SUPREME COURT OF QUEENSLAND

CITATION:	*Trustee of the Property of Geoffrey Mahony and Deborah Mahony & Ors v McElroy & Ors* [2003] QCA 208
PARTIES:	**THE TRUSTEE OF THE PROPERTY OF GEOFFREY REX MAHONY & DEBORAH LEE MAHONY** (first plaintiff/first respondent) **HUGH DAVID RAMSAY & PLANNED INVESTMENTS PTY LTD** ACN 010 788 262 (second plaintiffs/second respondents) **v** **LIONEL CHARLES McELROY & LENORE MARY McELROY** (first defendants) **CHAKOLA PTY LTD** ACN 010 517 585 (second defendant/first appellant) **DENNIS GLEN** (third defendant/second appellant) **SYKES PEARSON & MILLER** (third party/fourth respondent)
FILE NOS:	Appeal No 5180 of 2002 SC No 6110 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27 March 2003
JUDGES:	de Jersey CJ, White and Atkinson JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Dismiss the appeal and order that the appellants pay the respondents' costs of and incidental to the appeal**
CATCHWORDS:	HIGH COURT AND FEDERAL COURT – OTHER MATTERS RELATING TO FEDERAL COURTS – APPLICATION OF STATE LAWS – LIMITATION OF ACTIONS HIGH COURT AND FEDERAL COURT – OTHER MATTERS RELATING TO FEDERAL COURTS – APPLICATION OF STATE LAWS – WHETHER

COMMONWEALTH LAW OTHERWISE PROVIDES

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – AMENDMENT – where plaintiff brought claim under s 82 *Trade Practices Act* – where Supreme Court exercising federal jurisdiction – where plaintiff sought to have trustee of plaintiffs' family trust joined as a party after expiry of limitation period – whether power to amend under Queensland law extends outside limitation period – whether this power applicable to claims under *Trade Practices Act* (Cth) – whether Commonwealth legislation "otherwise provided" so as to exclude application of Queensland provisions

Bankruptcy Act 1966 (Cth), s 58, s 116
Judiciary Act 1903 (Cth), s 79, s 80
Trade Practices Act 1974 (Cth), s 82
Supreme Court of Queensland Act 1991 (Qld), s 81
Uniform Civil Procedure Rules (Qld), r 69, r 375, r 376, r 387

Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield [2003] VSCA 6, considered
Austral Pacific Group Ltd (in liq) v Airservices Australia [2000] HCA 39; (2000) 203 CLR 136, followed
Fried v National Australia Bank Ltd [2001] FCA 907, distinguished
Jekos Holdings Pty Ltd v Australian Horticultural Finance Pty Ltd [1994] 2 Qd R 515, not followed
John Pfeiffer Pty Ltd v Rogerson [2000] HCA 36; (2000) 203 CLR 503, followed
Lamru Pty Ltd v Kation Pty Ltd (1998) 44 NSWLR 432, distinguished
Lidden v Composite Buyers Ltd (1996) 139 ALR 549, distinguished
Northern Territory v GPAO [1999] HCA 8; (1999) 196 CLR 553, followed
PSL Industries Ltd v Simplot Australia Pty Ltd [2003] VSCA 7, considered
Queensland Industry Development Corporation v Australia and New Zealand Banking Group Ltd, unreported decision of 16 September 1994 (BC 9404073), not followed
Wardley Australia Ltd & Anor v Western Australia (1992) 175 CLR 514, distinguished
Western Australia v Wardley Australia Ltd & Ors (1991) 30 FCR 245, considered

COUNSEL: K A Barlow for the first and second appellants
G Beacham for the first and second respondents
K Holyoak for the fourth respondent

SOLICITORS: Carter Newell for the first and second appellants

Kimballs for the first and second respondents
Clayton Utz for the fourth respondents

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of White J. I agree with the orders proposed by her Honour, and with her reasons.

[2] **WHITE J:** On 5 September 1996 Geoffrey Rex Mahony and Deborah Lee Mahony entered into a contract with Lionel Charles McElroy and Lenore Mary McElroy to purchase a licensed restaurant business in Hastings Street, Noosa Heads known as "Café Vespa". They executed the contract as trustees of The Mahony Family Trust ("the Family Trust"), a discretionary trust of which they are class A beneficiaries with other family members as beneficiaries in other classes. The restaurant business was marketed through Chakola Pty Ltd trading as Ray White (Noosa). Dennis Glen was its agent.

