<<Federal Court of Australia>>
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LYDIA <<STEPHENSON AS EXECUTRIX OF THE ESTATE OF THE LATE ALYSCHIA DIBBLE v. HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION AND ST VINCENT'S HOSPITAL LIMITED No. G444 of 1995 FED No. 1031/95 Discrimination Law - Human Rights And Equal Opportunity Commission>>

COURT
IN THE <<FEDERAL COURT OF AUSTRALIA>>
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION
BEAZLEY J
HRNG
SYDNEY, 6 November 1995
#DATE 15:12:1995
#ADD 17:1:1996

Counsel for the Applicant: S. Winters

Solicitors for the Applicant: Inter City Legal Centre

Counsel for the Respondent: M. Nicholls

Solicitors for the Respondent: HREOC
ORDER
The Court orders that:
1. The application be dismissed.
2. The applicant pay the respondents' costs of the application.
Note: Settlement and entry of orders is dealt with in Order 36 of the <<Federal>> Court Rules.
JUDGE1
BEAZLEY J This is an application under the Administrative Decisions Judicial Review Act 1977 (Cth) (ADJR Act) for an order for review of a decision of the <<Human Rights and Equal Opportunity Commission>> (HREOC) that an inquiry into a complaint lodged by Alyshia Dibble under the Sex Discrimination Act 1984 (Cth) (the SDA) against St Vincent's Hospital abated upon her death. The correctness of this determination is the principle matter in issue. The applicant also alleges she was denied natural justice by HREOC.

Background facts
2. Alyschia Dibble, who was born on 22 June 1944, was diagnosed HIV positive in 1990. During 1993 and the early months of 1994, she experienced a considerable downturn in her condition. In June 1994, St Vincent's Hospital was conducting clinical trials of the drug proteas inhibitios with HIV positive patients. Ms Dibble sought to participate in the trials. However, she was excluded as she was considered still capable of becoming pregnant. The applicant complained that there was no risk of her becoming pregnant because she had not engaged in sexual activity with men for many years and, in any event, she offered to undergo a tubal ligation.

3. On 23 November 1994, Ms Dibble lodged a complaint with HREOC under s 22 of

the SDA, alleging that, by being excluded from the drug trials, she had been discriminated against by St Vincent's Hospital on the ground of her sex in the provision of goods and services. St Vincent's Hospital's response to her claim was that it was only authorised to conduct the drug trial on the condition that it complied strictly with the drug manufacturer's protocol governing the tests. Ms Dibble was ineligible under this protocol as she was capable of becoming pregnant. The Hospital had requested the manufacturer to vary the protocol in relation to the deceased but the manufacturer had refused to do so.

4. On 28 February 1995, Mr Dibble requested that her complaint be referred to HREOC for inquiry pursuant to s 57(1)(a) of the SDA. She advised HREOC at the time that her life expectancy was about 2 to 3 months. On 5 March 1995, the deceased died. On 14 March 1995, the Executrix of the deceased's Estate, the applicant herein, advised HREOC that the estate wished to proceed to a hearing. On 20 March 1995, the Sex Discrimination Commissioner referred the complaint to HREOC pursuant to s 57(1)(c).

5. On 7 April 1995, the applicant was advised that the matter had been referred to HREOC. On 11 April 1995, HREOC advised the applicant's solicitors by letter that a directions hearing had been appointed for 28 April 1995. The letter stated that the President of HREOC had requested the parties to provide written submissions regarding the items raised in the agenda of the matters to be dealt with at the directions hearing by 24 April 1995. An agenda was enclosed. Item 2 on the agenda was:

> "Correct complainant - whether the Estate has standing to pursue the complaint or whether the complainant's cause of action is extinguished by her death?

6. The applicant's solicitors lodged submissions in accordance with the President's request.

7. At the directions hearing on 28 April, the applicant was represented by counsel. Dr Martin Mackertich, Director of Clinical Services, announced his attendance on behalf of St Vincent's Hospital. I will return to the manner in which the directions hearing was conducted later in these reasons. It is convenient at this point to turn to the relevant statutory provisions.

RELEVANT LEGISLATION

8. The relevant legislation in this matter is the SDA, s 2 of the Law Reform (Miscellaneous Provisions) Act 1944 (NSW), and ss 79 and 80 of the Judiciary Act 1903 (Cth). It is convenient at this point to deal with the relevant provisions of the SDA.

The SDA

9. The objects of the SDA are to eliminate, so far as is possible discrimination against persons on the grounds of sex, marital status or pregnancy in various areas including, relevantly, in the provision of goods, facilities and services: s 3(b); and to promote recognition and acceptance within the community of the principle of the equality of men and women: s

3(d). Discrimination on the ground of a person's sex, marital status or pregnancy is, in specified situations, unlawful: see generally Part II. It is unlawful for a person who, whether for payment or not, provides goods or services or makes facilities available to discriminate against a person on the ground of that person's sex, marital status or pregnancy by refusing to provide the other person with those goods or services or to make those facilities available: s 22(1)(a). Discrimination may be direct or indirect: ss 5(1), 6(1) and 7(1) (direct discrimination); ss 5(2), 6(2) and 7(2) (indirect discrimination).

