

SUPREME COURT OF QUEENSLAND

CITATION: *Scott v Brambles Security Services Ltd & Ors* [2003] QSC
183

PARTIES: **BRENDA SCOTT (NOW BRENDA JANE ATKINSON)**
(plaintiff)
v
**BRAMBLES SECURITY SERVICES LTD (NOW
CHUBB SECURITY SERVICES LTD) ACN 004 247 358**
(first defendant)
**WESTPAC BANKING CORPORATION ARBN 007 457
141**
(second defendant)
STATE OF QUEENSLAND
(third party)

FILE NO: S 11293 of 1998

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 19 June 2003

DELIVERED AT: Brisbane

HEARING DATE: 12 May 2003

JUDGE: B W Ambrose J

ORDER: **I make the following orders –**

- (1) I give the plaintiff leave to discontinue her action against the second defendant Westpac Banking Corporation.**
- (2) I abridge the time within which Brambles Security Services Ltd (now Chubb Security Services Ltd) may bring its application for leave to file and serve a third party notice.**
- (3) I give the first defendant Brambles Security Services Ltd (now Chubb Security Services Ltd) leave to issue, file and serve a third party notice and statement of claim directed to Westpac Banking Corporation (previously the second defendant) in this action in the terms exhibited in Ex LNR3 to the affidavit of Louise Nicole Radloff sworn 12 May 2003.**
- (4) I order Westpac Banking Corporation to make further and better disclosure of any documents in its possession or under its power an control relevant to its knowledge of any proposed delivery to its branch bank at 167 Beaudesert Road, Moorooka on 22 December 1995.**

- (5) I order that Westpac Banking Corporation make further and better disclosure to Brambles Security Services Ltd (now Chubb Security Services Ltd) of all documents in its power, possession or control relating to its knowledge that an item of foreign currency or a dishonoured international draft was to be delivered to the Moorooka Branch of its bank on 22 December 1995 including any contract between it and Brambles Security Services Ltd (now Chubb Security Services Ltd) in relation to the delivery of foreign currency.
- (6) If no such documents are presently in the possession or under the power and control of Westpac Banking Corporation I order Westpac Banking Corporation by affidavit to depose to the following effect –
- (a) That Westpac does not have a document or documents relating to a scheduled visit by a Brambles cash car of Brambles Security Services Ltd on 22 December 1995 to its branch located at 167 Beaudesert Road, Moorooka in its possession or under its power or control.
 - (b) If such documents did once exist and were in its possession, power and control that they ceased to exist or passed out of its possession, power or control stating the relevant circumstances in which that occurred.
 - (c) That Westpac does not have in its possession, power and control any document or documents received by it relating to the delivery of foreign currency or a dishonoured international draft on 22 December 1995.
 - (d) If any document or documents were ever received by the Westpac relating to such foreign currency or dishonoured international draft and were in its possession, power or control but have since ceased to exist or have passed out of its possession, power or control, stating the relevant circumstances in which that occurred.
- (7) I order that Brambles Security Services Ltd (now Chubb Security Services Ltd) forthwith file and serve upon Westpac Banking Corporation the third party notice and third party statement of claim referred to in para 3 of this order.
- (8) I order that Westpac Banking Corporation forthwith file and deliver any third party defence upon service upon it of such third party notice and third party statement of claim.
- (9) I adjourn the plaintiff's application to set this action down for trial to a date to be fixed to be brought on by the plaintiff upon two days notice to the defendants

Brambles Security Services Ltd (now Chubb Security Services Ltd) and to the second third party Westpac Banking Corporation and to the first third party the State of Queensland.

(10) I reserve the question of costs.

CATCHWORDS: PRACTICE – Discontinuance – application by plaintiff for leave to discontinue against second defendant – where pleadings closed – where application opposed by first defendant – whether leave should be granted

Uniform Civil Procedure Rules 1999 (Qld), r 223(2)

COUNSEL: M Grant-Taylor SC for the plaintiff
P Applegarth SC for the first defendant
R Douglas SC for the second defendant

SOLICITORS: White Harris for the plaintiff
Ebsworth & Ebsworth for the first defendant
Carter Newell for the second defendant

- [1] **AMBROSE J:** This is an application by the plaintiff for leave to discontinue her action against the second defendant (“Westpac”) which she instituted against the first defendant (“Brambles”) and the second defendant on 4 December 1998.
- [2] There have been many pleadings and amended pleadings, applications and discussions concerning the defendants’ involvement with events which led to the plaintiff’s injury on 22 December 1995 in respect of which she brought this action against both defendants. I will state only briefly the essential elements of the claim she brought initially against the defendants.
- [3] The plaintiff’s claim is that she was walking down the street past a branch of Westpac at Moorooka when she was caught in crossfire between two armed security guards employed by Brambles to make a delivery to Westpac and two armed bank robbers.
- [4] The plaintiff was shot in the back near her spinal column either by one of Brambles security guards or by one of the bank robbers. As a consequence she has suffered very severe injury and now needs a wheelchair to ambulate.
- [5] It is the plaintiff’s case that prior to the attempted bank robbery one of Westpac’s employees at its Moorooka branch received a telephone warning from another bank of an added security risk of robbery. It is the plaintiff’s case that the bank then took steps to remove certain cash from the vicinity of its customer area and place it in a locked safe. It was the plaintiff’s case that it took no other steps to guard against the danger of which it had been warned and in particular made no effort to warn Brambles.
- [6] It is the case for Brambles that had it been warned of the increased security risk of which Westpac had been warned it would not have attempted to make the delivery

which it was in the course of making to the Westpac Branch at the time of the attempted armed robbery.

