

SUPREME COURT OF QUEENSLAND

CITATION: *Kember v Carl & Anor* [2020] QSC 105

PARTIES: **REX MAXWELL JOHN KEMBER**
(plaintiff)
v
RAYMOND LESLIE CARL
(first defendant)
AAI LIMITED T/A SUNCORP INSURANCE
ACN 005 297 807
(second defendant)

FILE NO/S: SC No 670 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 7 May 2020

DELIVERED AT: Rockhampton

HEARING DATE: 5 May 2020

JUDGE: Crow J

ORDER:

1. **The requirement for the defendants to sign the Form 48, Request for Trial Date is dispensed with.**
2. **This proceeding is transferred to the Supreme Court at Brisbane.**
3. **If the parties cannot agree as to costs, written submissions as to costs are to be filed as follows:**
 - a. **Defendant's submissions by 11 May 2020.**
 - b. **Plaintiff's submissions by 13 May 2020.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TRIAL – TIME AND PLACE – where the plaintiff instituted proceedings against the defendants in the Central Regional Registry at Rockhampton – where the second defendant filed an application to transfer the proceeding from the Central Regional Registry to Southern Regional Registry of Brisbane – where there is no connection to the Central Region in respect of the initial cause of action – where the plaintiff resides in Southern Region - where the plaintiff engaged solicitors residing in the Central Region – where the parties intends to call expert witnesses from the Southern Region – where the parties intend to call lay witnesses from the Southern Region - whether the proceeding should be transferred to Southern

Regional Registry

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TRIAL – SETTING DOWN FOR TRIAL - where plaintiff file application to dispense with requirement for defendant's signature on request for trial date

Uniform Civil Procedure Rules 1999 (Qld), r 39, r 469

National Mutual Holdings Pty Ltd & Ors v Sentry Corporation & Anor (1988) 19 FCR 115, considered
Clark v Ernest Henry Mining Pty Ltd [2019] 3 Qd R 136;
 [2018] QSC 253, followed
Manasse v Shine Lawyers Pty Ltd [2019] QSC 123, cited

COUNSEL: S J Deaves for the plaintiff
 M Grant-Taylor QC for the second defendant

SOLICITORS: Chris Trevor & Associates for the plaintiff
 Jensen McConaghy for the second defendant

- [1] On 5 December 2015, Mr Kember suffered serious personal injury in a motor vehicle accident that occurred at the intersection of Bruce Highway and Uhlmann Road, Burpengary. Liability has been admitted.
- [2] Despite being injured in Burpengary and residing in North Lakes, Mr Kember retained Chris Trevor & Associates of Gladstone to act on his behalf. There can be no criticism of Mr Kember in this regard. Mr Kember is entitled to retain a solicitor in which he has trust and confidence.
- [3] Mr Kember has been assessed by a number of medical experts; Dr Morgan, Dr Estensen, Dr FitzPatrick, Dr Jetnikoff and the occupational therapists, Mr Hoey and Mr Zietek. All of these experts practice in Brisbane.
- [4] On 6 August 2019, a compulsory conference pursuant to the provisions of the *Motor Accident Insurance Act 1994 (Qld)* was held, however, it was unsuccessful. On 29 August 2019, the plaintiff filed their claim and statement of claim in Supreme Court Central Regional Registry at Rockhampton. On 18 September 2019 the second defendant filed its notice of intention to defend and defence, admitting liability and putting quantum in issue.
- [5] On 10 October 2019 the solicitors for the defendant wrote to the solicitors for the plaintiff raising the transfer of the matter to the Brisbane Registry by consent. By correspondence of 30 October 2019, the plaintiff's solicitors advised they would not consent to the transfer of the matter to the Brisbane Registry. In particular, the solicitors for the plaintiff raised the fact that the plaintiff's partner's family resides in Gladstone, so that a trial in Rockhampton would be more convenient as the plaintiff's children would receive childcare nearby.¹

¹ Exhibit PRB-02 to the affidavit of Paul Richard Birkett filed 30 April 2020.

- [6] The plaintiff's solicitors pointed out that as the plaintiff had lost his employment, his family was suffering from financial stress and they sought a trial date as soon as possible to enable the resolution of the matter. The plaintiff's solicitor concluded:²

“We suggest that the appropriate course of action is to consider whether the Rockhampton or Brisbane Court can provide the most prompt trial at the point when the parties are ready for trial rather than bringing an Application to transfer the matter at this stage when it is not known when the trial may be held.”

- [7] On 6 March 2020 a mediated conference pursuant to r 553 of the *Uniform Civil Procedure Rules 1999 (Qld)* (“UCPR”) was conducted.

- [8] On 21 April 2020, the plaintiff applied for orders which, *inter alia*, sought to have the requirement for the defendant to sign the request for trial date dispensed with and for a trial date to be set.

On 30 April 2020, the second defendant filed an application to seeking for the matter to be transferred to the Supreme Court at Brisbane.

Second defendant's application

- [9] Rule 39 UCPR provides:

“39 Change of venue by court order

- (1) This rule applies if at any time a court is satisfied a proceeding can be more conveniently or fairly heard or dealt with at a place at which the court is held other than the place in which the proceeding is pending.
- (2) The court may, on its own initiative or on the application of a party to the proceeding, order that the proceeding be transferred to the other place.”