10. The statutory complaint process is initiated by lodging a complaint: s 50. The persons who may lodge a complaint are: a person aggrieved by the act complained of (the alleged unlawful act), on the person's own behalf or on behalf of that person and another or others aggrieved by the alleged unlawful act: s 50(1)(a); two or more persons aggrieved by the alleged unlawful act on their own behalf, or on behalf of themselves or another or others aggrieved by the alleged unlawful act: s 50(1)(b); a person or persons included in a class of persons aggrieved by the alleged unlawful act, on behalf of the persons included in the class: s 50(1)(c); a trade union of which a person or persons, or persons included in a class, aggrieved by the alleged unlawful act is a member or members, on behalf of that person, those persons or persons included in the class: s 50(1)(d).

11. Once lodged, a complaint relating to an alleged unlawful act is notified to the Sex Discrimination Commissioner who must inquire into the alleged act and endeavour by conciliation to effect a settlement: s 52(1).

12. Section 52 provides another mechanism, independent of the complaints procedure, whereby HREOC may inquire into a matter. Under s 52(1)(b), if it appears to HREOC that a person has done an act that is unlawful under Part 11, HREOC shall notify the Commissioner and, subject to subsection 2, the Commissioner shall inquire into the act.

13. The Commissioner has a discretion not to inquire into an alleged unlawful act or to cease inquiries in certain circumstances, for example, if she is satisfied that the act is not unlawful by reason of the provision of Part II: s 52(2)(a); or she is of the opinion that the person or persons aggrieved by the alleged unlawful act do not desire an inquiry to be made or continued: s 52(2)(b).

14. In the case of a complaint, if the Commissioner decides not to inquire into an alleged unlawful act, notice must be given to the complainant who may, within 21 days, require the matter to be referred to HREOC: s 52(4)(a); or to the President: s 52(4)(b). Where notice is given under s 52(4)(b) the President must review the Commissioner's decision and either confirm or set aside that decision; s 52A.

15. In cases where the Commissioner forms the opinion that a matter cannot be settled by conciliation; where a conciliation has not been successful; or where the Commissioner is of the opinion that the nature of the matter is such

that it should be referred to HREOC, the Commissioner is obliged to refer the matter to HREOC, together with a report relating to any inquiries made by the Commissioner into the matter: s 57(1). In this case, the matter was referred because the Commissioner was of the opinion that the nature of the matter was such that it should be referred: s 57(1)(c).

16. HREOC's functions include inquiring into and making determinations on matters referred to it by the Commissioner: s 48(1)(b). It has an obligation to hold an inquiry into each complaint or matter referred to it under s 57(1): s 59(1). If a complainant notifies HREOC that the complainant does not wish the inquiry to be held or continued, HREOC must not hold or must discontinue an inquiry into the complaint: s 59(2).

17. HREOC may direct that a person be joined as a party to the inquiry: s 62. There are provisions for giving notice of the inquiry, for the <<rights>> of parties at an inquiry, and in respect of the <<right>> of appearance and to representation and the like: see, for example, ss 63 and 65. HREOC is not bound by the rules of evidence when conducting an inquiry and may inform itself on any matter in such manner as it thinks fit: s 77(1)(a). It is required to hold proceedings with as little formality and technicality as the Act and a proper consideration of the matters before it, permit: s 77(1)(b). It may give directions relating to procedure, including a direction as to procedure it considers appropriate or necessary to ensure that justice is done: s 77(1)(d). The <<Commission>> may, at any stage of an inquiry dismiss the complaint if it is satisfied that the complaint is frivolous, vexatious, misconceived, lacking in substance or relating to an act that is not unlawful by reason of a provision of Part II: s 79.

18. After holding the inquiry, HREOC may dismiss the complaint: s 81(1)(a). It may find the complaint substantiated and make a determination, including making one of the declarations specified in s 81(1)(b). These include: a declaration that the respondent has engaged in conduct rendered unlawful by the SDA and that the respondent should not repeat or continue such unlawful conduct: s 81(1)(b)(i); and a declaration that the respondent should pay the complainant damages by way of compensation for loss or damage suffered by reason of the conduct of the respondent: s 81(1)(b)(iv). "Damage" for the purposes of the section includes injury to the complainant's feelings or humiliation suffered by the complainant: s 81(4). HREOC may also make a declaration that it would be inappropriate for any further action to be taken in the matter, notwithstanding that the complaint has been substantiated: s 81(1)(b)(vii).