[3] The business was not successful and the Mahonys, on their own petitions, were declared bankrupt on 27 February 1998. Hugh David Ramsay was appointed trustee of their respective estates.

[4] An action was commenced by writ of summons on 30 June 1999 between "The Trustee of the Property of Geoffrey Rex Mahony and Deborah Lee Mahony Bankrupts Estate Queensland 1009/98 71V" and Lionel Charles McElroy and Lenore Mary McElroy as first defendants, Chakola Pty Ltd as second defendant and Dennis Glen as third defendant. The claim was pleaded to have vested in the Mahonys' trustee in bankruptcy by virtue of s 58 and s 116 of the *Bankruptcy Act* 1966 (Cth). As against the first defendants, the McElroys, the plaintiff sought damages for deceit alternatively negligent misstatement and in the further alternative pursuant to s 82 of the *Trade Practices Act* 1974 (Cth). As against the second defendant, the business broker, Chakola Pty Ltd, the plaintiff sought damages pursuant to s 82 of the *Trade Practices Act*. No relief was sought against the third defendant. The writ was served on the defendants on 26 June 2000 and the statement of claim delivered about 6 June 2001. The purchasers' solicitors on the conveyance were joined as a third party.

[5] On their bankruptcy on 27 February 1998 the Mahonys ceased to be trustees of the Family Trust. On 4 December 2001, exercising their power of appointment under the trust deed, they appointed Hugh David Ramsay and Planned Investments Pty Ltd as the new trustees.

[6] On 13 May 2002 Muir J ordered the joinder of the new trustees of the Family Trust as second plaintiffs in the action and gave leave to the first plaintiff to amend the statement of claim in the following terms:

> "43. In the alternative to paragraph 42 [which alleged that the causes of action pleaded had vested in the Mahonys' trustee in bankruptcy] above:

43.1 By virtue of their payment of debts incurred in the operation of The Mahony Family Trust ('the Trust'), GR and DL Mahony possesses a right of indemnity ('the right of indemnity') against the trust estate in respect of those payments;

43.2 Upon the bankruptcy of GR and DL Mahony;

43.2.1 The right of indemnity vested in the first plaintiff;

43.2.2 Consequently the first plaintiff obtained a beneficial interest in the trust estate;

43.2.3 GR and DL Mahony ceased to be the trustees of the Trust pursuant to clause 26 of the deed.

43.3 The first plaintiff brings this action and relies upon its beneficial interest in the trust estate.

43.4 On 4 December 2001 the second plaintiffs were appointed as trustees of the Trust."

[7] Although it was argued that any cause of action seeking damages for breach of the *Trade Practices Act* by the new trustees of the Family Trust was statute-barred, his Honour was persuaded that the new trustees were a proper party to ensure that they were bound by the decision in the proceedings. He doubted that the amendment would defeat the operation of the limitation provisions in s 82(2) of the *Trade Practices Act*. His Honour was persuaded that the Mahonys as beneficiaries of the Family Trust and by virtue of their right of indemnity as trustees had sufficient standing to bring the proceedings which vested in their trustee in bankruptcy. His Honour relied on statements by Finn J in *Lidden v Composite Buyers Ltd* (1996) 67 F.C.R 560 at 563-564 and on *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at 436, *Fried v National Australia Bank Ltd* (2001) 111 F.C.R 322 and *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 and concluded, without elaboration, that there was sufficient that was "exceptional" or "special" in the circumstances to give them standing to sue as beneficiaries. Mr Ramsay deposed that the Family Trust was insolvent and unable to fund the present litigation and that the trustees of the Family Trust had no objection to being joined in the proceeding as either plaintiff or defendant and would abide by the order of the court.

[8] The circumstances said by the respondents to make the circumstances exceptional were the impecuniosity of the Family Trust and the absence of a trustee after the Mahonys' bankruptcy. It seems clear enough that the

proceeding as originally constituted was brought on the erroneous view that the Mahonys were, themselves, the contracting purchasing party and their trustee in bankruptcy brought the action by virtue of s 58 and s 116 of the *Bankruptcy Act*. There is no mention of the Family Trust in the pleadings. It was not until correspondence from the first plaintiff's solicitors in November 2001 responding to an assertion by the appellant's solicitors that the Mahonys' trustee in bankruptcy had no standing to sue on the contract and for associated relief that the Mahonys' entitlement to an indemnity from trust assets in respect of monies spent on behalf of the trust was first raised.

