

SUPREME COURT OF QUEENSLAND

CITATION: *Giffin v Telstra Corporation Limited* [2018] QSC 111

PARTIES: **LEE GIFFIN**
(plaintiff/respondent)
v
TELSTRA CORPORATION LIMITED
ACN 051 775 556
(defendant/applicant)

FILE NO/S: SC No 11741 of 2017

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 24 May 2018

DELIVERED AT: Brisbane

HEARING DATE: 29 March 2018

JUDGE: Atkinson J

ORDERS: **1. The Claim filed 9 November 2017 be set aside pursuant to rule 16 of the *Uniform Civil Procedure Rules 1999 (Qld)*.**

2. The Amended Statement of Claim filed 1 March 2018 be struck out pursuant to rule 171 of the *Uniform Civil Procedure Rules 1999 (Qld)*.

3. Unless the plaintiff files written submissions within 7 days as to why such an order should not be made, I will order that the plaintiff pay the defendant's costs to be assessed.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COMMENCING PROCEEDINGS – SETTING ASIDE ORIGINATING PROCESS OR SERVICE THEREOF – where the plaintiff is self-represented and filed a defective claim – where the defendant applied to set aside the claim – whether there was a ‘high degree of certainty’ about the outcome of the proceedings such as to entitle the defendant to have the claim set aside

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – where the plaintiff is self-represented and filed a defective statement of claim – where the statement of claim was struck out in its entirety and the plaintiff was granted leave to

replead as a ‘last opportunity’ – where the plaintiff filed an amended statement of claim which failed to improve on the original statement of claim – where the defendant applied to strike out the amended statement of claim – whether the amended statement of claim failed to disclose a reasonable cause of action such as to entitle the defendant to have the amended statement of claim struck out – whether the amended statement of claim was embarrassing and tending to cause delay in the proceedings – whether the amended statement of claim was otherwise an abuse of process

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – IRREGULARITIES AND NON-COMPLIANCE WITH RULES – where the plaintiff is self-represented and has filed claims and statements of claim which do not comply with the rules – where the defendant has applied to strike out or set aside the documents – whether the documents should be struck out or set aside

Uniform Civil Procedure Rules 1999 (Qld), r 16, r 22, r 70, r 74, r 149, r 150, r 155, r 158, r 171, r 371

Markan v Bar Association of Queensland [2013] QSC 146, cited

Young v Crime and Corruption Commission [2018] QSC 12, cited

COUNSEL: The plaintiff/respondent appeared on his own behalf
M W P Ziebell (sol) for the defendant/applicant

SOLICITORS: The plaintiff/respondent appeared on his own behalf
King & Wood Mallesons for the defendant/applicant

- [1] This matter concerns the Further Amended Application of the defendant filed 16 March 2018 to strike out or set aside the Claim filed by the plaintiff on 9 November 2017 pursuant to rule 16 of the *Uniform Civil Procedure Rules 1999 (Qld)* (“UCPR”) and to strike out the Amended Statement of Claim filed by the plaintiff on 1 March 2018 pursuant to rule 171 of the UCPR.
- [2] Before discussing the merits of each application, it is appropriate to establish the events giving rise to these proceedings.

Background facts

- [3] In 1999, the plaintiff started his business, Japanese 4x4 Spares & Repairs. It appears that this business is not registered as a company but rather was the plaintiff trading as a sole trader.¹

¹ Affidavit of Shane Ogden affirmed 27 March 2018, exhibit “SGO-2”, 1-19.