19. At the time this complaint was referred to HREOC the SDA provided that a determination made under s 81(1) was to be registered in the <<Federal>> Court and once registered was to have effect as if it was an order made by the Court: s 82B(1). The corresponding provisions in the Race Relations Act were declared invalid by the High Court in Brandy v HREOC (1995) 69 ALJR 191. The SDA has since been amended. Now, proceedings for the enforcement of a determination made under s 81(1) may be brought in the <<Federal>> Court by HREOC, the complainant or a trade union acting on behalf of the complainant. A hearing in the <<Federal>> Court is by way of a hearing de novo: see s83A. If the Court is satisfied that the respondent has engaged in conduct or committed an

act that is unlawful under the Act, the Court may make such orders, including a declaration of <<right>>, as it thinks fit.

Findings of HREOC

20. The President of HREOC, Sir Ronald Wilson found that the proceedings before it abated upon the death of the deceased and did not devolve upon her Estate. In coming to this conclusion, he found it helpful to regard the institution of a personal civil action by a plaintiff as analogous to the lodgement of a complaint under the SDA. He found, drawing principally upon Finlay v Chirney (1888) 20 QBD 494, that it was "a basic rule of the common law...that a personal action dies with the person." Sir Ronald held that, in contra-distinction to a <<right>> of action in rem, the rule applied to every personal <<right of action, whether the right>> of action had its origin in the common law or in statute. He observed that the operation of the rule may be modified or reversed by a relevant statutory provision. However, there was no provision in the SDA dealing with the survival of complaints. He considered that the decision of the Full Court of the Supreme Court of New South Wales in Marvel Skate Co. Pty Limited v Bright (1952) 52 SR (NSW) 277 and the decision of the Court of Appeal in R v Jefferies (1969) 1 QB 120 supported this view. Sir Ronald distinguished Smith v Williams (1922) 1 KB 158 and Melkman v Commissioner of Taxation (1988) 20 FCR 331, being cases which had been relied upon by the applicant.

21. Sir Ronald considered that ss 79 and 80 of the Judiciary Act did not operate so as to apply s 2(1) of the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) to a complaint under the SDA as s 79 refers only to "Courts exercising <<Federal jurisdiction." The Commission>> was not a Court exercising <<Federal>> jurisdiction: see generally Ardeshirian v Robe River Iron Associates (1993) 116 ALR 173 at 185. I deal with the provisions of these two Acts below.

22. Sir Ronald also held that the <<Commission>> was not compelled by s 59 of the SDA to continue with the inquiry once it was instigated. He accepted that whilst s 59(1) was mandatory in its terms, the SDA contemplated the continued existence of the complainant: see ss 59(2), 64 and 65.

Applicant's submissions

23. Counsel for the applicant submitted that Finlay v Chirney was not authority for the proposition that a personal action dies with the person. Rather, it was authority for the proposition that the nature of the damages claimed was fundamental to the question whether the cause of action survived.

24. It was further submitted that the President's reliance on Marvel Skate Co. Pty Limited v Bright was misplaced as that decision had been overruled in Bogeta Pty Limited and Anor v Wales and Ors (1977) 1 NSWLR 139 and that the decision of R v Jefferies, upon which the President also relied was expressly not followed by the Court of Appeal in Bogeta.

25. Next, it was submitted, there was ample authority that statutory causes of action survive: see Peebles v The Oswaldtwistle Urban District Council

(1896) 2 QB 159 and other cases cited below.

26. It was further submitted that the complainant's case here arose out of contract in that it was alleged that there had been discrimination in the provision of goods and services. Accordingly, the damages were not personal or tortious damages so that the "actio personalis" principle did not apply to the complaint.

27. Finally, it was submitted that, whatever the state of the common law in New South Wales, s 2 of the Law Reform (Miscellaneous Provisions) 1944 removed any doubt about the survival of the complaint.

Application of the maxim "actio personalis" to a complaint under the SDA

28. The applicant submitted first, that Finlay v Chirney was not authority for the proposition that a personal action dies with the person. Rather, it was authority for the proposition that the question whether a cause of action survived depended upon the nature of the damages claimed. Secondly, she submitted that damages under s 81 of the SDA are not necessarily to be treated as tortious, so that a claim under the SDA was not governed by the maxim and did not abate upon death. Thirdly, she submitted that Ms Dibble's claim was for discrimination in the provision of goods and services. Those goods and services were provided under contract. Thus, whilst the claim clearly had a personal element, it was not exclusively tort based.

Finlay v Chirney

29. Finlay v Chirney involved an action for breach of promise of marriage. It was held that in such a case, where no special damage was alleged, the cause of action did not survive against the personal representative of the promisor. In coming to this decision, Bowen and Fry LJJ reviewed the basis of the maxim "actio personalis moritur cum persona". Their Lordships referred to the statement in Williams' Saunders (1) Wms. Saund. 240 that:

> "The rule was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant or any other duty to be performed."

and the further statement of Willes CJ in Sollers v Lawrence Willes 413 at 421 that: "Actio personalis is always understood of a tort".

