

SUPREME COURT OF QUEENSLAND

CITATION: *Green v The Trust Company Limited & Ors* [2020] QSC 180

PARTIES: **BRONWYN ANGELA GREEN**
(plaintiff)
v
THE TRUST COMPANY LTD (AS CUSTODIAN FOR STOCKLAND TRUST MANGEMENT LTD)
ACN 004 027 749
(first defendant)
STOCKLAND PROPERTY MANAGEMENT PTY LTD
ACN 000 059 398
(second defendant)
MILLENNIUM HI-TECH GROUP PTY LTD
ACN 103 423 374
(third defendant)

FILE NO/S: SC No 60 of 2020

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 17 June 2020

DELIVERED AT: Rockhampton

HEARING DATE: 12 June 2020

JUDGE: Crow J

ORDER: **1. The parties complete disclosure by 30 June 2020.**
2. The parties participate in a mediated Rule 553 conference in Rockhampton by 31 August 2020.
3. This proceeding be transferred to the District Court at Rockhampton.
4. If costs of the two applications heard 12 June 2020 cannot be agreed, the third defendant to file and serve its submissions on costs by 19 June 2020, the first and second defendants file and serve their cost submissions by 23 June 2020 and the plaintiff file and serve its submissions on costs by 25 June 2020.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TRIAL – SETTING DOWN FOR TRIAL – where application by plaintiff to dispense with requirement for defendants to sign request for trial date pursuant to r 469 of the *Uniform Civil Procedure Rules* 1999

(Qld) – where defendants have not yet received advice from a liability expert – where in accordance with r 429 of the *Uniform Civil Procedure Rules 1999* (Qld) the defendants have a further two months to receive advice regarding liability – whether it would be premature to dispense with the requirement for the defendants to sign the request for trial date

COURTS AND JUDGES – COURTS – JURISDICTION AND POWERS – TRANSFER OF PROCEEDINGS TO OR FROM HIGHER COURT AND BETWEEN COURT – TO A LOWER COURT – where proceedings commenced in Supreme Court – where claim falls within District Court jurisdiction – where third defendant files application to have matter remitted to the District Court – whether appropriate to transfer matter to the District Court

Civil Proceedings Act 2011 (Qld), s 25
Uniform Civil Procedure Rules 1999 (Qld), r 2, r 5, r 429, r 469

Campbell v Jones [2003] 1 Qd R 630; [2002] QCA 332, cited
Perfect v MacDonald & Anor [2012] QSC 11, followed
Platinum Investments Group Pty Ltd v Anderson [2019] 3 Qd R 305; [2018] QSC 2, applied
Tickner v Teys Australia Biloela Pty Ltd [2020] QSC 62, followed

COUNSEL: A M Arnold for the plaintiff
S J Deaves for the first and second defendants
A P J Collins for the third defendant

SOLICITORS: Rees R & Sydney Jones for the plaintiff
Wotton Kearney for the first and second defendants
Carter Newell for the third defendant

- [1] On 6 July 2018, Ms Green slipped in water at the Stockland Shopping Centre in Rockhampton. As a result of the slip, Ms Green has been diagnosed as suffering from a trimalleolar fracture of the left ankle, associated with dislocation and treated surgically, and an aggravation of previous lumbar spine pathology.¹ Dr Greg Gillett, orthopaedic surgeon, in his report of 16 July 2019, assesses a 5% whole person impairment and opines that Ms Green will be able to continue to work in her occupation but will “have issues with getting up and down and requirements of some assistance from co-workers with the getting up and moving around tasks”.²
- [2] On 17 September 2018, Ms Green served the first and second defendants with her Part 1 Notice of Claim pursuant of the provisions of the *Personal Injuries Proceedings Act 2002* (Qld) (“PIPA”).³ On 27 November 2018, Ms Green served

¹ Page 5 of Exhibit DFJ1 to the affidavit of Dominic Francis Jorgensen filed 8 June 2020.

² Page 6 of Exhibit DFJ1 to the affidavit of Dominic Francis Jorgensen filed 8 June 2020.

³ Paragraph 4 of the affidavit of Dominic Francis Jorgensen filed 8 June 2020.

her Part 2 Notice of Claim on the first and second defendants as occupiers of the Stockland Shopping Centre. The first and second defendants denied liability on 23 May 2019.⁴ On 18 June 2019 Ms Green served her Part 1 and Part 2 Notices of Claim on the third defendant as cleaner of the area where she suffered the injury. As discussed above, Dr Greg Gillett examined Ms Green on 16 July 2019 and provided his report on the same day. That report was provided to the first, second and third defendants on 20 August 2019. The first, second and third defendants have not sought to exercise their right to have Ms Green assessed by an orthopaedic surgeon of their own choice.