[9] The first plaintiff as the Mahonys' trustee in bankruptcy has a right of indemnity from the Family Trust's assets for expenses and liabilities incurred by the Mahonys personally as the trustees of the Family Trust, *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360 at 367. This right is not trust property and passes to the trustee in bankruptcy of a bankrupt trustee, *ibid*. See also *Re Enhill Pty Ltd* [1983] 1 VR 561, 563 at 567-9; *Re Suco Gold Pty Ltd (in liq)* (1983) 33 SASR 99; and *Re Matheson; Ex parte Worrell v Matheson* (1994) 49 FCR 454. In *Matheson* Spender J concluded at 459-60, having regard to the terms of s 116(2)(a) of the *Bankruptcy Act*, that while a trustee in bankruptcy has an equitable charge or lien over trust property in respect of trust debts as at the date of bankruptcy, the legal title to the trust property does not pass.

[10] As the amendment makes clear, the Mahonys now claim (through their trustee), not a beneficial interest as *cestuis que trust* for whose benefit, amongst others, the trust was established, but as the trustees of the Family Trust asserting their right to be indemnified out of the trust assets against personal liabilities which they incurred in the performance of the trust, *Octavo Investments* at 367. This interest will be preferred to that of the *cestuis que trust* who are not entitled to call for a distribution of trust assets which are subject to a charge in favour of the trustees until that charge has been satisfied. Accordingly, the nature of the claim is not that of *cestuis que trust*/beneficiary of the kind discussed in *Lidden v Composite Buyers Ltd*, *Fried v National Australia Bank Ltd* and *Lamru Pty Ltd v Kation Pty Ltd* where exceptional or unusual circumstances were held to be necessary to warrant a beneficiary acting independently of its trustee.

[11] Nonetheless the amendment is, in my view, a distinct claim against the defendants and not merely an aspect of the existing cause of action as pleaded. The entitlement to indemnity from trust assets for expenditure on behalf of the trust will not extend to the recovery of damages for the various other losses which are pleaded as flowing from the misrepresentations made in respect of the business.

[12] Section 82(2) in the form in force at the time of the contract provided for a limitation period of three years. The amendment to s 82(2) of the *Trade Practices Act* providing that an action under sub-section (1) might be commenced at any time within six years after the day on which the cause of action that relates to the conduct the subject of the action accrued came into force in July 2001. On any view, the cause of action under the *Trade Practices Act* crystallised by 27 February 1998, the date of the Mahonys' bankruptcy, and became statute-barred by 27 February 2001.

[13] It then becomes necessary to consider the interrelation between s 82(2) of the *Trade Practices Act* and s 81 of the *Supreme Court of Queensland Act* 1991 and the *Uniform Civil Procedure Rules* 1999 relating to joinder and amendment of pleadings.

[14] Section 81 of the *Supreme Court of Queensland Act* 1991 introduced in 1998 provided as at the date of Muir J's order:

> "(1) This section applies to an amendment of a claim, … pleadings …
>
> (2) The court may order an amendment to be made, or grant leave to a party to make an amendment, even though –
>
> (a) the amendment will include or substitute a cause of action or add a new party; or
> (b) the cause of action included or substituted arose after the proceeding was started; or
> (c) a relevant period of limitation, current when the proceeding was started, has ended.
>
> (3) This section applies despite the *Limitation of Actions Act 1974*."

This section was amended on 16 August 2002 by the *Justice and Other Legislation (Miscellaneous Provisions) Act* 2002 by renumbering (3) as (4) and adding as (3):

> "(3) Despite subsection (2), the rules of court may limit the circumstances in which amendments may be made."

This would appear to take account of the concerns expressed by Pincus and Thomas JJA in *Draney v Barry* [2002] 1 Qd R 145 discussed below about the effect which such a broad power might have on the operation of r 376. Furthermore, it appears to remove doubt, if there was any, that it was procedural in effect and could not be characterised as irreconcilable with any Commonwealth limitation law.