30. They continued at 504:

> "Modern jurisprudence has...since the reign of Queen Elizabeth adopted a rough but convenient interpretation of the maxim...On the one side of the line of demarcation lie actions of tort. Remedies for wrongful acts, according to the present law, can only be pursued against the estate of a deceased person when property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys...On the other side of the line lie actions founded on any contract express or implied 'or any other duty to be performed'"

31. Further at 504, referring to the nature of the cause of action of breach of promise, their Lordships stated:

> "The question which we have to decide...relates to a class of action, which, though in its form and substance contractual, differs from other forms of action ex contractu in permitting damages to be given as for a wrong."

32. They referred to Chamberlain v Williamson 2 MandS 408, where Lord Ellenborough stated at 415:

> "Executors and administrators are the representatives of the temporal property, that is, the debt and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate."

33. Bowen and Fry LJJ stated that according to this decision, although an action for breach of promise was an action arising out of contract, the maxim "actio personalis" applied to so much of the damages as were a remedy for mere personal wrong, leaving to survive so much of the remedy as belonged to the ordinary category of actions "ex contractu". Their Lordships continued at 506:

> "In order accurately to draw the dividing line, it becomes necessary to analyse the damages which are recoverable in cases of breach of promise..."

34. Counsel for the applicant relied upon this passage in support of her submission that, in order to determine whether a cause of action survived, it was necessary to have regard to remedy and not to the nature of the cause of action. I do not agree. To read the passage that way it to take it out of context. In particular, it divorces it from the passage at 504 to which I have referred, where the identification of damage was used to identify the nature of the cause of action. It is clear from the joint judgment, read as a whole, that, for the purposes of the "actio personalis" principle, there is a distinction between personal wrongs and actions in contract or under a covenant or involving an obligation. This is clear from the further passage at 507 where their Lordships state:

> "But where there is no special averment ...of pecuniary loss arising out of the breach, the general allegation of the breach of promise imports...only a personal injury.

35. Lord Esher MR, in his separate judgment, said, at 498, of an action for breach of promise

> "It is clear that it is not a complaint of anything affecting property, whether personal or real; it is an injury; that is a cause of action purely personal on both sides."

36. Lord Esher accepted, although it would appear reluctantly so, that where special damage was claimed, affecting the property of the plaintiff, an action could be brought against the legal personal representative for that damage only. His Lordship stated at 500:

> "I think (special damage) can only exist in cases where the

plaintiff can show that, besides the promise to marry, there was at the time of the making of the contract another promise affecting the personal property of the one party or the other."

37. In any event, a remedies based survival principle does not withstand scrutiny. A further reference to the applicant's submissions is necessary at this point. Counsel for the applicant submitted that as the question of remedy determined whether a complaint survived, it was necessary for HREOC to have "at least an idea of what remedy is being sought" to determine whether the complaint survived the death of the complainant. At the time that the deceased died, there had been no precise formulation of her claim, beyond the allegation of the hospital's unlawful conduct. It was submitted that a claim could be made for a declaration that the Hospital had engaged in unlawful conduct and should not repeat such unlawful conduct. A claim could also be made for damages. Clearly this is so. It would be necessary, according to the submission, to analyse the nature of the damages which might be awarded to determine whether they fell within the "actio personalis" principle.

38. She submitted that some remedies under the SDA were clearly personal e.g. an apology. Others were not. For example, it was submitted that damages by way of compensation for loss or damage would, at common law, or under other legislation, devolve upon the estate. This latter submission cannot be sustained in the bald form in which it was put. Compensation for loss or damage may now be payable for the benefit of an estate under the Law Reform (Miscellaneous Provisions) Act. Workers' compensation entitlements may devolve, because as a matter of characterisation, they constitute a debt owing to the estate, or an obligation owed by the employer. These issues are discussed further below.

39. Counsel for the applicant further submitted that in Ms Dibble's case, a possible remedy was a declaration under s 81(1)(b)(i), that is a declaration that the discriminatory conduct not be continued. It was submitted that such a remedy was not personal as it could have wide-reaching implications for women who had not made a complaint. The immediate difficulty with this submission is that there is not sufficient evidence to allow it to be adequately assessed. However, the difficulty in postulating what remedy HREOC might in fact give, highlights the difficulty in applying a remedies based test for determining whether a complaint survives. With a remedies based test, the survival of the complaint could too easily depend upon the drafting of the claim. It would be a simple task to draft a claim involving a non-personal remedy regardless of the appropriateness of the remedy. It may not be a simple task to determine that issue without a full hearing.