- [4] From this time, it appears that he used the services of Sensis Pty Ltd (“Sensis”) to advertise his business, presumably pursuant to a contract between the plaintiff and Sensis and/or Telstra Corporation Limited, the defendant (“Telstra”). No contracts have been exhibited, but there is evidence of the plaintiff paying these companies via direct debit in the material annexed to the plaintiff’s Amended Statement of Claim.
- [5] Sensis is not presently a party to the proceedings. The name “Sensis” has been added as the second defendant in the plaintiff’s Amended Statement of Claim. However, such addition is not effective, as the addition of a defendant requires an order allowing amendment of the originating process to add Sensis as a party following an application for leave to do so.² No such application has been made or order given.
- [6] It is clear from the material that the plaintiff’s business used various addresses in Caboolture, Burpengary and Maroochydore and at least three different contact phone numbers from 1999 to present. However, there is nothing exhibited in the documents provided by the plaintiff as to when each change of address happened or when the plaintiff informed Sensis and/or Telstra of the changes of address.
- [7] The plaintiff’s claim in these proceedings appears to be that these changes were not appropriately recorded by Sensis and/or Telstra and that he suffered a loss in business as a result of his clients (actual and potential) not being able to contact him.

Present proceedings

- [8] On 9 November 2017, the plaintiff filed a Claim and Statement of Claim in the Supreme Court of Queensland. On 27 November 2017, the defendant filed a Conditional Notice of Intention to Defend³ and an Application to strike out the plaintiff’s Claim and Statement of Claim. On 7 December 2017, the defendant filed an Amended Application to strike out the plaintiff’s Claim and Statement of Claim.
- [9] On 11 December 2017, Bond J heard the application and made orders striking out the entirety of the Statement of Claim and adjourning the decision to set aside or strike out the Claim.
- [10] When Bond J struck out the Statement of Claim on 11 December 2017, his Honour granted the plaintiff leave to replead a Statement of Claim and directed the plaintiff to file and serve an Amended Statement of Claim by 4:00 pm on 2 March 2018. In his Honour’s reasons delivered *ex tempore*, Bond J stated that the plaintiff would have a second attempt to file an adequate pleading, but that this would be his ‘last opportunity’.⁴
- [11] An Amended Statement of Claim was filed on 1 March 2018. This is the document that the defendant now applies to strike out, in addition to the application to set aside or strike out the Claim.

² UCPR rr 70 and 74.

³ UCPR r 144.

⁴ Affidavit of Shane Ogden affirmed 27 March 2018, exhibit “SGO-2”, 1-14.

Application to strike out or set aside the Claim

- [12] The application to strike out or set aside the Claim is said to arise out of rules 16 and 371(2) of the UCPR.
- [13] Rule 16(e) of the UCPR provides as follows:
 “16 Setting aside originating process
 The court may—
 (e) set aside an originating process ...”
- [14] Rule 371(2) of the UCPR provides as follows:
 “371 Effect of failure to comply with rules
 (2) Subject to rules 372 and 373, if there has been a failure to comply with these rules, the court may—
 (a) set aside all or part of the proceeding ...”
- [15] The defendant, in its written submissions in support of the striking out or setting aside of the Claim, relies on five grounds to support the striking out of the Claim.
- [16] First, the defendant argues that the Claim discloses no reasonable cause of action or statement as to the nature of the claims made, or relief sought, in breach of r 22(2)(a) of the UCPR. Rule 22(2)(a) provides that the plaintiff must state briefly in the claim the nature of the claim made or relief sought in the proceeding.
- [17] The Claim filed by the plaintiff uses the approved form, as required by r 22(1), but simply states:
 “The plaintiff claims: (*state concisely the relief claimed by the plaintiff*) WRONG LISTED”⁵
- [18] The Claim therefore fails to state, briefly or at all, the nature of the claim made or relief sought and so the Court has a discretion to set it aside.
- [19] Second, the defendant submits that the Claim fails to demonstrate the court’s jurisdiction, in breach of r 22(2)(c) of the UCPR. Rule 22(2)(c) provides that the plaintiff must show that the court has jurisdiction to decide the claim for a claim filed in the District Court or a Magistrates Court.
- [20] This ground should therefore be rejected, as the requirement in r 22(2)(c) of the UCPR only applies in terms to claims filed in the District Court or a Magistrates Court.