- [3] Mr Martin of InterSafe was engaged to conduct an inspection of the accident site and provide a report on 9 July 2019.⁵ That report was received almost two months later on 4 September 2019 and disclosed to all of the defendants on 9 September 2019.⁶ The defendants, in the last nine months, have not sought to commission a report from an ergonomic expert.
- [4] On 11 December 2019 the parties participated in a compulsory conference pursuant to the PIPA and, as the matter did not settle, the parties exchanged mandatory offers.⁷ Thereafter the following occurred:⁸

Date	Party	Event
16 January 2020	Plaintiff	Claim and Statement of Claim filed
29 January 2020	Plaintiff	Statement of Loss and Damage filed
29 January 2020	Plaintiff	List of Documents filed
2 March 2020	Third Defendant	Notice of Intention to Defend and Defence filed
6 March 2020	First and Second Defendant	Notice of Intention to Defend and Defence filed
11 March 2020	First and Second Defendant	Notice claiming contribution of Third Defendant filed
15 April 2020	Plaintiff	Reply to the Defence of first and second defendants filed
15 April 2020	Plaintiff	Reply to third defendant filed
7 May 2020	First and second defendants	Statement of Expert and Economic Evidence filed
7 May 2020	First and second	List of Documents filed

⁴ Paragraph 6 of the affidavit of Dominic Francis Jorgensen filed 8 June 2020.

⁵ Paragraph 10 of the affidavit of Dominic Francis Jorgensen filed 8 June 2020.

⁶ Paragraph 10 of the affidavit of Dominic Francis Jorgensen filed 8 June 2020.

⁷ Paragraph 13 of the affidavit of Dominic Francis Jorgensen filed 8 June 2020.

⁸ Paragraph 15 of the affidavit of Dominic Francis Jorgensen filed 8 June 2020.

	defendants	
19 May 2020	Third defendant	Statement of Expert and Economic Evidence filed
19 May 2020	Third defendant	List of Documents filed
21 May 2020	Plaintiff	Request for trial date sent to solicitors for defendants and a appointed a “trial plan conference for 5 June 2020” ⁹
4 June 2020	First and second defendants	Request for Further and Better Particulars of Statement of Claim delivered to plaintiff
5 June 2020	Plaintiff	Plaintiff’s solicitors attempt to comply with practice direction 18 of 2018 by undertaking trial plan conference
8 June 2020	Plaintiff	Application filed by for directions, dispensation with signature of defendants on request for trial date, and seeking trial date for 3 August 2020
12 June 2020	Plaintiff	Further and Better Particulars filed
12 June 2020	Third defendant	Application to transfer the proceeding to District Court at Rockhampton filed

Application for Directions and Trial Date

- [5] The philosophy behind r 469 of the *Uniform Civil Procedure Rules 1999* (Qld) (“UCPR”) is that a party who considers that it is fully prepared for trial can sign and send a request for trial date to an opponent who then has 21 days to either sign the request or alternatively decline to sign on the basis that the party is unable to certify that it is ready for trial.
- [6] The implied undertaking to proceed expeditiously in accordance with r 5 of the UCPR demands that those parties who are truly ready, in all respects for trial, immediately sign the request for trial date and send it so that the matter may be resolved expeditiously.
- [7] In the present case, as the request for trial date was forwarded on 21 May 2020 the defendants had until 11 June 2020 to sign the request.¹⁰ The plaintiff filed its application on 8 June, three days premature.

⁹ Paragraph 16 of the affidavit of Dominic Francis Jorgensen filed 8 June 2020.

¹⁰ UCPR r 469.

[8] Fryberg and Mullins JJ said in *Campbell v Jones*:¹¹

“[70] Members of the profession should realise that r. 469 requires preparation for trial to take place *before* a request is signed. As a general rule the responsible solicitor should obtain an advice on evidence from counsel or prepare his own ‘advice’ (if he has the necessary skill and experience in litigation), and implement the advice before signing the request. A solicitor who fails to obtain or prepare such an advice is exposed to the risk of paying any costs thrown away or worse, paying damages for negligence.”

(Original emphasis.)

[9] In the present case, by the letter of 26 May 2020 the solicitors for the first and second defendant have confirmed that they have not yet obtained any advice on evidence from counsel and that the matter would not be “resolved within the next 21 days”.¹² Similarly, the third defendant has not yet obtained advice on evidence from counsel but is in the process of doing so.¹³

[10] Given that liability is in issue, the defendants may wish to exercise their rights to obtain a report from a liability expert. Pursuant to r 429(b) of the UCPR the defendants have until 13 August 2020 to serve any such report. In short, a fair trial cannot be had until the defendants are given proper opportunity to consider their position by way of the receipt of advice on evidence which should be forthcoming in the very near future, and then if so advised, obtain an expert report.

