there would have been no liability under the relevant parts of the contract unless the injury had occurred. In *Ackbar's case* (1) there was personal

injury in respect of which damages could have been claimed but for the alleged negligence of the brokers. Here there could never have been a successful claim for damages for the personal injury, because there was no breach of duty which caused the injury. As counsel for the plaintiff put it in *Ackbar's case* ([1975] Q.B. at 584): "The proviso … applies only when the personal injuries are sustained through the same breach of duty as that which gives rise to the action."

That argument was twice rehearsed by Croom-Johnson, J. in his judgment and, although he did not say in so many words that he accepted it, he did say (*ibid.*, at 585) that the cause of action was "breach of [the defendants'] duty to have the lorry covered against passenger liability…"; a breach of duty which was not the same as the breach of duty (the duty to take care) alleged to have caused the injury.

It is true that in *Ackbar's case* (1) the breach of contract alleged was by a party not involved in the accident, whereas here the promisor was the owner of the vessel on which the accident happened and the employer of the plaintiff, but that is not material. If the respondent's argument is accepted, the result is that the limitation period is three years. If the annuity had been payable by a third party (for example, under an insurance policy taken out by the plaintiff), I think it was admitted that the limitation period would be six years, although in each case the cause of action would be the same. That cannot be right.

It follows that I think the limitation period for this action was six years and that the appeal should be allowed.

DAVIS, J.A.: This is an appeal against the decision by Pizzarello, A.J. that the plaintiff's (the present appellant's) claim for an annuity in compensation for 100% disability arising from injuries suffered in an accident on January 31st, 1987 on board a vessel belonging to the respondent, as provided for in an agreement incorporated in the appellant's contract of employment with the respondent, was statute-barred by virtue of the proviso to s.4(1) of the Limitation Ordinance.

The plaintiff's statement of claim, as well as claiming an annuity or lump sum by way of compensation for disability, claims medical expenses, sick pay and leave payment, all of which are alleged to arise under the terms of the contract entered into between the appellant and the respondent, but we are not concerned with these claims for the purposes of this appeal.

In para. 22 of its defence the defendant (the respondent) claimed that that part of the plaintiff's action comprising a claim for compensation for disability arising from injuries suffered in the accident of January 31st, 1987 was statute-barred by virtue of the proviso to s.4(1) of the Limitation Ordinance because it was not brought within three years of the date on which it occurred. Accordingly, the defendant applied to the Supreme Court to have the appellant's claim struck out.

This application came before the learned judge as a preliminary point. For the purposes of the application, Pizzarello, A.J. assumed the following facts which I take from his ruling:

"(a) the plaintiff was employed by the defendant by virtue of a written contract of employment dated September 2nd, 1986;
(b) the terms and effect of the International Transport Workers' Federation Collective Agreement formed a part of the contract;
(c) the ship's articles are deemed to include the ITWF Collective Agreement;
(d) on January 31st, 1987 the plaintiff suffered an accident whilst in the employment of the owners of the vessel;
(e) at the time the vessel was lying in a port in Sweden;
(f) the plaintiff reported the matter to the Master at the time of the vessel '*Meonia*';
(g) the accident was no fault of the plaintiff;
(h) the plaintiff was not examined by a Medical Officer until February 12th, 1987 at Barcelona;
(i) the plaintiff thereafter was under medical treatment;
(j) the owners were aware."

The learned judge found as follows:

"5. No evidence has been led and the facts that I have assumed are those pleaded by the plaintiff. On the state of those pleadings, the matter is best approached by asking the question posed by Croom-Johnson in *Ackbar* v. *C.F. Green & Co. Ltd.*: '…[W]hat is this action all about?' It is to me clear beyond a peradventure that this is a claim for damages for personal injuries or, in other words, a personal injury action. As such, all claims in the statement of claim in that respect are statute-barred and ought to be dismissed."