⁵ The material in italics and contained in the round brackets is a prompt contained in the court form.

- [21] Third, the defendant argues that the Statement of Claim attached to the Claim is insufficient, in breach of r 22(2)(b) of the UCPR.
- [22] Rule 22(2)(b) requires a plaintiff to attach a statement of claim to the claim. While there are considerable irregularities with both the Statement of Claim and Amended Statement of Claim filed in this matter, which will be dealt with below, the plaintiff has arguably complied with his obligation to file a statement of claim to his claim. Subject to the application to strike out the Amended Statement of Claim, this ground has not been established.
- [23] Fourth, the defendant argues that the Claim wrongly gives notice under r 150(3) of the UCPR, where no debt or liquidated claim is alleged. Rule 150(3) imposes an obligation on a plaintiff claiming for a debt or liquidated demand to provide details, but does not impose any obligation on a party seeking unliquidated damages *not* to provide such details. This ground therefore is not established, but nothing turns on it.
- [24] Fifth, the defendant argues that the Claim, if advanced in its present form, would deny the defendant procedural fairness, in circumstances where the defendant is not in a position to comprehend the case as framed.
- [25] I consider this ground to be established. While I note that Bond J did acknowledge this case to be relatively simple in nature,⁶ there is nothing in the documents that have been filed that states that case in a way which would enable Telstra properly to defend the proceedings by being able to work out, in the absence of a coherent statement of claim, the nature of the claim or the relief sought, what the claim is for and therefore how it could respond to it.
- [26] Striking out a claim is the end of the proceeding. The defendant must therefore demonstrate a ‘high degree of certainty’ about the ultimate outcome of the proceeding.⁷
- [27] In *Markan v Bar Association of Queensland*, an aspect of the impugned originating process involved a claim in contract. The claim, as it related to the contract claim, was set aside and the statement of claim and amended statement of claim, as they related to the contract claim, were similarly struck out, as the documents filed failed to establish a possible cause of action:

“[41] The claim filed on 4 February 2013 pleaded damages (or monetary compensation) for breach of contract. The statement of claim pleaded that a contract existed between the BAQ and the plaintiff and the LSC. The amended statement of claim pleaded a contract between the plaintiff and the BAQ. **None of the facts pleaded sustain any suggestion that there was a contract between the plaintiff and the BAQ or between the plaintiff, the BAQ and the LSC.** The letters from the BAQ of 1 August 2011 do not, as pleaded, purport to be an offer capable of acceptance. They merely inform the plaintiff of the statutory responsibilities of the BAQ under the LPA and inform him of the way in which

⁶ Affidavit of Shane Ogden affirmed 27 March 2018, exhibit “SGO-2”, 1-15.

⁷ *Markan v Bar Association of Queensland* [2013] QSC 146 at [38]-[40].

the BAQ will undertake those statutory responsibilities. **There is no possible cause of action in breach of contract as, on the facts pleaded, there was no contract between the plaintiff and the BAQ or the LSC. Accordingly it is appropriate to set aside the claim and strike out the statement of claim and the amended statement of claim in so far as they relate to any action in contract.**

[42] Accordingly it is appropriate to set aside as disclosing no reasonable cause of action, paragraphs 1, 2, 3 and 4 of the claim and strike out paragraphs 2, 3, 4, 5 and 8 (in so far as it relates to breach of contract) of the statement of claim and 2, 3, 4 and 11 (in so far as it relates to breach of contract) of the amended statement of claim.”⁸ (emphasis added)

[28] These comments are true *a fortiori* in this case, as there is not even an indication in the Claim that the claim is for a breach of contract.