[11] As can be observed from the two-month time frame taken by the plaintiff’s expert to deliver his report, the defendants have almost two months in order to meet the requirements of r 429(b) in providing any expert report that they may wish to attempt to tender as evidence in trial. In the present case, it is appropriate that the solicitors for the defendants did not sign the request for trial date absent the advice on evidence. Furthermore, given that the defendants have until 13 August 2020 in order to serve any expert report, it is premature to dispense with the defendants’ signatures on the request for trial date and set a trial date.

[12] In the present case the plaintiff has made commendable efforts to comply with its undertaking to proceed expeditiously, however, it has proceeded too expeditiously.

[13] The position of the first and second defendants is that they support the third defendant’s application to have the proceeding transferred to the District Court after directions are made to advance the litigation.

[14] The first and second defendants propose directions that:¹⁴

1. The parties complete disclosure by 30 June 2020.

¹¹ [2003] 1 Qd R 630 at 647.

¹² Page 66 of Exhibit DFJ1 to the affidavit of Dominic Francis Jorgensen filed 8 June 2020.

¹³ Affidavit of Peter Stuart Dovolil filed 12 June 2020.

¹⁴ Exhibit 3 to the hearing 12 June 2020.

2. The plaintiff provide further and better particulars of her statement of claim in response to a request made 4 June 2020 by the first and second defendants by 30 June 2020.
3. The parties participate in a mediated rule 553 conference by 31 August 2020.
4. The parties sign and file a request for trial date by 30 September 2020.
5. The parties participate in a trial plan conference in accordance with practice direction 18 of 2018 by 15 October 2020.

[15] Counsel for the first and second defendants submits that, the first three directions ought to be made, regardless of whether or not the matter is to be transferred to the District Court.

[16] The position of the third defendant is that no directions should be made but rather the proceeding ought to be transferred immediately to the District Court. The third defendant did not oppose the three directions sought by the first and second defendants but submitted that it was inappropriate that such orders be made when the matter ought to be transferred immediately to the District Court as it had been commenced in the “wrong” court.

[17] I consider the approach submitted by the second defendant accords with rr 5(1) and 5(2) of the UCPR as the making of very limited directions does facilitate the just and expeditious resolution of the real issues in a civil proceeding with minimal expense. The making of such directions, as submitted by the first and second defendants, does meet with “the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.”¹⁵

[18] It is not necessary to consider the order sought in paragraph 2 as, following the hearing, the plaintiff’s filed further and better particulars in response to the request made 4 June 2020.¹⁶ Further, as the plaintiff’s application is premature and the matter is to be transferred to the District Court (see below) it is not appropriate to make the orders as sought by the plaintiff in their application. Accordingly, and as this court is currently seized of the matter, I intend to make the directions sought in paragraphs 1 and 3 of the first and second defendants proposed orders.

Application to Transfer to District Court

[19] Section 25 of the *Civil Proceedings Act* 2001 (Qld) provides:

“25 Transfer by Supreme Court—general

- (1) The Supreme Court may order that a proceeding pending in the District Court or a Magistrates Court be transferred to the Supreme Court.

¹⁵ UCPR r 5(2).

¹⁶ See table above at [4].

- (2) The Supreme Court may order that a proceeding pending in the Supreme Court for which the District Court, or a Magistrates Court, has jurisdiction be transferred to a court having jurisdiction.”

[20] In *Tickner v Teys Australia Biloela Pty Ltd*,¹⁷ with respect to Burns J decision in *Platinum Investments Group Pty Ltd v Anderson*,¹⁸ I said :¹⁹

“[17] Although said in respect of the discretion under s 25(1) of the *Civil Proceedings Act* 2011 his Honour’s reasons are equally applicable to the discretion in s 25(2). Therefore, I consider the approach that I ought take, be the same approach as Burns J, in that:

- (1) the discretion conferred on the court by s 25(2) is unfettered;
- (2) the discretion is broad one and unconstrained by any other express limitation;
- (3) the favourable exercise of the discretion is not simply there for the asking;
- (4) the discretion must be exercised judicially;
- (5) the onus is on the applicant for a transfer to demonstrate to the satisfaction of the court that it is in the interests of justice that the proceeding be transferred; and
- (6) all other things being equal, it will usually be in the interests of justice for the proceeding to be transferred, in terms of s 25(2), if that claim is within the jurisdiction of the inferior court.”