[15] That provision needs to be considered alongside the *Uniform Civil Procedure Rules* relating to joinder of a new party and amendment. The general power of amendment is contained in r 375. Rule 376 applies if an application for leave to make an amendment is made after the end of a relevant period of limitation current at the date the proceeding was started. The rule deals with the correction of a party's name even if the effect of the amendment would be to substitute a new party or change the capacity in which a party sues and:

> "(4) The court may give leave to make an amendment, even if the effect of the amendment is to include a new cause of action, if –

(a) the court considers it appropriate; and

(b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.

(5) This rule does not limit the court's powers under rule 375."

[16] Rule 387 provides that an amendment of a document takes effect on and from the date of the document that is amended. But subr. (2) provides:

> "However, an amendment including or substituting a cause of action arising after the proceeding started takes effect on and from the date of the order giving leave."

[17] Pincus JA in *Draney v Barry* at 156 considered the relationship between s 81 and the rules:

> "It is my opinion that when applications do not pass the test set out in r 376(4)(b) the court has a general discretion under s 81 of the *Supreme Court of Queensland Act* 1991 to add a cause of action out of time. In exercising that discretion, the court should have regard to the fact that the effect of adding a new cause of action out of time is equivalent to an evasion of the provisions of the *Limitation of Actions Act* 1974, so some adequate ground will be required, in order to justify such an amendment. Since the discretion given by s 81 is not, however, the subject of any express limitation, it appears to me that the court must always have a discretion to add a cause of action out of time where the interests of justice demand that."

[18] Thomas JA in the same case thought that the power given by s 81 should not be exercised on principles different from those contained in the rules. He agreed with Pincus JA that the enactment of s 81 should be regarded as "interrupting the flow of *Weldon v Neal* (1887) 19 QBD 394" which held that the discretion to amend should be exercised restrictively. Whilst conceding that s 81 created a source of power over and above r 376 his Honour could not envisage any situation where a court would act on any different principles under s 81 than those upon which it is required to act by r 376. At 163 he said:

> "I do not say that it is actually impossible that a separate stream of authority could arise, but while there is a rule of court that effectively covers the field I do not think there is any reason for a second stream. However, in Queensland rules of court are made with only limited judicial input, and if the relevant rule could be seen as a negation of the broad judicial power that is recognised by s 81, it might be necessary for a court to act under the latter section. But currently such a possibility is purely

> hypothetical. Rule 376 in my view now sets out the principles upon which such applications are to be considered."

[19] The rules relating to parties are found in ch 3 of the *Uniform Civil Procedure Rules.* Rule 69(1)(b) provides that the court at any stage of the proceedings may order that:

> "(i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding," and
>
> "(ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding,"
>
> may be included as a party.

[20] Rule 69(2) does not permit inclusion of a party after the end of a limitation period unless, relevantly, one of the following applies:

> "(a) the new party is a necessary party to the proceeding because – …
>
> (iii) the proceeding was started in or against the name of the wrong person as a party …; or
>
> (g) for another reason the court considers it just to include or substitute the party after the end of the limitation period."

[21] There is no contention that the action was started in the name of the wrong party, although as initially envisaged that might have been thought to be the case. Since the right of indemnity vests in the trustee of the Mahonys' bankrupt estates it is the need to bind the trustees of the Family Trust which requires their joinder.

[22] It remains then to turn to the relationship between the Queensland provisions and s 82(2) of the *Trade Practices Act*.

[23] When it entertains claims for damages under s 82(1) of the *Trade Practices Act* the court is exercising federal jurisdiction so that s 79 of the *Judiciary Act* 1903 (Cth) applies. It provides, relevantly, that:

> "The laws of each State … including the laws relating to procedure … shall, except as otherwise provided by … the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State … in all cases to which they are applicable."

[24] So far as is relevant, s 80 of the *Judiciary Act* provides that so far as the provisions of the laws of the Commonwealth are insufficient to carry them into effect, the common law in Australia as modified by the statute law in force in the State in which the court in which the jurisdiction is exercised is held, so far as it is applicable and not inconsistent with the laws of the Commonwealth, governs all courts exercising federal jurisdiction in the exercise of their jurisdiction in civil matters.