[29] A claim and statement of claim were struck out more recently in the case of *Young v Crime and Corruption Commission*.⁹ In his Honour’s reasons for striking out, Martin J noted the following:

“It sometimes occurs on applications such as this that the Court will allow a misguided plaintiff an opportunity to put into a sensible form the claim which the plaintiff has. This is not a case where the error is one of the expression of the cause of action. On the material before me, I can see no basis for any of the claims made by the plaintiff and it would be inappropriate to expose the defendant to a further claim based upon the assertions which are contained in the current pleading. The statement of claim discloses no reasonable cause or causes of action. It seeks relief that cannot be claimed and is, in the manner in which it is pleaded, vexatious. It is a rambling abuse of the process of this Court.”¹⁰

[30] His Honour’s comments are of relevance to this case. The plaintiff has been given an opportunity to place his claim in a sensible form and has not done so. Similarly with the conclusions drawn by Martin J in *Young v Crime and Corruption Commission*, no claim, nor the factual basis for this claim, is able to be established from the plaintiff’s material as filed and it would be inappropriate to require the defendant to defend the Claim as presently constituted.

[31] Therefore, I am satisfied that the court ought to exercise its discretion to set aside the Claim.

⁸ *Markan v Bar Association of Queensland* [2013] QSC 146 at [41]-[42] (emphasis added).

⁹ [2018] QSC 12.

¹⁰ *Young v Crime and Corruption Commission* [2018] QSC 12 at [17].

Application to strike out Amended Statement of Claim

[32] It is not strictly necessary to deal with the application to strike out the Amended Statement of Claim; however, I do so for the sake of completeness.

[33] The application to strike out the Amended Statement of Claim is brought pursuant to rule 171 of the UCPR.

[34] Rule 171 of the UCPR provides as follows:

“171 Striking out pleadings

(1) This rule applies if a pleading or part of a pleading—

- (a) discloses no reasonable cause of action or defence; or
- (b) has a tendency to prejudice or delay the fair trial of the proceeding; or
- (c) is unnecessary or scandalous; or
- (d) is frivolous or vexatious; or
- (e) is otherwise an abuse of the process of the court.

(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.

(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading.”

[35] The defendant, in its written submissions in support of its application to strike out the Amended Statement of Claim, relies on six grounds.

[36] First, the defendant argues that the Amended Statement of Claim discloses no reasonable cause of action, as it does not plead any material facts.

[37] The Amended Statement of Claim states as follows:

“This claim in this proceeding is made in reliance on the following facts: (*in consecutively numbered paragraphs, each containing, as far as practicable, a separate allegation*)

1. (*set out as briefly as the nature of the case permits all material facts relied on as required in the Uniform Civil Procedure Rules, Chapter 6, Parts 1, 2 and 3*)
2. READ EXHIBITS A TO Z
3. READ NOTICE OF DEFENCE EXHIBIT BROWN FOLDER 1

The plaintiff claims the following relief:

(*set out in full the relief claimed including full particulars of the nature and amount of each type of damages claimed and full particulars of interest required by Rule 159*)”