40. Accordingly, accepting for present purposes that the 'actio personalis" principle has application to a complaint made under the SDA, I am of the opinion that the principle is directed to the cause of action involved and not to the remedies which are sought or which may be available. I am also of the opinion that a complaint under the SDA is personal in nature. It involves a claim by a person who alleges discrimination against that individual, on a ground personal to that individual (e.g. that person's sex) as a result of an act engaged in by another, which the statute has made unlawful. The

provisions in the Act which permit representative complaints or complaints lodged by trade unions do not detract from the personal nature of the complaint. Indeed, those provisions reinforce the personal notion of a complaint. Accordingly, I am of the opinion, that to the extent that the "actio personalis" principle applies, either directly or by analogy, to a complaint under the SDA, a complaint abates upon the death of the complainant and does not devolve upon the personal legal representative of a complainant.

41. Having regard to my view in this regard, it is not necessary to determine the nature of the damages claimed by Ms Dibble. However, as the matter was addressed, I should deal with it briefly.

42. Nature of damages which may be awarded under the SDA There are judicial statements to the effect that a claim under the New South Wales Anti-Discrimination Act 1977 is an action in tort: Australian Postal <<Commission>> v Dao (1985) 3 NSWLR 565 at 604 per McHugh JA; Allders International Pty Ltd v Anstee (1986) 5 NSWLR 47 at 65 per Lee J where his Honour stated:

> "...there are sound reasons for treating an action under the Act as an action in tort and this, of course, permits a wider claim to damages being made than if the action is in contract. Hurt to feelings is recognised in many torts...and I see no reason why a tort of discrimination should not allow for that factor."

43. However, in Hall and Ors v A and A Sheiban Pty Ltd and Ors (1988) 20 FCR 217 at 239 Lockhart J stated that whilst in most cases under the <<federal>> anti-discrimination legislation the measure of damages in tort would be appropriate:

> "(i)t is difficult and would be unwise to prescribe an inflexible measure of damage (in anti- discrimination legislation cases) and, in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law. Although...it cannot be stated that in all claims for loss or damage under the Act the measure of damages is the same as the general principles respecting measure of damages in tort, it is the closest analogy that I can find and one that would in most foreseeable cases be a sensible and sound test. I would not, however, shut the door to some case arising which calls for a different approach."

44. Implicit in this approach is that claims under the anti-discrimination legislation are not actions in tort. Lockhart J referred at 238 to Australian Iron and Steel Pty Ltd v Najdovska (1988) 12 NSWLR 587 as supporting a flexible approach. (This decision was affirmed by the High Court on appeal on other issues: see Australian Iron and Steel Pty Ltd v Banovic (1989) 168 CLR 165.

45. French J in his judgment in Hall at 281 referred to Allders International v Anstee and Australian Postal <<Commission>> v Dao and stated that whether or not it was strictly correct to classify contraventions of anti-discrimination

legislation as a species of tort, if the statute made provision for a particular head of damage:

> "the rules applicable in tort can be of no avail if they conflict with it."

46. Section s 81(4) of the SDA expressly provides for damages for injury to a complainant's feelings or for humiliation suffered by the complainant. Accordingly, even though there may be some correspondence in the considerations involved in awarding damages for injury to feelings and humiliation in tort and under s 81(4), the statutory provisions of the SDA govern this head of damages.

47. It was submitted that Hall was authority for the proposition that damages under the SDA were statutory in nature and not tortious. It was further submitted that, in any event, the complainant's action was founded on contract - namely that she was discriminated against in the provision of goods and services. It should be stated that there is no evidence of the basis upon which the medical services in question were, or were to be, provided. Leaving that aside, however, the fact that the discriminatory conduct arose out of contract does not alter the nature of the damages available. They remain statutorily based and are not converted into damages for, or damages in the nature of damages for, breach of contract.

Marvel Skate Co. Pty Ltd v Bright and R v Jefferies

48. It was submitted that the President fell into error by his reliance on Marvel Skate Co. Pty Limited v Bright and R v Jefferies as Marvel Skate was overruled by the New South Wales Court of Appeal in Bogeta Pty Ltd v Wales and R v Jefferies was not followed. Whilst this is correct, the point in Bogeta is that the well established principle that superior courts have the <<right>> to devise an appropriate procedure in cases where jurisdiction exists but where no procedure was provided by statute also applied to inferior courts. In this case, counsel for HREOC readily, and correctly, conceded that if the claim survived the death of the deceased, there was power in HREOC to join the legal personal representative.

Survival of statutory <<rights>>

49. Counsel for the applicant submitted that subject to any express words to the contrary in a statute, a statute based cause of action survives the death of the party in whom the cause of action was vested. She relied upon a number of authorities commencing with Peebles v The Oswaldtwistle Urban District Council in support of this submission. It is necessary to look at these authorities to determine whether they stand for the proposition asserted.