[25] In Queensland the *Uniform Civil Procedure Rules* and s 81 of the *Supreme Court of Queensland Act* 1991 enable parties to be joined and amendments to be made after limitation periods have expired against that party. Section 82(2) of the *Trade Practices Act* prescribes a period of limitation for claims brought for damages pursuant to s 52 - in this proceeding, three years. The question is whether the Commonwealth legislation "otherwise provided" so as to exclude the application of the Queensland provisions. The test is whether the Commonwealth legislation is irreconcilable with the state provisions, see *Northern Territory v GPAO* (1999) 196 CLR 553 at 588 per Gleeson CJ and Gummow J, at 606 per Gaudron J, and *Austral Pacific Group Ltd (In liq) v Airservices Australi* (2000) 203 CLR 136 per Gleeson CJ, Gummow and Hayne JJ at 144.

[26] Observations of Toohey J with whom Deane J agreed in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 614 have governed the approach which a number of judges have taken to s 82(2) of the *Trade Practices Act.* The Full Court of the Federal Court in *Western Australia v Wardley Australia Limited* (1991) 30 FCR 245 had held that the limitation period in s 82(2) of the *Trade Practices Act* was to be regarded as procedural in character, that is, it was "a condition of the remedy rather than an element in the right" at 266. The Federal Court said that s 82 is properly understood only in its place in the spectrum of remedies given by Pt VI of the *Trade Practices Act* "and in light of the conferral of jurisdiction by s 86 in respect of 'matters'," at 260. In the absence of any express power to allow an amendment to a statement of claim introducing a cause of action otherwise statute-barred Toohey J concluded that the process of reasoning of the Full Court involved an impermissible blurring of notions of jurisdiction and power and failed to accord due weight to a limitation provision in the *Trade Practices Act* itself. He concluded that s 82(2) presented a statutory barrier to the addition of any new cause of action after the expiration of the limitation period.

[27] Since the decision in *Wardley* both the *Federal Court Act* 1976 (Cth) and the rules of court made under it have been amended (July 1994 by s 59(2B) and O 13 r 2(7) respectively) and are similar in effect to s 81 of the *Supreme Court of Queensland Act* 1991 and r 376 of the *Uniform Civil Procedure Rules*.

[28] There is therefore now an express legislative power to amend outside any limitation period. There are Queensland cases which rely solely on Toohey J's reasoning on this point in *Wardley,* even though the then rules of court in O 32 r 1(2) permitted amendment in appropriate cases outside any relevant limitation period and joinder, in O 3 r 11, see for example, *Jekos Holdings Pty Ltd v Australian Horticultural Finance Pty Ltd* [1994] 2 Qd R 515 and *Queensland Industry Development Corporation v Australia and New Zealand Banking*

Group Ltd, unreported decision of 16 September 1994 (BC 9404073). All rules of court made before 30 May 1995 had the authority, force and effect of statutes, *Supreme Court Act* 1991, s 117, as amended in 1995. Subsequent rules, including the *Uniform Civil Procedure Rules* introduced in 1999, are subordinate legislation. The substantive/procedural dichotomy as related to limitation periods was largely laid to rest in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, a case concerning choice of law rules. The High Court said at 543-4:

> "[M]atters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure.
> …
>
> These principles may require further elucidation in subsequent decisions but it should be noted that giving effect to them has significant consequences for the kinds of case in which the distinction between substance and procedure has previously been applied. First, the application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance not procedure (which is the result arrived at by the statutes previously referred to). The application of any limitation period would, therefore, continue to be governed (as that legislation requires) by the lex loci delicti."

[29] Nonetheless, as Ormiston JA noted in *Agtrack (NT) Pty Ltd v Hatfield* (2003) 7 V.R 63 at 95 [60], although limitation periods are now characterised as substantive rather than procedural "they are inextricably bound up with the manner by which proceedings are brought". The court was concerned with the potential irreconcilability of s 34 of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) and the rules of the Victorian Supreme Court relating to amendment. His Honour concluded at 96 [62], Chernov JA and O'Bryan AJA agreeing, that:

> "s 34 (with which must be read all other related sections) is intended to lay down only the relevant limitation period, leaving questions of its application to particular parties, extension, power to amend proceedings, the manner in which actions are commenced and the like to the law which must be applied by the court in which the action is brought."

