

SUPREME COURT OF QUEENSLAND

CITATION: *Prider v Bond University Limited* [2019] QSC 197

PARTIES: **DYLAN PRIDER**
(Plaintiff)
v
BOND UNIVERSITY LIMITED ACN 010 694 121
(Defendant)

FILE NO/S: BS No 780 of 2019

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 25 July 2019, *ex tempore*

DELIVERED AT: Brisbane

HEARING DATE: 24 July 2019

JUDGE: Bowskill J

ORDER: **Application for determination of separate questions under *Uniform Civil Procedure Rules 1999 (Qld) r 483* is dismissed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR DETERMINATION OF QUESTIONS AND CONSOLIDATION OF PROCEEDINGS – SEPARATE DECISION OR DETERMINATION – GENERALLY – where the plaintiff claims both contractual relief and relief for misleading and deceptive conduct under the *Australian Consumer Law* – where the defendant applies for an order that two identified questions of law, one relating to the contract claim and another relating to the misleading and deceptive conduct claim, be heard and determined separately from and before the determination of the other questions in the proceeding under *Uniform Civil Procedure Rules 1999 (Qld) r 483* – where there is factual overlap between the proceeding and a separate proceeding in the Federal Court commenced by the plaintiff against the defendant – whether it is just and convenient for the Court to determine the identified questions separately and before any trial

Uniform Civil Procedure Rules 1999 (Qld) r 483

Advanced Traders Pty Ltd v McNab Constructions Pty Ltd [2011] QSC 212

CBS Productions Pty Ltd v O'Neill (1985) 1 NSWLR 601

Re Multiplex Constructions Pty Ltd [1999] 1 Qd R 287

Reading Australia Pty Ltd v Australian Mutual Provident Society (1999) 217 ALR 495
Tepko Pty Ltd v Water Board (2001) 206 CLR 1

COUNSEL: I Prider (*sol*) for the plaintiff
M H Hindman QC and S Eggins for the defendant

SOLICITORS: Prider & Co Lawyers for the plaintiff
MinterEllison for the defendant

- [1] The defendant applies for orders, firstly, under rule 483 of *Uniform Civil Procedure Rules* 1999, that two identified questions of law be heard and determined separately from and before the determination of the other questions in the proceeding and, secondly, that amendments recently made to the statement of claim be disallowed or alternatively struck out.
- [2] Dealing firstly with the application for an order for determination of separate questions.
- [3] It is relevant to note the procedural history. This proceeding began in this Court in January 2019 with the filing of an originating application by the plaintiff, a student, seeking interlocutory and final injunctive relief against the defendant, Bond University, essentially to require the University to permit and enable the plaintiff to enrol in, attend and participate in a particular course, namely a combined Bachelor of Commerce and Bachelor of Laws degree.
- [4] The application for interlocutory relief was heard by Mullins J on 29 January 2019 and dismissed. On that day, orders were made for the proceeding to continue as if started by claim and for the filing of pleadings.
- [5] In due course, a statement of claim was filed on 21 February 2019. In broad terms, there are two causes of action pleaded: a contract claim and a misleading and deceptive conduct claim. The plaintiff's claim is for specific performance of what is called the second BCom/LLB program agreement; further or alternatively, damages for breach of that agreement; further or alternatively, an order under s 237 of the *Australian Consumer Law* for the agreement to be varied in a particular way; and further or alternatively, damages or compensation under s 236 of the ACL for misleading and deceptive conduct.
- [6] The crux of the plaintiff's complaint is that there was a contract between him and the University, the terms of which included certain bases on which the plaintiff would be admitted to the BCom/LLB program (in terms of study prerequisites) and, also, what is called a "reasonable adjustments" term, pursuant to which he says the defendant agreed to provide reasonable adjustments to facilitate his participation in the program, notwithstanding his disability; and, further, that the university made certain representations to the plaintiff both as to the bases on which he would be admitted to the program and in relation to the provision of reasonable adjustments, which it failed to fulfil.

