SUPREME COURT OF QUEENSLAND

CITATION:	*Apap & Ors v Treanor & Ors* [2003] QCA 406
PARTIES:	**MARIA APAP and ANDREW GEORGE APAP** (first plaintiffs/first respondents/first cross applicants) **UGANA PLANTATIONS PTY LTD** ACN 073 831 884 **as trustee for the NICOTRA PLANTATION TRUST and NICOTRA PROPERTY TRUST** (second plaintiff/second respondent/second cross applicant) **v** **DALE ROBERT TREANOR** (first defendant/applicant/cross respondent) **CHARLES MUSCAT and TINA MUSCAT** (second defendants)
FILE NO/S:	Appeal No 5643 of 2003 DC No 4713 of 2001 DC No 2155 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2003
JUDGES:	McMurdo P, Muir and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Application for leave to appeal refused with costs** **Application for leave to cross appeal refused with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – RIGHT OF APPEAL – FROM INTERLOCUTORY DECISIONS – LEAVE TO APPEAL - where respondents commenced two actions in the District Court seeking damages for breach of contract or negligence – where the first action is a sub-set of the second action – where learned primary judge refused to make an order consolidating the actions but made orders joining additional parties out of time - where applicant seeks leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld) – whether applicant has been unjustly deprived of his right to pursue a defence based on the expiry of the limitation period

APPEAL AND NEW TRIAL – RIGHT OF APPEAL – INTEREFERENCE WITH DISCRETION OF COURT BELOW – INTERLOCUTORY ORDERS - where cross applicants seek leave to cross-appeal from interlocutory orders made by learned primary judge – whether learned primary judged erred in omitting to order consolidation of two actions – whether learned primary judge failed to order that the inclusion of the cross applicants as new plaintiffs in the first action have effect from 26 September 2001 – whether the cross applicants have suffered substantial injustice from the orders made

District Court of Queensland Act 1967 (Qld), s 118(3)
Limitation of Actions Act 1974 (Qld)
Uniform Civil Procedure Rules 1999 (Qld), r 62(2), r 63(2), r 69(2), r 74, r 78, r 79

Lynch v Keddell (No 2) [1990] 1 QdR 10, followed
Westpac Banking Corporation v Klef Pty Ltd [1998] QCA 311; Appeal No 8204 of 1998, 16 October 1998, followed

COUNSEL: M T Brady for the applicant/cross respondent
C C Wilson for the respondents/cross applicants

SOLICITORS: Phillips Fox for the applicant/cross respondent
Quinn & Scattini for the respondents/cross applicants

MCMURDO P: The background

[1] Maria Apap commenced an action in the District Court, Brisbane on 26 September 2001 seeking damages for breach of contract or negligence against her former solicitor, Robert Treanor. She claimed that, on 10 May 1996, in breach of a term of reasonable care and skill implied into his retainer and in breach of his duty of care, Mr Treanor advised her that she could rescind her original contract to purchase property and that another entity associated with her could enter into a new contract to purchase the same property without being charged stamp duty on the first contract. Mrs Apap claims that as a result of those breaches she suffered a loss, namely the payment of extra and penalty stamp duty and the costs of pursuing an appeal against the stamp duty assessment and legal costs.

[2] Mr Treanor filed a defence in October 2001 and Mrs Apap a reply in December 2001.

[3] It is common ground that the limitation period for this claim is six years although it is in contention as to when the cause of action arose.

[4] On 3 June 2002, over six years after Mr Treanor gave the allegedly negligent advice, Mrs Apap, together with, her husband, Andrew George Apap, another couple, (Charles James Muscat and Tina Muscat), and Ugana Plantations Pty Ltd as trustee for the Nicotra Plantation Trust and Nicotra Property Trust ("the trust company") commenced an action against Mr Treanor, making claims against him similar to those made by Mrs Apap alone in the first action. This second action was commenced by all the purchasers named under both sets of contracts. The statement of claim in the second action has not been served on Mr Treanor, and the

Muscats, who, by this time, had disposed of their interest in the trust to other trustees, have not given instructions to bring the action.

