SUPREME COURT OF QUEENSLAND

CITATION:	*Murchie & Anor v The Big Kart Track Pty Ltd & Ors* [2002] QSC 052
PARTIES:	**SHARON LYNETTE MURCHIE** (plaintiff) **FELOWARE PTY LTD (ACN 078 484 116)** (second plaintiff) **v** **THE BIG KART TRACK PTY LTD (ACN 010 342 104)** (first defendant) **GREGORY NEALE RYAN** (second defendant)
FILE NO/S:	No. S 2569 of 2000
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Brisbane
DELIVERED ON:	22 February 2002
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2002
JUDGE:	White J
ORDER:	**The mode of trial be trial by jury**.
CATCHWORDS:	*Uniform Civil Procedure Rules*, rr 467, 469, 471, 471 *Jury Act* 1995, s 13(c), s 65(1)(a) *Jury Regulation* 1997, s 11(1) *Australian Courts Act* 1828, s 24 *The Constitution Act* 1876, s 33 *The Common Practice Act* 1867, s 78 *The Supreme Court Act* 1995, s 51 *Workplace Health and Safety Act* 1995 *Matthews v General Accident Fire & Insurance Corporation Ltd* [1970] QWN 37 *Owen v Munro* [1980] 2 Qd R 679 JURY – abandonment of election for trial by jury – whether request for trial date overrode statement of claim
COUNSEL:	Mr M Grant-Taylor SC with Mr R Lynch for the plaintiffs Mr D North SC for the defendants

SOLICITORS: Boyce Garrick Lawyers for the plaintiffs
Moray & Agnew Solicitors for the defendants

[1] When this matter was called on for trial on 11 February 2002 Mr North SC for the defendants challenged the plaintiffs' entitlement to the mode of trial being by jury. I gave very brief reasons for rejecting that submission (T/S 24) and indicated that fuller reasons would be given subsequently rather than delay the empanelment of the jury and the progress of the trial. I now provide more extensive reasons.

[2] The plaintiffs elected to have their proceedings against the defendants tried by jury in their statement of claim, *Uniform Civil Procedure Rules* (*UCPR*) r 472, the proceedings having been commenced by a claim, r 471.

[3] On 20 April 2001 the plaintiffs' solicitors signed a request for trial date and tendered it to the defendants' solicitors. The request was in Form 48 and certified that:

"7. Trial by jury is not required".

Form 48 in item 7 calls for an election by the parties about the mode of trial. It appears in the Form as follows:

"7. Trial by jury is [not] required".

Accordingly this was a positive indication by the plaintiffs that trial by jury was not required.

[4] The request was not signed and returned by the defendants' solicitors and so the plaintiffs brought an application to dispense with signing by those parties. There were some outstanding interlocutory matters and Muir J made an order by consent on 28 June 2001, *inter alia*, that all parties were to sign a request for trial date pursuant to r 467 at the conclusion of a settlement conference in the event that proceedings were not resolved.

[5] The reason for mentioning this application is to note that the plaintiffs' solicitor, Mr Travis Schultz, swore an affidavit in support of the application exhibiting the request for trial date in which the plaintiffs did not require a jury.

[6] Mr Schultz was cross-examined by Mr North on his affidavit filed on the morning of the commencement of the trial in which he explained that the request for trial date form was erroneously completed with respect to the mode of trial through inadvertence. Mr Schultz is an experienced litigation solicitor. He has sought a civil jury previously. I was unable to conclude, as Mr North tended to suggest, that the error was in some way a subterfuge to mislead the defendants. Mr Schultz deposed that his instructions from the plaintiffs had at all times been to elect for trial by jury. The request for trial date was subsequently signed by the solicitors for the second plaintiff (Mr Schultz's firm) and the defendants on 29 September 2001.

[7] In the days before the trial the plaintiffs' solicitors were informed by the court registry staff that a jury panel was not being arranged for the plaintiffs' trial in view of the indication in the request for trial date. No fee had been tendered, although the expression "before the trial begins" in s 65(1)(a) of the *Jury Act* 1995 relating to the payment of the initial fee for the jury gives no indication as to how much "before"

the commencement of the trial the payment needs to be. In the event, the court staff were prepared to accept the fee imposed by s 11(1) of the *Jury Regulation* 1997 on the morning that the trial was scheduled to begin. A panel was available from those summoned for criminal trials that day, s 13(c) of the *Jury Act*.