- [7] A defence was filed on 22 March, and a reply was filed on 12 April. Relevantly to the present application, among other things, in its defence the University:
- (a) first, pleads that the relationship between the University and the plaintiff at the time of and as contemplated by the second BCom/LLB program agreement was not of a contractual nature; that is, it denies the existence of any legally enforceable agreement of a contractual nature between the parties (see paragraph 51 of the defence); and
 - (b) second, denies that any representations made by the University were made in trade or commerce within the meaning of the ACL (see paragraph 49 of the defence).
- [8] On 20 May 2019, the plaintiff commenced a separate proceeding in the Federal Court of Australia against the defendant as well as a number of other parties. In this Federal Court proceeding the plaintiff seeks relief for what he alleges constitutes unlawful discrimination against him under the Commonwealth *Disability Discrimination Act* 1992. Insofar as it concerns the University, the originating application in the Federal Court proceeding articulates a number of breaches of the *Disability Standards for Education* 2005, made under s 31 of the *Disability Discrimination Act*, as well as breaches of other provisions of that Act.
- [9] Relevantly, the *Disability Standards for Education* provides for an education provider to make “reasonable adjustments” for a person with a disability, to assist with enrolment and participation in a course or program. Outlined in the originating application in the Federal Court proceeding are a number of respects in which the plaintiff contends the University failed to provide “reasonable adjustments” that it was obliged to provide under the legislation (as well as other breaches of either the Standard or the Act).
- [10] The commencement of the proceeding in the Federal Court followed a complaint dealt with in the Australian Human Rights Commission which was unable to be resolved by conciliation.
- [11] On 30 May 2019, Bond J made an order in this proceeding, on the application of the defendant, that the proceeding be placed on the commercial list. There was at the time foreshadowed an application by the plaintiff to transfer the Supreme Court proceeding to the Federal Court, although it had not yet been filed. Justice Bond also made directions for that to occur.
- [12] The plaintiff’s application for transfer was heard by Mullins J on 4 July 2019. It was opposed by the defendant, in part, on the basis that the defendant proposed to bring an application for the determination of separate questions, which had the potential to dispose of the proceeding entirely. The transfer application was adjourned, part-heard, with directions being made for the application which is now before me.
- [13] In the course of the hearing before Mullins J, counsel for the defendant conveyed the defendant’s instructions that, in the event it was unsuccessful in obtaining an order for the determination of separate questions, it would consent to the transfer of the Supreme Court proceeding to the Federal Court. In that sense, it is uncontroversial that, but for this application for determination of the separate questions, it is appropriate for the proceeding in this Court to be transferred to the Federal Court, so that the whole of the dispute between the parties can be determined by the one Court. It is acknowledged

that there is a factual overlap between the proceedings, in particular between one element of the contractual action advanced in this Court, being the alleged breach of the “reasonable adjustments” term of the alleged contract, and the allegation of unlawful discrimination in the Federal Court, by failing to comply with the statutory obligation to provide reasonable adjustments, having regard to the plaintiff’s disability.

- [14] Recently, on 9 July 2019, the plaintiff filed an amended statement of claim in this proceeding, adding a pleading of common law misrepresentation in addition to the statutory misleading and deceptive conduct claim and also adding a pleading of breach of two additional alleged agreements. The defendant complains that the plaintiff did so without seeking leave (a requirement due to the matter having been placed on the commercial list and, in any event, in order to amend the originating document to add a claim for damages for misrepresentation) and, further, on the basis that the pleading is deficient.
- [15] The defendant also submits that it is more appropriate in any event that any new causes of action be advanced in the Federal Court proceeding. However, it is accepted that, for the purposes of determining the application for determination of separate questions, the Court should proceed on the basis that the misrepresentation claim could be properly pleaded, and would be permitted to be added as part of this proceeding.
- [16] The questions the defendant seeks to be separately determined are identified in annexure A to the application filed on 10 July 2019 and are as follows:

“Existence of a contractual relationship

- (1) (in the event the amended statement of claim filed 9 July 2019 is permitted) Are the agreements described in the Statement of Claim as the Dip Legal Studies Agreement, the First BCom/LLB Agreement and the Second BCom/LLB Agreement, legally enforceable contracts?

(or in the event the amended statement of claim filed 9 July 2019 is not permitted) Is the agreement described in the Statement of Claim as the Second BCom/LLB Agreement, a legally enforceable contract?

Trade or commerce

- (2) Assuming (without deciding) that:
- (a) the facts pleaded in Parts C and D of the Statement of Claim are true; and
- (b) Bond University made the representations:
- (i) pleaded at paragraph 44 of the Statement of Claim;
- (ii) further, or alternatively, pleaded at paragraph 46 of the Statement of Claim,

were those representation made by Bond University in “trade or commerce” within the meaning of that expression in the Australian Consumer Law?”