[30] His Honour recognised, at 99 [68], that if a state or territory statute or rule purported directly to resuscitate an extinguished claim such as one subject to s 34 of the *Civil Aviation (Carriers Liability) Act*, it would be clearly ineffective whether by virtue of s 109 of the Constitution or s 79 of the *Judiciary Act* but if the state provisions could properly be characterised as essentially procedural, s 79 of the *Judiciary Act* would pick up the state law.

[31] At the same time as the Victorian Court of Appeal decided *Agtrack* it also decided *PSL Industries Ltd v Simplot Australia Pty Ltd* (2003) 7 V.R 106.

Chernov JA wrote the principal judgment. That was a case concerning an application to amend pleadings so as to allege pre-contractual breaches of s 52 and s 59(2) of the *Trade Practices Act* and s 11 of the *Fair Trading Act* 1985 (Vict) after the expiration of the relevant limitation period. At first instance the amendment was allowed relying on s 34 of the *Limitation of Actions Act* 1958 (Vict) and r 36.01(6) of the rules of court which permitted amendment notwithstanding that a limitation period may have expired. The appellants maintained that s 82(2) of the *Trade Practices Act* operated to render the Victorian provisions inapplicable for the purposes of the proposed amendment. Chernov JA held that s 82(2) did not say in terms that the right created by s 82(1) of the *Trade Practices Act* would be extinguished at the end of the applicable limitation period:

> "If Parliament intended to achieve that result, it would have used direct language to that effect as, it seems to have done, for instance, in s 34 of the *Civil Aviation (Carriers' Liability) Act*. To my mind, the language of the subsection is more consistent with it barring a cause of action rather than extinguishing the right. Next, as the learned primary judge pointed out, the fact that s 82(2) stands apart from the cause of action that is created by s 82(1) is a strong indication that Parliament did not intend that the time limit that is prescribed by the subsection should constitute an ingredient of the cause of action. That this is the case has been recognised in decisions which deal with other limitation provisions of the Act which are similar to s 82(2), such as ss 74J and 87(1CA) (where the prescribed limitation period also stands apart from the causes of action to which they refer). Thus, for example, in *Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* (2001) 112 FCR 336 French J recognised that s 74J of the Act did not make compliance with the time limit prescribed by it an element of the relevant cause of action, nor did it extinguish it; rather, the provision only operated to bar the remedy." 114-115 [18].

[32] A well-known Queensland example of a provision which extinguishes the right and makes inapplicable the rules relating to joinder and amendment outside the limitation period is s 15(3) of the *Subcontractors' Charges Act* 1974, see *Stumann v Spansteel Engineering Pty Ltd* [1986] 2 Qd R 471.

[33] As the Australian Law Reform Commission noted in its report on *The Judicial Power of the Commonwealth* (October 2001) at 570, since there is no general federal limitation statute applicable to all actions in federal jurisdiction and there is no complete code governing the limitation of actions in federal matters, the law of the state or territory is necessarily picked up and applied as "surrogate" Commonwealth law. This is even more so where matters of practice and procedure are concerned particularly joinder of parties and amendment of pleadings.

[34] Section 82(2) of the *Trade Practices Act* is located in a section of the Act separate from those which allow the rights of action. It has not "otherwise provided" for matters relating to amendment either within or beyond the

limitation period described. The Queensland rules of court and s 81 of the *Supreme Court of Queensland Act* 1991 are not irreconcilable with the Commonwealth law and accordingly become surrogate Commonwealth law for the cause of action based on the *Trade Practices Act*. I have concluded that the amendment in para 43 of the statement of claim constitutes a new cause of action. However it arises out of the same facts or substantially the same facts as the proceeding which was commenced within time. That the trustee of the Mahonys' bankrupt estates will be unable to recover the full extent of the damages which could be recovered if successful by the contracting purchaser is not of significance on the question of amendment. Apart from some formal matters there will be no new facts beyond those already alleged. This is borne out by the very limited nature of the proposed amendment.

[35] As to the joinder of the new trustees, they are necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding and will bind the new trustees and any order the court hearing the matter may make about the assets of the Family Trust.

[36] The orders which I would make are, dismiss the appeal and order that the appellants pay the respondents' costs of and incidental to the appeal to be assessed. I would not disturb the costs order made below.

[37] **ATKINSON J:** I have had the advantage of reading the comprehensive and learned reasons of White J, with whom I respectfully agree. The appeal should be dismissed with costs.