

CARLETON v. BYRNE

Kelly J.
Dec 3,
1951.

In the Supreme Court today Mr. Justice Kelly sat on the case of Carleton v. Byrne. Mr. McCubbery was in the Courtroom at 9.30am, His Honour took his place on the Bench at 9.31am approximately. Mr. White, Counsel for the Plaintiff, arrived in the Courtroom at 9.29 am.

When the case opened Mr. White announced that after discussion with Mr. McCubbery he, Mr. White, asked for an adjournment for twentyfour hours and may ask for a further adjournment. Mr. White informed His Honour that Mr. McCubbery had raised the question of privilege on certain documents, which he contended were secret state documents.

During the discussion which ensued Mr. White informed His Honour that he had served the Notice to Produce on Mr. McCubbery on the 1st December, requiring production of all documents. His Honour referred to his earlier decision in Chambers that under the adopted Queensland rules an order for production could not be made on a Summons for Directions in a civil case in the Papuan jurisdiction. His Honour then suggested to Mr. White that if Mr. McCubbery's claim of privilege was correct, and enforced, it was obvious that he would not be able to obtain authority from his clients to produce the privileged documents within twentyfour hours or within twentyfour weeks.

A further discussion then ensued and His Honour asked Mr. White, if he felt so disposed, to indicate the nature of his case. Mr. White then stated the crux of the matter was that his client acquired the articles at Manus and was claiming de facto possession of them, and that the Commonwealth were endeavouring to establish a better title. His Honour then commented that the claim of "de facto possession" in a civil action was a new experience to him.

After some discussion between His Honour and Mr. White of Counsel, His Honour stated that, without knowing the full details but knowing local conditions at Manus, it may be that what had occurred was that someone had taken possession of the articles in dispute and that in some way the Crown found the opportunity and took them back. Mr. White commented "took" to which His Honour replied "back", "I used the word 'back' which perhaps will be the question."

Some further discussion ensued and His Honour then asked Mr. McCubbery whether he could establish the Commonwealth title without reference to any secret documents. Mr. McCubbery replied that it might be possible but that in view of the seriousness of the matter he felt that he needed the secret documents. In the course of the discussion Mr. McCubbery indicated to His Honour that as barely forty-eight hours had elapsed since he was served personally with the Notice to Produce all documents, he had not had sufficient time to contact his clients, who were

primarily the Minister of State for External Affairs and the Treasurer, and possibly the Prime Minister, to obtain their instructions. Mr. McCubbery then advised His Honour that as far as he was aware, the Minister of State for External Affairs was at the moment either in Europe or America.

His Honour then intimated that he proposed granting the adjournment but if there were to be further adjournments he would seek the Chief Judge's instructions regarding hearing the case during vacation. He intimated to Mr. White that he had made all arrangements to go on leave at the end of January and unless the Chief Judge instructed him to hear the case during vacation he did not intend setting the precedent of hearing civil actions during vacation. His Honour stated that he could not remember clearly the vacation term but he believed it extended from about mid-December to the end of January. His Honour intimated that if necessary he would consider asking one of his brother Judges to hear the case and that he felt that as this was merely an application for the adjournment he was entitled to do so if he felt that such a course was desirable.

Mr. McCubbery informed His Honour that he would ask His Honour's permission for another Counsel to appear for the Defendant. His Honour remarked that it was not necessary at that stage for Mr. McCubbery to ask such permission. Mr. McCubbery replied that he was informing the Court of the probability of another Counsel appearing in his place.

In the course of the discussion Mr. White, Counsel for Plaintiff, informed His Honour that he had no doubt that Mr. Byrne was acting as Chief Collector of Customs and that Mr. Byrne and Mr. Reeves were acting under instructions from the Commonwealth.

The Court then rose until 9.30 a.m. on the 4th December 1951.

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JAMES I. CARLETON v. THOMAS PHILIP
MILES BYRNE

Kelly, J.
12/12/51

RULING ON DEMURRER

On a Summons for Directions before me on 19th June last I refused to make an order for pleadings, particulars, discovery, inspection, and interrogatories. There is no provision for such an order under the Rules of Court in the Papuan jurisdiction of this Court. However, on my suggestion, counsel for defendant, Mr. McCubbery of the Crown Law Office, delivered to plaintiff's solicitor Particulars of Defence. By consent those particulars have been filed in this action.