- [7] It is the plaintiff's claim and I think Brambles claim that the attempted robbery occurred at about the time of its scheduled visit to the bank branch. It is Westpac's case that the visit was not scheduled.
- [8] It is unnecessary to further consider the pleadings between the plaintiff and the defendants.
- [9] There are contribution notices between Brambles and Westpac.
- [10] The plaintiff has agreed to discontinue her action against Westpac. Having regard to the state of the pleadings it is necessary for her to obtain leave of the court to do so at this stage. Her application to discontinue against Westpac is opposed by Brambles. If she obtains leave to discontinue then Brambles seeks leave to issue a third party notice against Westpac seeking contribution.
- [11] Brambles also seeks to plead against Westpac a right of indemnity pursuant to contract.
- [12] The reason for the leave sought by the plaintiff to discontinue her action against Westpac is her perception that her case against Brambles is much stronger than it is against Westpac. It is unnecessary upon this application to analyse the strengths and weaknesses of her case against either Westpac or Brambles.
- [13] Much somewhat acerbic correspondence has passed between the solicitors for the parties in this action. Naturally enough Westpac does not oppose the plaintiff's discontinuance of her action against it.
- [14] In my view there is no basis upon which leave could properly be refused to the plaintiff who simply seeks to discontinue her action against one of two defendants if on the state of the evidence presently available to her she thinks her prospects of success are minimal particularly if upon her perception of the available evidence her prospects of success against the other defendant are significant.
- [15] In essence the plaintiff seeks to recover damages only against Brambles for the negligence of its security agents in voluntarily engaging in a shoot-out with masked bank robbers in a public street where she and other people happened to be walking at the time. Her case essentially is that whether she was shot in the back and crippled by a bullet fired by one of Brambles security guards or was shot by one of the armed bank robbers who were shooting at those security guards, it was the negligence of the guards joining in that shooting escapade with the bank robbers which makes Brambles liable to her – whether or not the bullet which actually caused her spinal injuries was fired by one of those guards.
- [16] It is clear in my view that Brambles should have leave to issue file and serve a third party notice and statement of claim directed to Westpac in the terms of those which are exhibit LNR3 to the affidavit of Louise Nicole Radloff sworn 12 May 2003.
- [17] The consequence of taking this step will be to place the onus on Brambles to establish negligence or breach of a duty to the plaintiff on the part of Westpac. The plaintiff will be relieved of that obligation. However from a practical point of view Brambles will have to surmount the same hurdles in establishing liability to the

plaintiff against Westpac as would she had she not discontinued her action against Westpac. As far as she is concerned of course she will be relieved of her consequent liability for costs should she fail to establish any breach by Westpac of a duty of care owed to her.

- [18] Westpac has already taken contribution proceedings against Brambles which of course will no longer need to be pursued should the plaintiff's action against it be discontinued.
- [19] This is a case in which there has always been a dispute between Brambles and Westpac as to the liability of each to the plaintiff in respect of the injury she suffered outside the Westpac branch bank at Moorooka.
- [20] Much time has passed since the plaintiff's injury. She has been left with very serious disabilities as a consequence. It is my view that steps should be taken to have her action brought to trial as quickly as possible.
- [21] One matter which has figured largely in the correspondence passing between the solicitors' for the parties in this case is the alleged failure of Westpac to disclose documents relevant to show that it was aware that there was to be a scheduled visit by Brambles to its branch at Moorooka at about the time the plaintiff was shot. Brambles has in its possession documents tending to establish that the visit to the Westpac Moorooka branch bank was a scheduled visit and unsurprisingly the plaintiff and Brambles infer from that that Westpac would have in its possession similar documentary evidence relating to the Brambles delivery to its Moorooka branch at or about the time of the plaintiff's injury.
- [22] Westpac however has specifically pleaded that the Brambles visit to its bank at the relevant time was unscheduled. To no small extent I think the decision of the plaintiff to discontinue her action against Westpac was motivated by Westpac's defence that the Brambles visit to its bank was unscheduled and by the failure of Westpac to disclose any documents of the sort held by Brambles relating to that visit.
- [23] There has been much correspondence between the solicitors for the parties concerning the existence of such documents. As yet there has been no leave sought to interrogate Westpac as to what if any system was in place for the delivery to or receipt of money from its branch bank at the material time or for that matter before and after the material time by which Westpac might become aware of the approximate time when money was to be picked up from or delivered to Westpac by Brambles. If no such documents are disclosed by Westpac because they cannot be found – which I would find unsurprising having regard to the period of time that has elapsed since the time of the shooting and indeed since the time of the institution of the action nearly three years later – Counsel for Brambles seeks an order pursuant to UCPR 223(2) that an affidavit be made in the following terms:-
- “(a) Stating that a document or documents relating to a scheduled visit by a Brambles cash car in December 1995 to the Westpac branch located at 167 Beaudesert Road, Moorooka (“the bank”) does or does not exist.