[5] The plaintiffs in both actions[1] ("the respondents") applied to a District Court Judge for orders that the actions be consolidated and that they be at liberty to file and serve an amended claim and amended statement of claim in the consolidated proceedings. Alternatively, they applied for an order in the first action that Mr Apap and the trust company be added as plaintiffs and that Mr & Mrs Muscat be included as defendants.[2]

[6] The learned primary judge heard the matter on 12 February 2003. Mr Treanor opposed the applications on the basis that the respondents had failed to demonstrate any reason why it would be just to deprive him of his accrued limitation defence in respect of the case to be brought against him by the additional parties. The learned primary judge reserved judgment until 28 May 2003 when, in written reasons, he refused to make an order consolidating the actions but ordered in the first action that Mr Apap and the trust company be included as plaintiffs and the Muscats be included as second defendants; the reconstituted plaintiffs were to file and serve an amended pleading by 3 July 2003[3] and to pay Mr Treanor's costs of the application and, if necessary, the preparing, filing and serving of a further amended defence. In the second action his Honour ordered that Mr & Mrs Muscat be removed as plaintiffs and made second defendants in that action and that the plaintiffs pay Mr Treanor's costs of the application.

[7] Mr Treanor contended then, and still contends through his counsel Mr Brady, that his Honour's reasons for judgment delivered on 28 May 2003 did not explain why his Honour made the orders joining the additional parties out of time and nor did they address the considerations listed in UCPR r 69(2). Mr Brady by letter dated 4 June 2003 wrote to the judge seeking those reasons. The learned primary judge was on leave and no response was received to that letter until after Mr Treanor filed this application.

[8] His Honour provided further reasons by letter dated 25 June 2003.

[9] Mr Treanor applies for leave to appeal under s 118(3) *District Court of Queensland Act* 1967, claiming that errors of law and a miscarriage of the discretion under UCPR r 69(2) have caused an injustice to him warranting the granting of leave. He contends that his Honour's reasons are so deficient that there has not been a proper exercise of judicial discretion under that sub-rule and that he has been unjustly deprived of his right to pursue a defence based on the expiry of the limitation period. Mr Treanor urges this Court to grant the application for leave to appeal, to allow the appeal and to re-exercise the discretion under UCPR r 62(2) in favour of not joining the additional parties out of time.

[10] Mr & Mrs Apap and the trust company seek leave to cross-appeal from those orders and contend that his Honour erred in omitting to order consolidation of the actions

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1 Other than the Muscats.

2 See UCPR r 63(2).

3 This date was substituted when the order was amended on 25 June 2003.

and in failing to order that the inclusion of Mr Apap and the trust company as new plaintiffs in the first action have effect from 26 September 2001.[4]

[11] These applications are for leave to appeal from interlocutory orders. Leave to appeal from such orders will ordinarily be refused unless it appears that the decision is attended with sufficient doubt to warrant being reconsidered and also that, supposing it is wrong, substantial injustice would result if leave were refused: *Westpac Banking Corporation v Klef Pty Ltd*.[5] A determination of that question involves some consideration of the merits of the grounds of appeal sought to be argued and the parties agree that if leave is granted, any resulting appeal can be conveniently heard with the application for leave to appeal.

[12] Affidavit material filed in these applications indicates that Mr & Mrs Muscat have no wish to be involved in either action or in any appeal or application for leave to appeal.

Mr Treanor's application for leave to appeal

[13] The primary judge's reasons of 28 May 2003 noted the similarities between the two actions but considered consolidation was premature as the pleadings in the second action had not been served on Mr Treanor or the Muscats as proposed second defendants.[6] It may later become appropriate to consolidate proceedings under UCPR r 78 or to order hearing in sequence under UCPR r 79. His Honour declined to make the order for consolidation but instead made the orders set out earlier in these reasons.[7] His Honour observed that it was for the reconstituted plaintiffs to decide which (if only one) of the two actions is to proceed and for the reconstituted defendants to determine whether or not to plead any point under the *Limitation of Actions Act* 1974 (Qld).

[14] In response to Mr Brady's request for reasons for joining additional parties to the first action outside the limitation period, his Honour added in his letter dated 25 June 2003 that, particularly in the light of UCPR r 69(2), the trust company may be the "nominee" named as one of the purchasers in the contract of 29 February 1996 or may be "the entity associated with the plaintiff" referred to in the statement of claim in the first action. The trust company is the second plaintiff in the second action, which is really identical to the first action: it is against the same defendant who is said to have been negligent in the same way, namely as to Mr Treanor's advice on rescission of the contract in the first action. It is desirable that the parties be added to enable the single determination of all matters in dispute, namely as to whether the advice sought from Mr Treanor was sought on behalf of all purchasers under the contracts or by Mrs Apap alone. His Honour added:

> "I was conscious that r 69(2) required me to consider it just to include the additional persons as plaintiffs after the end of the limitation period. …

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4 It seems now accepted that this Court has the power to entertain cross-appeals from the District Court: *Van Riet & ors v ACP Publishing Pty Ltd* [2003] QCA 37; Appeal Nos 3591 and 4001 of 2002, 14 February 2003, [40].