Article 18, "Disability," on which the appellant based that part of his claim which is the subject of this appeal, reads as follows:

"A Seafarer who suffers an accident whilst in the employment of the Owners through no fault of his own, including accidents occurring whilst travelling to or from the ship or as a result of marine or similar peril, and whose ability to work is reduced as a result thereof, shall receive from the Owners in addition to his sick pay (Articles 13 and 14 above), an annual annuity calculated on his basic pay at the rate given in the table below:

Degree of disability %	Rate of Compensation % of basic pay
100	86"

Mr. Isola, for the appellant, submitted that while the learned judge was correct in referring to *Ackbar* v. *C.F. Green & Co. Ltd.* (1), he applied the decision incorrectly, in that instead of finding that the present case was a claim for damages for personal injuries, he should have found that it was a claim for damages for breach of contract to which a six-year period of

limitation applied under s.4(1) of the Limitation Ordinance and which was not therefore statute-barred.

Section 4(1) of the Limitation Ordinance, in so far as is relevant to this case, reads as follows:

> "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:-
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> (*a*) actions founded on simple contract or on tort;
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> …
>
> Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years."

Mr. Isola submits that the breach of duty on the part of the respondent in this case was its failure to pay the appellant compensation under Article 18 of the International Transport Workers' Federation Collective Agreement, which formed part of the appellant's contract with the respondent. This was a breach of the respondent's contract with the appellant as a result of which the appellant had suffered loss, namely the amount of the compensation due to him under Article 18. To ascertain what that compensation was, it was then necessary to look at the injuries sustained by the appellant as a result of the accident on January 31st, 1987 in order to assess his degree of disability and from that to quantify the amount of compensation due to him in accordance with the table set out in Article 18.

Mr. Isola, adopting the argument of the plaintiff in *Ackbar* v. *C.F. Green & Co. Ltd.* (1), submits that this action is not one where damages in respect of personal injuries are sought within the wording of the proviso to s.4(1), because to fulfil that wording the personal injuries must have been sustained by the same breach of duty as gives rise to the action.

In *Ackbar's case* the plaintiff, who was injured in an accident while travelling as a passenger in his own lorry, discovered that the defendants, his insurance brokers, had failed to carry out his instructions to obtain passenger liability insurance for the lorry. More than three but less than six years after the date of the accident, the plaintiff, who had been unable to recover his losses from his insurers, issued a writ claiming damages from the defendants for breach of their contractual duty to obtain the insurance.

On the preliminary point as to whether the action was statute-barred under the proviso to s.2(1) of the Limitation Act 1939 (which is in the same terms as the proviso to s.4(1) of the Gibraltar Limitation Ordinance), Croom-Johnson, J. said ([1975] Q.B. at 588):

"Arguments on the interpretation of this proviso tend to become circular, but the point is made that where the proviso imposes a three-year period when the damages consist of or include damages in respect of personal injury, those damages must be the same damages as are claimed for the negligence, nuisance, or breach of duty, and that, when the words 'claimed by the plaintiff for' occur, the word 'for' is to be read in its sense of 'having been caused by,' and that what this proviso is dealing with is what is commonly referred to as an action for personal injuries or, in other words, as a personal injury action."

He continued (*ibid.*):

"In the end if one asks the question here, 'what is this action all about?', one gets the answer that it is about an alleged breach of contract by the defendants, as a result of which the plaintiff lost the chance or right to recover his loss either from the driver or from his own insurers. I do not think that the damages sought in this action consist of or include damages in respect of personal injuries. Those damages, which might have been recovered heretofore, are only the measure of the damages now claimed. Accordingly, I find that the proviso has no application and that the period of limitation is six years in this case."

In support of his conclusion he referred to the Scottish case of *McGahie* v. *Union of Shop Distrib. & Allied Workers* (2), in which a woman sued her trade union for failure to pursue a claim for compensation on her behalf. She brought her action more than three years after she acquired her right against the union which relied on s.6(1)(a) of the Law Reform (Limitation of Actions, etc.) Act 1954, the wording of which is very similar to that of the proviso to s.2(1) of the Limitation Act 1939.