- [17] Rule 483(1) of the UCPR confers a discretion on the Court to make an order for the decision by the Court of a question separately from another question, before the trial of the proceeding. It is a wide discretion, in an overarching sense to be exercised having regard to what is just and convenient: see *Re Multiplex Constructions Pty Ltd* [1999] 1 Qd R 287 at 288; and *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495 at [9]. The relevant principles were summarised in *Reading* at paragraph [8], which has been applied by this Court in relation to rule 483 (see, for example, *Advanced Traders Pty Ltd v McNab Constructions Pty Ltd* [2011] QSC 212 at [10] to [11]). Acknowledging the discretion is a wide one, courts have sounded notes of caution in invoking this procedure. For example, in *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 at 606, Kirby P, as his Honour then was, cautioned against the separate determination of an issue where it is one of two or more alternative ways in which an applicant frames its case, and determination of the issue would leave significant other issues unresolved. For the plaintiff, reliance is also placed on the observations of Kirby and Callinan JJ in *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at [168] to [170], culminating in the statement that “[s]ingle-issue trials should ... only be embarked upon when their utility, economy, and fairness to the parties are beyond question”.
- [18] The defendant submits it is just and convenient for this Court to determine the identified questions separately, and before any trial of this proceeding, because:
- (a) First, the proposed questions are questions of law which will be determinative of the litigation in this Court, save for the allegations of misrepresentation recently added. This should be clarified to say that the questions will be determinative if answered in the way the defendant contends they should be. Further, it is emphasised that the fundamental questions, of whether the relationship between the parties is contractual and whether the conduct of the University was relevantly in trade or commerce, do not arise in the Federal Court proceeding. Although the factual matters (in terms of breach of the alleged contract and the discrimination alleged) overlap, it is submitted the underlying legal issues are different.
 - (b) Second, insofar as the “trade or commerce” question is concerned, that is proposed to proceed on the basis of an assumption as to the correctness of matters pleaded by the plaintiff. In relation to the contract question, that will involve evidence being called. However, counsel for the defendant says there does not presently appear to be a factual dispute about the matters said to give rise to the alleged contract (as opposed to the allegations of the breach); although appropriately it is acknowledged that, until the parties put on their evidence, the possibility of some factual dispute cannot be ruled out.
 - (c) Third, that determining these questions will result in significant time and cost savings because, again, if determined in the way the defendant contends for, it would relieve either this Court or the Federal Court of the need to determine the contested questions of fact in relation to alleged breaches of contract and the alleged misleading and deceptive conduct. Further, even if determined unfavourably to the defendant’s arguments, it may facilitate the resolution of the dispute or part of the dispute between the parties. And the questions could be determined relatively quickly in this Court given the progress of these proceedings otherwise (since pleadings have closed and disclosure is almost complete); whereas the proceedings have only recently commenced in the Federal Court.

- [19] In that regard, I have been informed that the first case management hearing in the Federal Court proceeding was held on 19 July but has been adjourned pending the outcome of this application. It is acknowledged that, if the application is refused in this Court it is open to the defendant to pursue the determination of the separate questions in the Federal Court proceeding also. The work that has been done in this proceeding, in terms of pleadings and disclosure, is not lost.
- [20] Counsel for the defendant candidly acknowledges the complicating features of this case, namely, the factual overlap between this proceeding and the Federal Court proceedings and the recent amendment to the statement of claim.
- [21] The questions are said by the defendant to be of important significance to the University, and the higher education sector more widely, with conflicting views having been expressed to date at first instance and intermediate appellate level. As described by counsel for the defendant, the issues are highly contentious and undecided legal issues; which I would observe potentially raises the issue of additional potential appeals referred to by Justices Kirby and Callinan in *Tepko* at [170].
- [22] The plaintiff opposes the order for determination of the separate questions on the following bases.
- (a) First, because of the factual overlap between the two proceedings in relation to whether the University was obliged to provide reasonable adjustments; what those reasonable adjustments were; and whether they were provided or not.
- (b) Second, because of a perceived risk that the separate determination of the questions in this proceeding would have a detrimental impact on the Federal Court proceeding in terms of *res judicata* or issue estoppel. Again, in particular, this is said in relation to the issue of what reasonable adjustments were required to be provided, whether there was a failure to implement the required adjustments and also the issues and factual basis for the misrepresentation and “victimisation”, the latter being a matter raised in the Federal Court proceeding only.
- That does not appear to be a real risk, given the scope of the proposed questions. That is, the contract question does not invite consideration of what reasonable adjustments were required to be provided or whether or not such adjustments were implemented. However, it should be observed that it may be relevant, in considering the question whether the relationship between the parties was a contractual one, to have regard to what are said to be the terms of the alleged contract. The trade or commerce question does not invite consideration of the factual basis for any alleged misrepresentation.
- (c) Third, the plaintiff submits that the procedure would involve additional time and costs. The plaintiff is concerned that determination of the separate questions in this Court would delay the progress of the Federal Court proceeding. He is also concerned about the impact of a costs order on his ability to continue to prosecute his claims if he was unsuccessful in this Court. As to the latter, that may be said to be a consequence of litigation. But, of course, there are a range of possibilities that might flow if the questions were to be determined separately, including a delay in enforcement of any costs orders. As to the former, there does not appear to be any reason why the Federal Court proceeding could not progress, at least to some extent, even whilst the separate questions were being determined in this