- [38] No allegations of fact are made in the Amended Statement of Claim itself and no relief is claimed.
- [39] The material styled as “EXHIBITS A TO Z” are a collection of factual assertions, which range in their relevance to the proceedings. They are said in a document entitled “Statement” to include:
- “Exhibit A I Started my Business Japanese 4x4 Spares & Repairs in 1999 using Sensis and Yellow Pages and Sister Company Telstra
- Exhibit B I have been using Telstra & Sister Co Sensis Yellow Pages through a Monthly Direct Debit out of my CBA Bank account
- Exhibit C My Business Commenced Trading at Lot 1 Dickson rd Caboolture ph 54990673 Year 1999 and Traded there for 3 year
- Exhibit D In 2002 I re-located to 20 Reynolds Court Burpengary Ph. 38880877. At this time I had 4 employees working . The business being quiet successful.
- Exhibit E At this stage I had earned \$160.000 which I then purchased, with a substance deposit of \$100.000, my second home. 546 Morayfield road, Burpengary
- Exhibit F As 20 Reynolds Court was a no thru road, I again re-located to the Corner of No 1 Reynolds and the Eastern Service road for more exposure to the passing trade
- Exhibit G I was still using Telstra and Sister Co. Sensis Yellow Pages. Same Phone No. Also still being Deducted Direct Debit from my CBA Account.
- Exhibit H After a conversation with Telstra and Sister Co. Sensis Yellow Pages to keep the same phone no. 38880877 they finally released it to be
- Exhibit I I then moved my business to 38 Kayleigh Drive Maroochydore. Having my phones diverted from 38880887 to 54438686 , and my advertisements with Telstra & Sister Co. Sensis Yellow Pages were informed of my move. All direct Debit were still being drawn out.
- Exhibit J I had noticed a loss of Business from Reynolds Court. I approached the Representative for Sensis Yellow Pages enquiring” Why my phones aren’t as busy as companies that I have sat down & visited”?
- Exhibit K Visiting other Companies and observing the phone calls one after another wasn’t making my Business grow and wondered why my phones weren’t working. I asked Tony Milroy that very Question Why My Phones were not ringing.
- Exhibit L After speaking to other companies and realising that my company was not doing anywhere near as good as other wrecking yards I tried to understand why my company was trading successfully. Was is ME. What was I doing WRONG. I was paying Huge money on advertising and Rent and going NOWHERE. I spent every minute of everyday working my guts out. Lost my life Family Business and No one CARED.
- Exhibit M I was experiencing making more money at 546 Morayfield Road, Burpengary ON 5 ACRES with NO Advertising from Sensis Yellow Pages while still paying rent on a vacant industrial premises TOTAL of \$88,000 per annum. It is 60 KLMS from Burpengary to Maroochydore .
- Exhibit N While struggling to pay rent I still have to pay taxes, rates, water, electricity bill, and back tax bill of \$125,000
- Exhibit O After driving home from Maroochydore which was always around 10 or 11 pm IF I DID COME HOME AT ALL as sometimes I stayed at work because I was TOO Tied to drive home. Worked 7 days a week Missing out on all

Family Activities EXAMPLE Birthday Parties waiting for phone calls that Never Came

Exhibit P Tow Truck repayments \$1450 per month Rego \$2200 per year and insurance running cost 20 litres per 100 klms. House repayments x 2 food on table of \$300 per week approx. for my growing family

Exhibit Q Realistically I haven't bonded with my family BECAUSE I was NEVER home BECAUSE I was stuck in a Lease and trying to keep MY Family life together.

Exhibit R At the same time I had \$40,000 in the Bank and trying to make money I had to move my business back to my acreage NOT making an income BUT still paying wages and expense of moving back to 546 Morayfield Rd, Burpengary

Exhibit S I took a Month to move approx. while still paying an astronomical amount of money for an empty shed. I could have become a Homeless bum pushing a trolley down the street.

Exhibit T While trying to run my Business successfully separating from my partner the mother of my three Sons and using a solicitor at a cost of \$45,000.00

Exhibit U I have had 4 Debt Collection Agencies harassing me for payments due to their professional negligent.

Exhibit V Child Support garnishing money out of my Business Account without consent and knowledge consequently MY House Payment were in arrears. The Bank notified me that there was NO MONEY in my account. Therefor receiving penalties from the Bank

Exhibit W Having to deal with Sheriffs at my premises about Tax obligations

Exhibit X NO ONE CARED ABOUT ME AND MY SITUATIONS AND STILL DON'T

Exhibit Y Due to Telstra and Sister Co. Sensis Yellow Pages While trying to sort these problems I rang them 1005 times resulting in me being arrested and being charged with harassment and Band from any Telstra Premises and at a great funding expense to me of \$1,500 and extreme Business LOSS

Exhibit Z I lodged my application thru Hardship, another day of Loss Business. I had a Court Appearance on the 9th December 2017. I was instructed to go home and do a Statement of Claim. Completing my Statement with No Help from Law Right. I was escorted from the Court by the Head of Security Mr. Avery informing me, if I returned I will be Arrested."