5 [1998] QCA 311; Appeal No 8204 of 1998, 16 October, 1998, para 11.

6 See UCPR r 63(2).

7 [6].

> … I consider that justice requires that this action be determined on its facts and merits and not fail in any respect merely for want of any necessary party. …"

[15] Mr Treanor contends that the order for joinder should not have been made unless the matters set out in UCPR r 69(2) were established and that Mr Treanor is prejudiced by the effective loss of his defence based on the expiry of the limitation period. The respondents contend that the orders made by the learned primary judge do not prejudice Mr Treanor and that he remains able to bring an application for summary judgment in the first action based on the defence of expiry of the limitation period.

[16] It is common ground that, if the effect of his Honour's orders is not to defeat any limitation defence, then Mr Treanor cannot be said to have suffered real prejudice or substantial injustice.

[17] Prior to the coming into force of the UCPR, in order to effectively join parties outside the limitation period it was necessary not only to obtain an order to that effect but also to obtain an order that the proceedings against those parties should be deemed to have been begun at the date of issue of the originating pleadings: see *Lynch v Keddell [No 2]*.[8]

[18] UCPR r 74 concerns the amendment of proceedings after a change of party to an action and relevantly provides:

> "(5) However, for a limitation period, the proceeding against the new defendant or respondent is taken to have started with the proceeding started against the original defendant or respondent unless the court otherwise orders."

[19] It follows that it is no longer necessary to obtain an order joining a defendant or respondent outside the limitation period from the time of the commencement of proceedings. UCPR r 74(5) relates only to the joinder of a new defendant or respondent. The UCPR do not contain any equivalent provision as to the joinder of plaintiffs. Mr C C Wilson, who appears for the respondents, concedes that the absence of any order deeming the joinder of Mr Apap and the trust company in the first action to date from the commencement of those proceedings means that any defence of Mr Treanor to the first action based on the expiry of the limitation period remains open. This concession seems rightly made and is supported by the terms of the UCPR. His Honour's observations in his reasons of 28 May 2003, that it was for the reconstituted defendants to determine whether or not to plead any point open as to any provision of the *Limitation of Actions Act* 1974 (Qld), demonstrate that this was also his Honour's understanding. The primary judge framed the costs orders to protect Mr Treanor from the immediate consequences of the joinder. His Honour's orders have not defeated any limitation defence and Mr Treanor will not suffer substantial injustice if the application for leave to appeal is refused.[9] The application for leave to appeal should be refused.

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8 [1990] 1 QdR 10, 18-19.

9 *Westpac Banking Corporation v Klef Pty Ltd*.

The cross application

[20] Mr & Mrs Apap and the trust company ("the cross applicants") have to mount the same high hurdle which defeated Mr Treanor's application before they can succeed in their application for leave to cross appeal.

[21] His Honour was understandably reluctant to order consolidation when the second action had not been served on Mr Treanor and the proposed second defendants, the Muscats, were largely unaware of its existence or its detail; he understandably considered that consolidation was premature. The cross applicants have not demonstrated any substantial injustice flowing from his Honour's omission to order the consolidation of the two actions.

[22] The cross applicants also now seek an order that the joinder of the new parties have effect from the date of the commencement of the proceedings, an order not sought at first instance. It seems likely that the merits of Mr Treanor's limitation defence will be argued at a future time in the District Court when it will also be appropriate for the cross applicants to pursue their application for an order that the joinder of the new parties have effect from the commencement of the proceedings.

[23] It follows that the cross applicants have not suffered any substantial injustice from the orders made and that the application for leave to cross appeal must also be refused with costs.

Orders:

1. Application for leave to appeal refused with costs.

2. Application for leave to cross appeal refused with costs.

[24] **MUIR J:** I agree with the reasons of McMurdo P and with her proposed orders. The primary judge’s refusal to order the consolidation of the two proceedings was also supported by the intimation made to him that an application for summary judgment in the second action would be made once pleadings had been filed and served.

[25] **HOLMES J:** I agree with the reasons for judgment of McMurdo P and the orders she proposes.