50. Peebles involved a claim for mandamus to compel the Council to construct a sewer as allegedly required by statute. The plaintiff died after the claim was commenced but before it was heard. It was held the cause of action survived. The statutory duty to build the sewer was a "duty to be performed" within the actio personalis principle. A.L. Smith LJ stated at 161:

> "In the note to Wheatley v Lane 1 Wms Saund 2169 it is said:
> 'It was a principle of the common law, that if an injury were done either to the person or the property of another, for which

damages only could be recovered in satisfaction, the action died with the person to whom, or by whom, the wrong was done'; but it is pointed out in the same note that this rule 'was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant, or any other duty to be performed;' for there the action survived." (emphasis added)

51. A number of cases involving workers' compensation legislation were also relied upon. They were Darlington v Roscoe and Sons (1907) 1 KB 219; The United Collieries Limited v Simpson (1909) AC 383; Schlenert v H. G. Watson Contracting Co Pty Ltd (1979) 1 NSWLR 140. In both Darlington v Roscoe and Sons and United Collieries Limited v Simpson a dependant of a deceased was entitled to monies under the applicable workers' compensation legislation. In Darlington, the dependant died after commencement of the action but before it was heard. The Court construed the legislation as imposing a statutory duty upon the respondent employer to pay compensation. The statutory entitlement thus survived. In United Collieries Limited, the dependant died before making a claim. In that case, the statutory requirement to pay compensation to a dependant was construed as a debt owed to the dependant. It thus fell outside the actio personalis principle and the dependant's claim survived her death. Lord MacNaughten observed at 391 that the actio personalis principle was "limited to actions in which remedy is sought for a tort, or for something which involves, at any rate, the notion of wrong-doing."

52. United Collieries Limited was applied by the New South Wales Court of Appeal in Schlenret. In that case, a worker was entitled to the payment of a lump sum under s 16 of the New South Wales Workers' Compensation legislation for the loss of an eye. It was held that the <<right>> to make the s 16 claim devolved upon the deceased's legal personal representative.

53. Peebles and Darlington were applied by the Court of Appeal in Dean v Wiesengrund (1955) 2 QB 120. In that case, the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 gave a <<right>> to a tenant who had paid excess rent to recover it immediately. The legal personal representative of a tenant who had paid excess rent sought to recover the excess under the statute. Although the statute itself made no reference to a tenant's legal personal representative, it was held that the <<right>> of the tenant devolved. Essential to this finding was an analysis of the nature of the <<right>> which was conferred by the Act. Singleton LJ considered that the <<right>> conferred was an asset of the tenant, namely, a chose in action conferred by statute. As such, it was something which prima facie would, on death, pass to the tenant's legal personal representative and could only be taken away by clear words in the statute. Jennings LJ classified the <<right>> as a debt. He stated that had the legislature intended to give the tenant something less than the full <<rights>> of a creditor, the Act would have been framed to include some attempt at a definition of the nature and extent of the limited <<right>> which the tenant was to have. Morris LJ was of a similar view, stating at 137:

"different wording would have been adopted if there had been the intention to create, for the benefit of a tenant, a debt or a <<right>> to recover a sum of money to which was attached the somewhat novel feature that the death of the creditor should destroy it."

54. The Court also concluded in that case that the cause of action survived under the United Kingdom's Law Reform (Miscellaneous Provisions) Act 1934.

55. Dean v Wiesengrund was applied by the Court of Appeal in Rickless and Ors v United Artists Corporation (1988) QB 40 where it was held that the Dramatic and Musical Performers' Protection Act 1958 gave a private <<right>> to performers to give or withhold consent to the use of their performances and conferred a <<right to enforce that right in the civil courts. It was held that the right>> survived the death of the performer. Browne-Wilkinson VC stated at 56:

> "(t)he question in every case is whether the <<right>> is personal and dies with (the performer); if it is not personal it vests in (the performer's) personal representatives... It has been held that prima facie a <<right>> conferred...by statute survives...death and that clear words are required if it is to be held that the <<right dies with the person given that right>>: Dean v Wiesengrund...There are no such clear words in this case."

56. The reliance on Dean v Wiesengrund must be read in context. The Act in question was construed as an Act to protect a performer's economic interests by ensuring that the performer was paid for the use of the performer's performances. The cause of action thus conferred was not merely a cause of action in respect of a personal wrong. Browne-Wilkinson VC classified the <<right as a quasi-property right>> akin to copyright.

57. Once these cases are analysed, it is apparent that they do not support the applicant's submission that a statutory cause of action survives unless the statute provides otherwise. In each case, the statutory <<right>> was analysed to determine its nature. In each case it was characterised as falling into one of the categories outside the actio personalis principle.