[40] There are then some hundreds of pages of documents annexed to the Amended Statement of Claim, including:

- (a) Tax invoices and purchase confirmations from Telstra and Sensis;
- (b) Advertising proofs and confirmations from Sensis;
- (c) Emails between the customer service teams of the Commonwealth Bank of Australia and Telstra regarding the plaintiff's payment of Telstra and Sensis's invoices;
- (d) Overdue notices from Sensis from 2005;
- (e) Evidence of direct debits from the plaintiff to Sensis and Telstra;
- (f) A letter from Bodkin Accounting dated 7 December 2017 to the plaintiff;
- (g) A letter from Northside Lawyers & Consultants dated 19 August 2016 to the plaintiff;

- (h) A letter from the Telstra Communication Industry Ombudsman;
- (i) A letter dated 26 February 2015 and marked 'confidential' and 'without prejudice' from Sensis to the plaintiff; and
- (j) Various letters by the plaintiff repeating similar statements as those contained in the exhibits section.

[41] None of these documents provide a coherent series of factual allegations comprising the plaintiff's case, or even the necessary details on which such a case could be inferred.

[42] First, the plaintiff makes no attempt to plead to the existence and/or terms of a contract between the plaintiff and Sensis and/or Telstra or the existence of a duty of care owed by Sensis and/or Telstra to the plaintiff.

[43] Second, the plaintiff makes no attempt to detail what the potential breach of the contractual duty or duty of care would be.

[44] Third, the plaintiff does not attempt to plead the loss suffered in any ascertainable form. The plaintiff's case may be best summarised as business losses, but a \$10 million figure appears to have been chosen virtually at random.

[45] All of this is despite the fact that Bond J went to some lengths on 11 December 2017 to explain to the plaintiff his duty to plead a case that made legal sense and went through the steps that the plaintiff would need to establish to ground his cause of action,¹¹ together with the fact that the plaintiff had some two and a half months to draft the Amended Statement of Claim.

[46] The Amended Statement of Claim discloses no reasonable cause of action.

[47] Second, the defendant argues that the Amended Statement of Claim would prejudice or delay a fair trial in circumstances where the plaintiff has breached the rules of pleading in chapter 6 of the UCPR including, but not limited to:

- (a) failing to state, precisely, the material facts on which the plaintiff relies to constitute a cause of action, in breach of rule 149(1)(b) of the UCPR;
- (b) failing to state the relief which the plaintiff claims, in breach of rule 149(1)(d) of the UCPR;
- (c) failing to coherently enunciate a cause of action, or any type of damage being sought, in breach of rule 150(1) of the UCPR;
- (d) failing to particularise the nature, circumstances and basis for the loss of \$10 million, in breach of rules 155(1) and (2) of the UCPR; and
- (e) failing to particularise, or contain any lucid statement of, loss and damage, in breach of rule 158(1) of the UCPR.

¹¹ Affidavit of Shane Ogden affirmed 27 March 2018, Exhibit "SGO-2", 1-13 to 1-15.

[48] For the reasons given above in respect of the failure to disclose a reasonable cause of action, I agree that the pleading, as presently constituted, would prejudice or delay a fair trial, particularly where this is the plaintiff's second attempt at a pleading and no cause of action has been disclosed.

[49] I therefore order:

1. The Claim filed 9 November 2017 be set aside pursuant to rule 16 of the *Uniform Civil Procedure Rules 1999* (Qld); and
2. The Amended Statement of Claim filed 1 March 2018 be struck out in its entirety pursuant to rule 171 of the *Uniform Civil Procedure Rules 1999* (Qld).

[50] Unless the plaintiff files written submissions within 7 days as to why such an order should not be made, I will order that the plaintiff pay the defendant's costs to be assessed.