- [10] With reference to the decision of the full Federal Court in *National Mutual Holdings Pty Ltd & Ors v Sentry Corporation & Anor*,³ I said recently in *Clark v Ernest Henry Mining Pty Ltd*:⁴

“As the Full Federal Court pointed out, in exercising the discretion to transfer, it is necessary for an applicant to satisfy the Court that the proceeding may be more conveniently or fairly heard or dealt with in another place and that often requires consideration of the residence of the parties, the residence of witnesses, the expense to the parties, the place where the cause of action arose, and the convenience of the Court itself.”

- [11] Senior Counsel for the second defendant accepts that the second defendant, pursuant to r 39(1) UCPR, bears the onus in showing that the proceeding can be more conveniently or fairly heard or dealt with in Brisbane

² Exhibit PRB-02 to the affidavit of Paul Richard Birkett filed 30 April 2020.

³ (1988) 19 FCR 115.

⁴ [2019] 3 Qd R 136 at 139.

- [12] With respect to the residences of the parties, the plaintiff and his partner reside at North Lakes, 32 kilometres north of the Queen Elizabeth II Courts of Law building in George Street, Brisbane. The respondent has offices throughout Queensland.
- [13] With respect to the residences of the witnesses, the principal witness is the plaintiff who resides at North Lakes and his partner, whom the second respondent has agreed may appear by telephone if necessary.
- [14] There is one further lay witness, Mr Darren Farimbella, who is the Queensland Production Manager of Ardex Australia, the former employer of the plaintiff. Ardex has its production facility at Brendale, a suburb within the Moreton Bay Regional Council locality.
- [15] With respect to the expert witnesses, their places of practice are in Brisbane. However, as I discussed in *Manasse v Shine Lawyers Pty Ltd*,⁵ as experts ordinarily provide their evidence-in-chief by report and are available for cross-examination by telephone or audio visual means, little turns on the residence of the expert witnesses.
- [16] With respect to the expenses of the parties, there can be little doubt it will be less expensive for the defendant to litigate in Brisbane; its solicitors have their office in Brisbane. With respect to the plaintiff, he is able either to drive or obtain one of the many forms of public transport between North Lakes and Brisbane City. Accordingly, there is little expense to the plaintiff himself and his partner attending court in Brisbane. There is additional expense to the plaintiff's solicitor and Counsel attending in Brisbane, however, that has not been quantified.
- [17] In support of their opposition to the transfer, the plaintiff argues that given there are no active cases of COVID-19 in the Rockhampton region, that Rockhampton would be a more suitable location for trial. Whilst it is true that there are currently no active cases of COVID-19 in Rockhampton region, a trial in Rockhampton would require at the minimum the plaintiff, but more likely, the plaintiff, his partner, and their three children to travel some 600km north from North Lakes to Rockhampton. It is impossible, in the absence of more specific evidence, to make any finding upon the relative risks of possible infection by COVID-19 by holding the trial in Brisbane as opposed to Rockhampton.
- [18] As the plaintiff is under some financial stress, it is important that the trial be conducted as soon as possible. Convenience to the court is an important factor. Solicitor for the defendant, Mr Birkett, set out in his affidavit,⁶ the availability in Brisbane Supreme Court for a three day trial. It is available on the following dates:
- (a) 2 - 5 June 2020;
 - (b) 9 - 12 June 2020;
 - (c) 15 - 18 June 2020;
 - (d) 29 June – 3 July 2020;
 - (e) 15 - 17 July 2020;

⁵ [2019] QSC 123.

⁶ Affidavit of Paul Richard Birkett filed 30 April 2020.

- (f) 24 - 27 July 2020; and
- (g) 27 - 31 July 2020.

- [19] In Rockhampton, there is a regrettable delay in trial dates. The three-week Supreme Court sittings commencing 1 June 2020 has, currently, no primary dates available until 15 June 2020. The early availability of trial dates is an important factor in the exercise of the discretion conferred by r 39 UCPR; in this case it favours the defendant.
- [20] On the evidence as it currently stands, I conclude that the proceeding can more conveniently be heard or dealt with in Brisbane as:
- (a) The parties reside in close proximity to Brisbane;
 - (b) The witnesses reside in close proximity to Brisbane;
 - (c) The cause of action arose in Brisbane; and
 - (d) Earlier trial dates are available in Brisbane.

Plaintiff's application

- [21] Rule 469 UCPR provides:

“469 Dispensing with signature on request for trial date

On the application of a party who has signed a request for a trial date, the court may dispense with the signature of another party who has been served with the request under rule 467(2) and has not signed and returned it within 21 days after service.”

- [22] On 12 March 2020, solicitors for the plaintiff sent a request for trial date, in the appropriate form, to the second defendant by way of letter.⁷ As of 17 April 2020, a signed request for trial date has not been returned to the plaintiff's solicitors.⁸ The plaintiff applies to have the requirement for the defendants to sign the request for trial date be dispensed with. As the second defendant does not oppose the order sought by the plaintiff, and the requirements of r 469 UCPR are met, I consider it appropriate to make the order as sought.
- [23] With regard to the second order sought by the plaintiff, that is, for a trial date to be set, as the matter is to be transferred to Brisbane I consider it inappropriate to make that order.
- [24] Accordingly, I make the following orders in relation to both applications:

⁷ Affidavit of Margaret Anne Esdale filed 21 April 2020.

⁸ Affidavit of Margaret Anne Esdale filed 21 April 2020.

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