58. These cases are also to be distinguished from that line of authority that permits an appeal from a judgment on an actio personalis to continue as the original wrong merges in the judgment: see Ryan v Davies Bros Ltd (1921) 29 CLR 527 where it was held that upon the appeal, a new and different <<right>> has been substituted. See also Smith v Williams (1922) 1 KB 158.

Application of the Law Reform (Miscellaneous Provisions) Act 1944

59. It was submitted that even if the claim did not survive the death of the deceased at common law, the terms of s 2 of the Law Reform (Miscellaneous Provisions) Act ought to guide HREOC in its determination as to whether the complaint survived. Counsel conceded that because of the express terms of ss 79 and 80 of the Judiciary Act s 2 of the Law Reform (Miscellaneous Provisions) Act did not apply as HREOC is not a court exercising <<federal>> jurisdiction: Brandy v HREOC; Ardeshirian v Robe River Iron Associates.

60. Section 2 of the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) provides:

> "(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of

action subsisting against or vested in him shall survive against, or, at the case may be, for the benefit of, his Estate."

61. Defamation claims and claims under Division 2 of Part 3 of the De Facto Relationships Act 1984 (NSW) are excepted from the subsection. Exemplary damages and damages for loss of future earnings are not recoverable under that section.

62. Sections 79 and 80 of the Judiciary Act provide:

"79. The laws of each State or Territory, including the laws relating to procedure...shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising <<federal>> jurisdiction in that State or Territory in all cases to which they are applicable.

80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in <<Australia>> as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising <<federal>> jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

63. I do not agree with this submission. The complaint either survives as a matter of common law or pursuant to an express statutory enactment. Jurisdiction cannot be assumed by a tribunal or <<commission>> by application of the spirit of some inapplicable statutory provision.

64. It was submitted by counsel for HREOC that, in any event, the <<right>> to bring a claim under the SDA was not a "cause of action" within the meaning of s 2 of the Law Reform (Miscellaneous Provisions) Act. In the first place, there was no <<right>> as such for an inquiry to be completed. Secondly, a determination of the <<Commission>> is not enforceable as such. The SDA merely provides a statutory <<right>> to seek redress for discriminatory conduct which is unlawful. The lodgement of a claim may result in a remedy, including damages, being awarded. However, the entire processes contemplated by the statutory scheme, including the inquiry and conciliation processes, the <<right>> in the Commissioner to refuse to or refuse to continue to inquire into a complaint, the <<right>> to inquire into matters regardless of the lodgement of a complaint, the <<right>> in HREOC to terminate complaints and the lack of enforceability of HREOC's determinations are not processes which are consistent with a cause of action.

65. In Sugden v Sugden (1957) P 120; (1957 1 All ER 300 Denning LJ held that the English equivalent of s 2 only applied to "causes of action". that is:

"<<rights>> which can be enforced - or liabilities which can be redressed - by legal proceedings in the Queen's courts...'Causes of action' extend to <<rights>> enforceable by

proceedings in the Divorce Court, provided that they really are <<rights>> and not mere hopes or contingencies".

66. Denning LJ stated that as, under the relevant matrimonial legislation, there was no <<right>> to maintenance, costs, or to a secured provision and the like until the court made an order, no cause of action arose until the order was made. His Lordship drew a distinction between the non-existence of a cause of action and the availability of a discretionary remedy.

67. The position is similar under the SDA. There is no entitlement to a remedy. HREOC may find that a complaint is substantiated but refuse to make any declaration. More fundamentally, a finding or declaration made by HREOC cannot be enforced - either by HREOC or by a court: see Brandy. In other words, a complaint under the SDA is "in the nature of a claim yet to be made enforceable": see Premiership Investments Pty Ltd and Anor v White Diamond Pty Ltd (unreported Nicholson J; No WAG 81 of 1994, 17 November 1995); Sugden v Sugden.

<<Right>> of HREOC to terminate a complaint properly brought before it

68. It was submitted that the complaint having been properly referred to HREOC, there was no power to terminate the complaint other than to dismiss the complaint under ss 79 and 81 of the SDA. The consequence was that it was obliged to proceed to a hearing of the complaint notwithstanding the death of the deceased.

69. Sections 79 and 81 contemplate the dismissal of a complaint as part of an inquiry. In the case of s 79, a complaint may be dismissed "at any stage of an inquiry" if it is considered the complaint is "frivolous, vexatious, misconceived, lacking in substance or relates to an act that is not unlawful" under the Act. Under s 81, a complaint may be dismissed after an inquiry has been held. There is no definition of "inquiry" in the SDA. In my opinion, an inquiry encompasses all aspects of the matter, including preliminary steps such as the holding of a directions hearing. Section 77 of the SDA supports this construction. It provides:

> "(1) For the purposes of an inquiry, (HREOC):
> ...
> (c) may give directions relating to procedure that, in its opinion, will enable costs or delay to be reduced and will help to achieve a prompt hearing of the matters at issue between the parties; and
> (d) may give such directions as to procedure as it considers are appropriate or necessary to ensure that justice is done"

70. In my opinion, a step relating to the determination of whether a complaint is properly before HREOC is a matter which falls within the court's powers under s 77. In any event, HREOC could make a direction in relation to the joinder of parties. A necessary precondition to the making of such a direction would be a determination as to the appropriateness of a party being joined. In the present case, had it been determined that the claim devolved upon the applicant as the legal personal representative, the next step would have been to make a direction joining the applicant as the deceased's legal

personal representative. Sorting out this issue as part of the directions procedure was an integral part of the inquiry, albeit in respect of a preliminary issue.