[8] The defendants' position was that they would not have signed the request had they understood that the plaintiffs were still electing for trial by jury – not a reason for refusing to do so, as Mr North conceded.

[9] Nonetheless, the defendants maintained that by the certification in the request that trial by jury was not required the plaintiffs had abandoned the election made in the statement of claim.

[10] The common law right to trial by jury was not introduced into New South Wales by the *Australian Courts Act* 1828, s 24. Instead, issues of fact in civil actions were to be decided by one or more judges and by two assessors leaving the parties to make a special application to the court for trial by jury. This required that some general law or ordinance first be passed regulating the qualifications etc. of those who might be summoned. Kneipp J discussed the legislative development of jury acts in New South Wales after the *Australian Courts Act* in *Matthews v General Accident Fire & Life Insurance Corporation Ltd* [1970] QWN 37 at 95. His Honour noted that the New South Wales Act, 11 Victoria No. 20, in s 20 provided for trial by jury of four persons of "all actions at law and all civil issues of fact in the Supreme Court", and was in force when the Colony of Queensland was created by the Letters Patent of 6 June 1859. It was continued in force by cl 20 of the Letters Patent and by s 33 of the *The Constitution Act* of 1876.

[11] Since then the right to trial by jury in civil actions in Queensland has been dealt with in the Rules of Court. It is entirely created by statute. The *Common Practice Act* 1867 in s 78 (now s 51 of the *Supreme Court Act* 1995) provided that an action might be tried by judge alone but only with the consent of the parties. Successive jury acts were and are merely regulatory in character.

[12] Provisions relating to the mode of trial are found in Chapter 15 Part 3 Division 1 of the *UCPR*. They are in certain respects different from RSC O 39 rr 4-13 but it is not fruitful to set out the changes. Relevantly the rules provide:

> "472 Unless trial by jury is excluded by an Act, a plaintiff in the statement of claim or a defendant in the defence may elect a trial by a jury.
>
> …
>
> 474 The court may order a trial without a jury if –
> (a) The trial requires a prolonged examination of records; or
>
> (b) Involves any technical, scientific or other issue that can not be conveniently considered and resolved by a jury.
>
> 475(1) The court may order a trial by jury on an application made before the trial date is set by a party who was entitled to elect for a trial by a jury but who did not so elect.

> (2) If it appears to the court that an issue of fact could more appropriately be tried by a jury, the court may order a trial by jury."

[13] Mr North submitted that the certification in the request overrode the election made by the plaintiff in the statement of claim for trial by jury. There is nothing in the *UCPR* to support this submission and rr 467 and 469 which concern the request for trial date make no mention of the mode of trial. It is only to be found in Form 48. Ryan J in *Owen v Munro* [1980] 2 Qd R 679 at 680 considered that the notice of trial in Form 158 to RSC O 39 r 4 merely recorded the historical fact that a jury had or had not been required by the pleading and could not serve as an abandonment of a previous election in the pleadings. Similar language is used in Form 48. Earlier forms had used more peremptory language which, on one argument, his Honour noted, might support the submission advanced by Mr North.

[14] Form 48 cannot, without some support from the rules themselves, be conclusive of the mode of trial. This is likely to lead to great inconvenience for the staff of the court who must ensure that a panel has been summoned for the commencement of a civil trial where a jury is sought. Pleadings are now filed but it is neither appropriate nor convenient for the staff of the court to seek out the most recent pleading by each party to ascertain whether a jury panel is required. The *UCPR* could conveniently be amended so that an election is made *finally* in the request for trial date.

[15] It is also to be noted that the *UCPR* do not enable a party to apply to change the mode of trial to one without a jury save for the circumstances in r 474 or s 51 of the *Supreme Court Act* 1995 (by consent of the parties).

[16] Mr North further submitted that the court should order trial without jury in this case applying the provisions of r 474(b). He referred to a number of paragraphs in the pleadings which might create difficulties such as a reference to *Workplace Health and Safety Act* 1995. Most of the matters to which he made reference required rulings of law which the trial judge would make. The meaning of "conveniently" in r 474(b) must take its colour from the context and must relate to issues of fact of such complexity or difficulty or expense that they could not, with justice, be resolved by a jury.

[17] Accordingly I ruled that the plaintiffs had not abandoned their election for trial by jury and that the mode of trial would be trial by a jury.