

# SUPREME COURT OF QUEENSLAND

CITATION: *Wicks v New Westcoaster Pty Ltd & Ors* [2003] QSC 324

PARTIES: **MICHAEL PAUL WICKS**  
(First Plaintiff)  
**AUDREY DAPHNE WICKS**  
(Second Plaintiff)  
**WONGA FISHERIES PTY LTD.**  
**ACN 064 455 625**  
(Third Plaintiff)  
v  
**NEW WESTCOASTER PTY LTD.**  
**ACN 071 061 964**  
(First Defendant)  
**ROBERT BLOM**  
(Second Defendant)  
**ROBERT L LAMASON**  
(Third Defendant)  
**JAMES LECKIE**  
(Fourth Defendant)

FILE NO/S: 49 of 2000

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 5 August 2003

DELIVERED AT: Cairns

HEARING DATE: 25 July 2003

JUDGE: Jones J

ORDER: **In terms of the draft initialled by me and placed with the papers**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – PRACTICE UNDER RULES OF COURT – DISCONTINUANCE – where plaintiffs purported to discontinue their claim – whether plaintiff’s notice of discontinuance effectual – whether leave to discontinue should be granted (UCPR r 304(2))

PROCEDURE – SUPREME COURT PROCEDURE PRACTICE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – where plaintiff sought to deliver a new Statement of Claim preventing fourth defendant from seeking contribution to the Law Reform Act – whether such

an amendment should be allowed – whether the issue of liability between the plaintiffs and the fourth defendant should be tried separately

*Uniform Civil Procedure Rules* r 304(2)

COUNSEL: J Davidson for the plaintiff  
P G Bickford for the fourth defendant

SOLICITORS: Lyon Smith for the plaintiffs  
Bottoms English for the first, second and third defendants  
Minter Ellison for the fourth defendant

- [1] At this hearing the parties have sought the making of formal orders which I deferred when the matter was last before me on 19 December 2002. The making of the orders were deferred in the hope that a case appraisal may have resolved the central issue to be determined. Unfortunately that was not to be.
- [2] Before me, then, are the four applications – the first two by the plaintiffs seeking directions as to the further conduct of the matter and seeking leave to deliver an amended Statement of Claim and the others, by the fourth defendant, seeking a declaration that the purported discontinuance by the plaintiffs of their claim against the first, second and third defendants is ineffectual pursuant to r 371(2) of the *Uniform Civil Procedure Rules* (UCPR) and seeking a separate hearing on the liability issue pursuant to r 483.
- [3] The background of the dispute and the history of these proceedings has been canvassed in my reasons of 19 December 2002 and I shall not restate those now. The matter I should first consider is whether the plaintiffs’ purported notice of discontinuance is effectual.
- [4] The circumstances in which such a notice can be issued are identified in r 304(2) of UCPR which provides:-
  - (2)...after being served with the first defence or first affidavit in reply, a plaintiff or applicant may discontinue a proceeding or withdraw part of it only with the court’s leave or consent of the other parties.”
- [5] The plaintiffs do not concede that the Notice of Discontinuance was ineffectual but having regard to my remarks in the earlier reasons they now make an oral application for leave to discontinue the proceedings against the first, second and third defendants. The grant of such leave is opposed by the fourth defendant who would be left in the position of having to institute third party proceedings against the first three defendants. This would result in the same issues having to be litigated but on new pleadings repeating the same allegations.
- [6] In my earlier reasons I expressed the view that the Notice of Discontinuance was not effective. Having considered the further arguments raised by counsel at the further hearing I adhere to that view. The question, then, is whether leave to discontinue should be granted in the exercise of my discretion.

- [7] The plaintiffs and the first, second and third defendants argue by not having leave to discontinue they are forced to remain as parties to a conflict in which they have no interest. The scope of that conflict, however, is determined by the pleadings which, in this case, include the contribution notices served by the fourth defendant on the other defendants. So the conflict remains regardless of the first, second and third defendants' wish to participate in it. The issue for me, then, is how best the issues in those circumstances can be resolved with the greatest efficiency and least expense to the parties. These aims would not be achieved by forcing the fourth defendant to institute third party proceedings on new pleadings repeating old allegations to which the remaining defendants would then have to respond. In my view the pursuit of the issues to resolution can be adequately undertaken on existing pleadings with the expert evidence already obtained by all parties being available for consideration.
- [8] The plaintiffs sought leave also, to deliver a new Statement of Claim against the fourth defendant which deleted any claim based on a breach of duty and simply alleged a breach of s 52 of the *Trade Practices Act* seeking damages pursuant to s 82. The plaintiffs contend that if the Statement of Claim could be delivered in that form the fourth defendant would have no right then to pursue claims for contribution or indemnity from the first, second and third defendants because his right to do so under the *Law Reform Act* 1995 depended upon the fourth defendant being a "tortfeasor". That provision of the *Law Reform Act* does not apply to a breach of s 52 of the *Trade Practices Act* for which damages are not to be equated with damages for tort. The fourth defendant objects to such an amendment being allowed particularly having regard to its effect on the contribution issue.
- [9] Whilst the innovative approach the plaintiffs seek to adopt might well prevent the fourth defendant from seeking contribution pursuant to the *Law Reform Act*, it would not preclude the fourth defendant from pursuing third party proceedings with the same consequences for the first, second and third defendants but with the additional expense of having to file and deliver new pleadings. For those reasons I do not intend to grant leave to file an amended Statement of Claim in the terms proposed. The plaintiff may of course wish to add the new relief identified against the fourth defendant but that has not been separately proposed or argued against.
- [10] It has been suggested to me that the major expense in pursuing these claims and counterclaims would relate to the assessment of damages. That certainly seems to be the area in which the professional witness would, in the main, be required. For this reason I have taken the view that the issue of liability between the plaintiffs and the fourth defendant should be tried as a separate issue. This should have the effect of disposing of the claim or identifying the framework in which damages should be assessed. Certainly, in terms of convenience and least expense to the parties, the hearing of liability as a separate issue is indicated. I would therefore allow the fourth defendant's application for separate trial of the liability issue.
- [11] I have asked legal representatives to prepare the terms of the orders which flow from this decision and which set the directions required. The terms of those orders are now agreed save for the fact that the first, second and third defendants seek to be excepted from the requirement to provide copies of "documents containing the substance of the evidence of any expert" (para 4). These defendants for their own part are at liberty to participate in the hearing to whatever degree they may choose but the other parties are entitled to know what is the expert evidence which might be

raised against any opponent. The opportunity should be available for any party to call an expert who is expected to be independent of the party by whom he or she is retained. I do not anticipate that any significant expenses will be occasioned to the first, second and third defendants by having to make the disclosure encompassed by the order. I would therefore not alter the terms proposed in paragraph 4 of the draft.

### **Orders**

- [12] I make orders in terms of the draft initialled by me and placed with the papers.