- (b) If such documents did exist and they ceased to exist or passed out of the possession or control of Westpac stating the relevant circumstances in which that occurred.
- (c) Stating that any document or documents received by the bank relating to the delivery of foreign currency or a dishonoured international draft on 22 December 1995 to the bank does or does not exist.
- (d) If any document or documents were received by the bank relating to delivery of any such foreign currency or dishonoured international draft ceased to exist or passed out the possession or control of the second defendant stating the circumstances in which that occurred.”

[24] Depending upon the outcome of Westpac’s compliance with this order it may or may not be necessary for Brambles to seek leave to interrogate Westpac on matters relating to the system it followed in connection with the delivery of money and other items by Brambles according to any schedule and as well circumstances in which Brambles attended its Moorooka branch to deliver or pick up items including money without any prior notification to Westpac either at its head office or at its Moorooka branch.

[25] Once Brambles has served its third party notice and statement of claim on Westpac, Westpac will file its defence to that proceeding. There should be little difficulty in filing that defence promptly having regard to the existing contribution notices etc that have already been delivered touching on the same issues.

[26] There has already been held an unsuccessful mediation.

[27] I can see no reason why the pleadings in this matter should not close promptly and when that occurs there seems to be no reason why a request for trial should not be signed by the plaintiff, Brambles and Westpac and indeed by the State of Queensland which did not appear on this application.

[28] I propose to abridge the time for Brambles to bring its application for leave to file and serve a third party notice.

[29] Should any party to the action decline to sign a request for a trial date upon close of pleadings this application may be pursued to set the matter down for trial dispensing with the necessity to have all parties so request. To avoid the cost of making further applications to set this action down for trial I propose simply to adjourn to a date to be fixed the plaintiff’s application in this case to set the matter down for trial giving her liberty to bring that application on again upon three days notice given to the other parties to the action.

[30] I therefore make the following orders –

- (1) I give the plaintiff leave to discontinue her action against the second defendant Westpac Banking Corporation.

- (2) I abridge the time within which Brambles Security Services Ltd (now Chubb Security Services Ltd) may bring its application for leave to file and serve a third party notice.
- (3) I give the first defendant Brambles Security Services Ltd (now Chubb Security Services Ltd) leave to issue, file and serve a third party notice and statement of claim directed to Westpac Banking Corporation (previously the second defendant) in this action in the terms exhibited in Ex LNR3 to the affidavit of Louise Nicole Radloff sworn 12 May 2003.
- (4) I order Westpac Banking Corporation to make further and better disclosure of any documents in its possession or under its power and control relevant to its knowledge of any proposed delivery to its branch bank at 167 Beaudesert Road, Moorooka on 22 December 1995.
- (5) I order that Westpac Banking Corporation make further and better disclosure to Brambles Security Services Ltd (now Chubb Security Services Ltd) of all documents in its power, possession or control relating to its knowledge that an item of foreign currency or a dishonoured international draft was to be delivered to the Moorooka Branch of its bank on 22 December 1995 including any contract between it and Brambles Security Services Ltd (now Chubb Security Services Ltd) in relation to the delivery of foreign currency.
- (6) If no such documents are presently in the possession or under the power and control of Westpac Banking Corporation I order Westpac Banking Corporation by affidavit to depose to the following effect –
 - (a) That Westpac does not have a document or documents relating to a scheduled visit by a Brambles cash car of Brambles Security Services Ltd on 22 December 1995 to its branch located at 167 Beaudesert Road, Moorooka in its possession or under its power or control.
 - (b) If such documents did once exist and were in its possession, power and control that they ceased to exist or passed out of its possession, power or control stating the relevant circumstances in which that occurred.
 - (c) That Westpac does not have in its possession, power and control any document or documents received by it relating to the delivery of foreign currency or a dishonoured international draft on 22 December 1995.
 - (d) If any document or documents were ever received by the Westpac relating to such foreign currency or dishonoured international draft and were in its possession, power or control but have since ceased to exist or have passed out of its possession, power or control, stating the relevant circumstances in which that occurred.
- (7) I order that Brambles Security Services Ltd (now Chubb Security Services Ltd) forthwith file and serve upon Westpac Banking Corporation the third party notice and third party statement of claim referred to in para 3 of this order.

- (8) I order that Westpac Banking Corporation forthwith file and deliver any third party defence upon service upon it of such third party notice and third party statement of claim.
- (9) I adjourn the plaintiff's application to set this action down for trial to a date to be fixed to be brought on by the plaintiff upon two days notice to the defendants Brambles Security Services Ltd (now Chubb Security Services Ltd) and to the second third party Westpac Banking Corporation and to the first third party the State of Queensland.
- (10) I reserve the question of costs.