Court. There may, however, be some delays, particularly in the event of an appeal or appeals.

- (d) Fourth, the plaintiff says the process would be attended by fruitlessness. If the separate questions are answered favourably to the University, that still leaves the substantive issue of discrimination to be dealt with. Even if the separate questions were answered unfavourably to the University, that is, to find that there was a contractual relationship, and the conduct was in trade or commerce, that would not resolve the issues between the parties, because the reasonable adjustments to be provided for the plaintiff would need to await the outcome of the Federal Court proceeding and there would likely be further delays due to appeals.

[23] In terms of how the discretion under rule 483 ought to be exercised in this case, looked at in isolation, in the context of this proceeding only, there may be said to be sound reasons supporting the separate determination of the two identified questions. They are questions of law, capable of precise formulation, to be determined on the basis of assumed facts in the case of the trade or commerce question, and facts to be determined but not anticipated to be controversial in the case of the contract question. In relation to the contract question, an answer favourable to the defendant would bring an end to that part of the plaintiff's claim against it. In relation to the trade or commerce question, an answer favourable to the defendant would bring an end to the statutory misleading and deceptive conduct claim. But, of course, there would still be the ancillary misrepresentation claim. Nevertheless, determination of the questions could narrow the issues for trial.

[24] But this proceeding is not in isolation. It represents part of a broader dispute between the parties, another substantial part of which is pending in the Federal Court. Apart from the application presently before me, the factual overlap between the two proceedings is acknowledged as justifying transfer of this proceeding to the Federal Court. The separate determination of these questions is said to be of importance and significance to the defendant and universities more broadly. That may be accepted. But even if determined favourably to the defendant, the substance of the dispute between the parties remains, in terms of the alleged disability discrimination issues involving, in large part, the issue of reasonable adjustments.

[25] As I have said, it is acknowledged by both parties that it would be open to pursue the separate determination of the questions in the Federal Court, following the transfer. However, the defendant presses for this Court to make an order under rule 483, and determine the questions prior to any transfer, because it is thought that the questions could be dealt with more quickly and conveniently here, given the stage this proceeding has reached. As to that, both parties estimate requiring two to three months before the questions could be heard. Assuming three months, that would mean a hearing at the end of October, with a decision being delivered sometime after that.

[26] In my view, after giving the matter careful consideration, that is not a persuasive reason to grant the application. The scope of the broader dispute between the parties, which it is acknowledged ought appropriately be dealt with by one court, relevantly the Federal Court, strongly supports the conclusion that it is that Court which ought to determine whether to separate out any questions for early determination (whether limited to those presently advanced by the defendant or otherwise) and determine them. I do not consider it appropriate to assume there would necessarily be significant delay in the

matter if that course were followed. I am concerned that keeping the proceeding in the Supreme Court, only for the purposes of determining these questions, is not just and convenient, in the context of the dispute between the parties as a whole.

- [27] It is preferable, in my view, for the dispute to be managed to a resolution in the one court which may, of course, involve the determination of separate questions if the Federal Court considers that appropriate. At least in that context, seized of the whole dispute, the Federal Court will be well placed to consider the relevant factual basis of any separate questions and how they fit into the overall dispute. There may also be a greater level of control, and less risk of delays to the balance of the proceeding, if it is dealt with in one place.
- [28] For those reasons, I decline to exercise the discretion conferred under rule 483 and the application for determination of the separate questions is refused. I will hear from the parties about the remaining part of the application concerning the amendments to the statement of claim, although I anticipate that in light of the concession as to transfer, that may become uncontroversial.
- [29] I record that, following delivery of the reasons set out above, the parties were in agreement as to an order that the recent amendments to the statement of claim be disallowed (on the basis that further work will be required in any event to consolidate the pleadings following transfer) and, further, that an order for transfer of this proceeding to the Federal Court be made, by consent.