IN THE HIGH COURT OF AUSTRALIA

KITANO

v.

THE COMMONWEALTH OF AUSTRALIA

REASONS FOR JUDGMENT

Oral judgment delivered at SYDNEY

on FRIDAY, 13th APRIL 1973

RM.72/20133

SHIGEO KITANO

v.

THE COMMONWEALTH OF AUSTRALIA

JUDGMENT
(ORAL)

GIBBS J.

SHIGEO KITANO

v.

THE COMMONWEALTH OF AUSTRALIA

In this action brought by a Japanese national against the Commonwealth the plaintiff seeks to enforce what broadly stated may be said to be two causes of action, namely, first a claim for damages for breach of contract and, secondly, a claim for damages for negligence or breach of statutory duty.

The act which constituted, so it is alleged, both the breach of contract, and the negligence or breach of statutory duty, was the issue by a customs officer of a certificate of clearance pursuant to which, it is said, one Norio Matsushita and other members of the crew of a yacht in which the plaintiff claims a ninety per cent interest sailed the yacht out of Darwin harbour and away from Australia.

Application is now made for an order pursuant to Order 35 rule 2 of the Rules that the question whether the facts alleged by the plaintiff in his amended statement of claim, if established, entitle the plaintiff to recover damages from or to any other relief against the defendant on any of the grounds mentioned in the statement of claim other than the alleged breach of contract and in particular the grounds of wrongful or negligent conduct or breach of statutory duty, should be decided by a single Justice before any evidence is given or question or issue of fact is determined.

The principles on which an application of this

kind is to be determined were stated by Lord Justice Romer in Everett v. Ribbands in 1952, 2 King's Bench, 198, at p. 206, in a passage which the Court of Appeal in Carl Zeiss Stiftung v. Herbert Smith & Company in 1969, 1 Chancery, 93, at p. 98, said was the "true rule" as follows:

> "Where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings or very shortly after the close of pleadings."

It seems to me that that statement needs to be qualified in this respect, that if the decision of the point of law in one way would dispose of one substantial issue in the action then an order under the rule may be made.

I must confess that during the course of the clear argument which was submitted by both counsel my mind has fluctuated as to the manner in which I ought to exercise my discretion in the present case. It is clear that there is a question of law of some importance and possibly also of some difficulty that is raised by the part of the statement of claim which now falls for consideration. However, the resolution of that question of law in favour of the defendant will not determine the whole action although it will dispose of one of the substantial questions that arises in it.

One of the matters I have to consider is whether the determination before trial of that question of law in favour of the defendant would have a sufficiently substantial effect on the length of the trial and upon the expenses involved in it to justify my making an order which would involve a departure from what might be said to be the ordinary course

of the trial and which would entail certain disadvantages in that the question of law would have to be determined without a full investigation of the facts which, if made, might place a different complexion upon the bald allegations contained in the statement of claim.

The affidavit made in support of the application states that the deponent believes that the persons referred to by the plaintiff in paragraphs 2, 3, 6, 7, 12, 16, 17 and 19 of the amended statement of claim, namely, Norio Matsushita, and two other Japanese nationals, are at present in Japan and that to call those persons as witnesses or to appoint a Commission to take evidence in Japan would put the defendant to great expense. The affidavit goes on to say that the deponent believes that if a decision favourable to the defendant is made in respect of the question of law referred to in the summons prior to trial, there will be a substantial reduction in the length of the hearing and in the number of witnesses to be called by the defendant, and that in particular it would be unnecessary to call evidence from the three persons in Japan and also from certain other officers of the Department of Customs and Excise who reside in the Australian Capital Territory, Queensland the Northern Territory. There is, however, a certain conflict in the two passages from the affidavit to which I have just referred. Paragraphs 2, 3, 6, 7 and 12 of the statement of claim contain allegations of fact which relate to both causes of action. If it is material to call witnesses from Japan to deal with the facts stated in those paragraphs, it would seem that that necessity would arise even if the trial proceeded only in relation to the alleged breach of

contract.

Having regard to those circumstances and to the nature of the allegations made in paragraphs 16, 17 and 19 which relate to the cause of action for negligence or breach of statutory duty, I think it is open to doubt whether the trial of the action would take a much greater time and would involve a much greater expense if the issues of fact in relation to both causes of action were litigated than if it proceeded on the issue of the breach of contract only.

I have also taken into consideration the fact that there has been a delay in making this application, although the effect of the delay could, to a large extent, be mitigated by an appropriate order for costs. Nevertheless delay in itself can be a detriment to a party for which no order for costs can make recompense.

Having regard to the matters which I have mentioned, I have in the end come to the conclusion that I ought to exercise my discretion adversely to the applicant. I therefore dismiss the application.