Paragraph 5 of the Particulars of Defence set up, in the nature of a demurrer, that the plaintiff's action is barred under Section 214 of the Customs Ordinance 1909-1950, of the Territory of Papua. That Section reads:- "Every proceeding against any officer shall except as mentioned in the next section be commenced within six months after its cause shall have arisen and not afterwards and the defendant may plead the general issue and give any special matter in evidence."

The Writ of Summons was issued on 30th May, 1951, claiming wrongful detention by the defendant of certain goods. The wrongful detention is alleged to have taken place on 26th November, 1948, and to have continued since that date.

The defendant's case has not yet been opened, and it appears likely that it will be some time before it can be opened. I have therefore invited both counsel to argue the demurrer now, and at the same time to argue the possibility of the plaintiff being estopped, on the evidence in the plaintiff's case. Leaving the right for the defendant to raise any question of estoppel should evidence in the defendant's case entitle that course.

After hearing both counsel on both points:-

On the action being barred:

On 14th February 1951 plaintiff's solicitor wrote to defendant as "Chief Collector of Customs" claiming that the defendant was wrongfully retaining the goods, Ex. "A".

On 16th March, 1951 the Plaintiff by his solicitor, served notice under Section 210 of the Customs Ordinance on the defendant as "Chief Collector of Customs", joining in that notice John Gerrard Smith as "Collector of Customs", Ex. "B".

On 16th April, 1951 the Acting Crown Law Officer wrote the plaintiff's solicitor, inter alia, "I wish to advise that the

Commonwealth have claimed and taken possession of the items claimed and taken possession of the items claimed by Mr. Carleton as his property with the exception of the following items" (enumerating three items), Ex. "C".

On 31st May, 1951 plaintiff's solicitor wrote a letter addressed "T.M. Byrne, Esq., Port Moresby," informing the defendant of the Acting Crown Law Officer's advice that the Commonwealth of Australia claimed the goods, and requesting the defendant to give an undertaking not to permit the goods to leave the shed in which they were then stored until the matter could be decided by the Court, Ex. "D".

Apparently the plaintiff's solicitor received oral information from the Crown Law Officer that the goods had been delivered into the custody of the Treasurer of the Territory. On 12th June, 1951 the plaintiff's solicitor wrote the Treasurer informing him of the Crown Law Officer's advice, claiming the goods on behalf of the plaintiff, and demanding immediate delivery to the plaintiff, Ex. "E".

On 3rd July, 1951 the Acting Crown Law Officer wrote plaintiff's solicitor that Mr. Reeve, the Treasurer, was acting for the Commonwealth, and that the Commonwealth does not admit any right or title as claimed by the plaintiff.

The plaintiff did open his negotiations, and demands, with the defendant as Chief Collector of Customs. However, he changed his course after receipt of Ex. "C", which brought the Commonwealth into the matter, and issued his Writ on 30th May, 1951, electing to sue the defendant personally, and not in his official capacity as Chief Collector of Customs.

In my opinion that was the duty of plaintiff's solicitor to his client. Warning had been received from the Acting Crown Law Officer that the defendant was not acting in his capacity as "Chief Collector of Customs," but acting on instructions from the Commonwealth.

On the evidence before me, at the present stage, the defendant is sued personally and not in his official capacity as Chief Collector of Customs. Therefore I find that he is not entitled to

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the benefit of Section 214 of the Customs Ordinance. The demurrer is over-ruled on that point.

On estoppel:

I refer again to the correspondence referred to above.

For the purpose of this particular action I feel that I can well adopt the definition of estoppel as given in Halsbury's Words and Phrases p.277:

"A man shall not be allowed to blow hot and cold - to affirm at one time and deny at another - making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which Courts of law have in modern times most usefully adopted. Cave v. Mills (1862), 7 H. & N.913, per Wilde, B., at pp.927,928."

The mere fact that the plaintiff made his opening demands on the defendant in his official capacity as Chief Collector of Customs, but subsequently changed his course and sued the defendant personally - after receiving notice of the Commonwealth's claim - has not, in my opinion, deluded or placed the defendant at any disadvantage on the merits of the case. That is on the evidence before me at this stage.

Subsequent evidence for the defendant may, or may not, alter the position on this point. But on the evidence before me, at this stage, I over-rule the demurrer on this point also.

(Sgd) A.Kelly, J.

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