[21] Counsel for the third defendant argues that my approach in *Tickner v Teys*, as set out above, is incorrect. Counsel submits that, on the basis of the 23rd footnote in *Perfect v McDonald & Anor*,²⁰ there is a “rebuttable presumption” that a proceeding commenced in the “wrong” court will be transferred to the “correct” court. In *Tickner v Teys* I addressed the decision of McMeekin J in *Perfect* as follows:²¹

“[18] The applicant refers to footnote 23 in the judgment of McMeekin J in *Perfect v MacDonald & Anor* [2012] QSC 11, where his Honour said:

‘...In my judgment the matter properly fell in the Magistrates’ Court jurisdiction. Irrespective of that, there was no good reason to commence this claim in the Supreme Court. This is not a matter of a litigant’s choice. The legislature has sought to strike a balance between the workloads of the various courts. Save and

¹⁷ [2020] QSC 62.

¹⁸ [2019] 3 Qd R 305.

¹⁹ *Tickner v Teys Australia Biloela Pty Ltd* [2020] QSC 62 at [17].

²⁰ [2012] QSC 11.

²¹ *Tickner v Teys Australia Biloela Pty Ltd* [2020] QSC 62 at [18].

unless good reason is shown proceedings should be commenced in the court of appropriate jurisdiction. There will be costs consequences, and not necessarily just for the litigants, where officers of the Court refuse to comply with these jurisdictional changes.’

- [19] In *Perfect*, judgment was given for the plaintiff in the sum of \$123,813.10. That is a sum less than half the Magistrates Court jurisdictional limit of \$250,000. The injury in *Perfect* was damage to the left deltoid muscle which on the plaintiff’s case was assessed as a 1% whole person impairment.”
- [22] The approach of McMeekin J, “[s]ave and unless good reason is shown proceedings should be commenced in the court of appropriate jurisdiction” is, in my view, similar to the conclusion that “all things being equal, it will usually be in the interests of justice for the proceeding to be transferred in terms of s 25(2), if that claim is within the jurisdiction of the inferior court”.
- [23] Where a proceeding is within the jurisdiction of an inferior court it may be presumed the proceeding will be transferred, however that presumption is not inevitable and in that sense it may be viewed as a “rebuttable presumption”. However, I do not think it is necessary, nor in accordance with the legislation, to couch an interpretation of s 25(2) as involving a “rebuttable presumption” that proceedings be transferred from the “wrong” court to the “correct” court, as this approach infers that the onus is on a respondent plaintiff and that such transfers are “there for the asking”. As s 25(2) has the same words, “may order” as s 25(1) of the *Civil Proceedings Act* 2011, I adhere to the views I expressed in *Tickner v Teys*,²² that is, when it is established that that the inferior court has jurisdiction, the discretion to transfer is unfettered.
- [24] As set out above, the proceeding will not be ready to be heard in the August 2020 Supreme Court sittings. The next available trial dates for civil matters in the Supreme Court at Rockhampton is 30 November 2020. The availability of the District Court is set out in Mr Dovolil’s affidavit as follows:²³
- “On 9 June 2020 I made a further telephone call to the District Court Registry and again spoke to the Registrar regarding availability of Court to hear a trial in this matter. On this occasion the Registrar advised the situation may be different. While the scheduled sittings remain, I was informed that another civil matter which recently requested a trial date was placed on a running list by the sitting judge with no guarantee of a trial date. I was advised further that whilst there could be no certainty as to when this matter could ultimately be heard in the District Court, the Registrar’s best estimate at the present time was late in 2020 or early in 2021...”
- [25] The best estimate of availability for the District Court is for a hearing in late 2020 or early 2021. This is similar to the availability of the Supreme Court, which as previously stated is available for a date commencing 30 November 2020.

²² *Tickner v Teys Australia Biloela Pty Ltd* [2020] QSC 62.

²³ Paragraph 16 of the affidavit of Peter Stuart Dovolil filed 12 June 2020.

[26] Given the similar availability of civil trial dates in both the Supreme and District Court at Rockhampton and that the matter plainly is within the District Court jurisdictional limit, the matter ought to be litigated in the District Court.

[27] Accordingly, I make the following orders:

1. The parties complete disclosure by 30 June 2020.
2. The parties participate in a mediated Rule 553 conference in Rockhampton by 31 August 2020.
3. This proceeding be transferred to the District Court at Rockhampton.
4. If costs of the two applications heard 12 June 2020 cannot be agreed, the third defendant to file and serve its submissions on costs by 19 June 2020, the first and second defendants file and serve their cost submissions by 23 June 2020 and the plaintiff file and serve its submissions on costs by 25 June 2020.