71. In Nagasinghe v Worthington and Ors (1994) 53 FCR 175, von Doussa J adopted at 178, the statement of Sir Ronald in GVR v Department of Health, Housing and Community Services (unreported, 23 August 1993) that:

> "The meaning of the term 'lacking in substance' has been considered in a number of decisions of this <<Commission>>. My view...is that a claim which presents no more than a remote possibility of merit and which does no more than hint at a just claim would ordinarily be found to be lacking in substance."

72. The present case is different and accordingly this statement does not have direct application. However, I am of the opinion that a complaint is lacking in substance within the meaning of s 79 if there is a reason of substance which prevents the continuation of the complaint. At the time that the matter came before the President for the directions hearing, there was no complainant to continue the complaint. I have found that the complaint did not survive the death of a complainant. In my opinion, the absence of a complainant, whether by death or any other reason, is a reason of substance why the complaint cannot be continued and thus may be terminated under s 79. Thus Sir Ronald was empowered to dismiss the complaint under s 79.

73. It was also submitted that HREOC had, by inviting the applicant to make submissions in respect of the standing issue, had recognised the <<right>> of the estate to continue the complaint. This submission is clearly misconceived. If it were correct, it would mean that upon any application of a party to be joined to proceedings, a court or tribunal, upon hearing that party on the application to be joined, would thereby be obliged to join the party.

Breach of Natural Justice

74. Finally it was submitted that the applicant had been denied natural justice as the President had relied upon authorities which had not been the subject of submission, either in the applicant's written submissions or during the argument at the directions hearing.

75. A person is entitled to a fair trial with the <<opportunity>> to put her or his case properly: Stead v SGIC (1986) 161 CLR 141 at 145; Jones v National Coal Board (1957) 2 QB 55 at 67. In Stead v SGIC the High Court said that this principle was not without qualification. Even if a party had been denied the <<opportunity>> to put submissions on a question of law, a new trial would not be ordered if the question of law must clearly be answered against the aggrieved party. In the present case, the applicant was not denied that <<opportunity>>. The applicant was requested to address the issue of standing in written submissions. She did so. At the directions hearing, the applicant was represented by counsel who supplemented the written submissions by oral submissions. Whilst a court, tribunal or <<commission>> is usually assisted by submissions of counsel, it is not infrequent that relevant authorities are not cited to the court. There could be a number of reasons for this. Counsel may not have located the authority during the course of research. A view may

have been taken that an authority was not relevant. Systems would become unworkable if a matter had to be referred back to parties for further submission if, on each occasion that a court, or other body applying legal principles, considered that an authority, not cited by the parties, was relevant to the issues argued before it.

76. Counsel for the applicant also relied upon Lower v Norton and Anor (1972) 4 SASR 162. There, Walters J stated at 175 that:

> "...if a Judge or judicial officer, after reserving judgement, reaches a conclusion on the issues for ...determination, upon entirely new points which were not the subject of argument...the desirable course...is to restore the case to the list for further argument."

77. This statement is correct. However, his Honour was referring to a situation where the court's determination was reached upon a new point. That is not the case here. There is a conceptual difference between reaching conclusion on a new point which had not been argued and relying on authorities on the point argued but which had not been referred to.

78. It was further submitted that neither party anticipated that the question of standing would be finally determined at the directions hearing. It was submitted that had that been the understanding, the applicant may have approached the hearing differently. There is nothing in the transcript of the directions hearing which reveals that the applicant was disadvantaged. Certainly, counsel did not make any submission to that effect. Indeed, the transcript bears the mark of counsel in command of her material. Further, counsel for the applicant conceded that it was clear from what was said by Sir Ronald during the course of the hearing that he was intending to decide whether there was an entitlement in the estate to continue the complaint. Counsel's responses to Sir Ronald clearly showed that she appreciated that this issue was to be determined. In any event, the President was entitled, had he considered it appropriate, to confine his consideration of the issue to the written submissions. HREOC's letter advising that the President had called for written submissions is capable of that interpretation. It was not argued that the applicant had not had an <<opportunity>> to canvass the issue as her legal representatives considered appropriate, in the written submissions. Accordingly, I do not agree that the applicant was denied procedural fairness.