Lord Fraser in the Outer House of the Court of Session said (1966 S.L.T. at 75), as cited by Croom-Johnson, J. in *Ackbar* v. *C.F. Green & Co. Ltd.* ([1975] Q.B. at 588–589):

"'There is, in my opinion, only one item of loss in the damages claimed in this action, that item being the loss caused by the lapse of the pursuer's right to sue her employers. The lapse of that right did not cause her any personal injury. The matter was put correctly, … thus:- The expression 'damages in respect of personal injuries' may be paraphrased as compensation for a wrong consisting of personal injuries; but the pursuer in this action seeks compensation for a wrong consisting of allowing her right of action against her employers to lapse without having been exercised. Therefore, said senior counsel, the damages are not in respect of personal injuries. No doubt this action will necessitate inquiry into the nature and extent of the personal injuries sustained by the

> pursuer, but that is, in my opinion, only for the purpose of evaluating the right that she has lost or (what is the same thing) of quantifying her loss.'"

In the present case there is no question of the appellant's having lost a right to sue, as was the case in *Ackbar* v. *C.F. Green & Co. Ltd.* (1) and in *McGahie's case* (2).

While it appears in the present case that the appellant had no claim in negligence against the respondent for the accident in which he suffered injury giving rise to damages, nevertheless he has brought an action directly against the respondent in contract in which he claims compensation alleged to be due under a term of the contract for disability arising from injuries suffered in the accident. It cannot be said, however, that the alleged breach of contract—*i.e.* the failure to pay compensation under Article 18—caused the appellant's injuries. Similarly, in *McGahie's case* Lord Fraser held (1966 S.L.T. at 75) that the lapse of the pursuer's right to sue her employers "did not cause her any personal injury." Nor does the appellant seek compensation for what Lord Fraser, in paraphrasing damages (*ibid.*), called "a wrong consisting of personal injuries," but for the wrong of failing under a contract to make a payment due under the contract.

Mr. Baglietto submits that in contrast to *Ackbar's* and *McGahie's cases*, the appellant in the present case could not have brought any action had it not been for his injuries. He emphasized that the appellant's injuries were much more closely connected with the respondent than was the case in *Ackbar* and *McGahie*, in that the injuries had occurred on the respondent's vessel and in the course of employment by the respondent. His claim was for compensation, as provided for in his contract, for disability resulting from personal injuries suffered on board the respondent's vessel.

Accordingly where, applying the test propounded by Croom-Johnson, J. in *Ackbar* v. *C.F. Green & Co. Ltd.*, the learned trial judge asked the question: "what is this action all about?" Mr. Baglietto submitted, he came to the correct answer that it was "a claim for damages for personal injuries," notwithstanding that it was framed as a claim for damages for breach of contract, because "the damages claimed by the plaintiff (the appellant) for breach of duty consist of or include damages in respect of personal injuries" to the appellant and, accordingly, the action fell within the terms of the proviso to s.4(1).

In support of this argument that this was essentially a personal injury action, Mr. Baglietto drew attention to the fact that the appellant's statement of claim relies on the accident on January 31st, 1987 as the basis of his claim and not, as one would have expected in an action for failure to pay compensation in breach of the terms of the contract, on the respondent's refusal to accede to a request for payment of compensation made at some subsequent date after the extent of the appellant's disability resulting from the accident had been ascertained.

Cogent as I think Mr. Baglietto's argument is, I have come to the view that the proviso to s.4(1) is intended to apply to personal injury actions, that is, actions arising from a breach of duty, whether in contract or tort, which caused the damages claimed by the appellant. That is not the case here. In my view, the appellant's injuries, albeit closely connected with his claim for compensation, have to be considered only for the purpose of quantifying the appellant's degree of disability under Article 18 of the ITWF Collective Agreement incorporated into his contract from which the rate of compensation prescribed in that Article can be calculated.

Accordingly, I find that the appellant's claim for an annuity under Article 18 is not statute-barred and that this appeal should be allowed and the learned judge's order set aside.

Appeal allowed.