

SUPREME COURT OF QUEENSLAND

CITATION: *Borg & Ors v Northern Rivers Finance Pty Ltd & Ors* [2003]
QSC 376

PARTIES: **ANDREW JAMES BORG**
(first plaintiff)
JASON MARK BYRNE
(second plaintiff)
ROBERT STUART CHRISTENSEN
(third plaintiff)
GLEN ANGELLO COPPO
(fourth plaintiff)
LAURENCE ROY DIXON
(fifth plaintiff)
IAN ANTHONY GLAZEBROOK
(sixth plaintiff)
MICHAEL CHARLES GOTTKE
(seventh plaintiff)
BRIAN KENNETH HINCHEY
(eighth plaintiff)
ROBERT MICHAEL McCLOY
(ninth plaintiff)
NANCY MARY MONTGOMERY
(tenth plaintiff)
HENRY ALEXANDER MONTGOMERY
(eleventh plaintiff)
GORDON EDWARD PARISH
(twelfth plaintiff)
GORDON JOHN REID
(thirteenth plaintiff)
JAMES MICHAEL ROACH
(fourteenth plaintiff)
GLEN ALAN SCOTT
(fifteenth plaintiff)
GASPAR SICH
(sixteenth plaintiff)
NEIL GREGORY CAMERON
(seventeenth plaintiff)
COLIN SCOTT PURDIE
(eighteenth plaintiff)
GEOFFREY DAVID RAPSON
(nineteenth plaintiff)
DREW KINGSLEY WOODMAN
(twentieth plaintiff)
NIKO JOZINOVIC
(twenty-first plaintiff)
v
NORTHERN RIVERS FINANCE PTY LTD

(first defendant)

INVESTMENT LICENCING PTY LTD

(second defendant)

NORTHERN RIVERS PLANTATION MANAGEMENT LTD

(third defendant)

DARREN PAWSKI and RALPH MARCEL NUNIS trading as "SecurInvest Accounting Services"

(fourth defendant)

DREW GRAHAM FRANCIS

(fifth defendant)

BASE METALS EXPLORATION NL

(sixth defendant)

EXPLORERS AND PROSPECTORS FINANCE LIMITED

(seventh defendant)

DARREN CHARLES HORNER

(eighth defendant)

JOHN MEARES

(ninth defendant)

BANALASTA OIL PLANTATION

(tenth defendant)

SAFEINVEST PTY LTD

(eleventh defendant)

KAREN EVANS

(twelfth defendant)

PLANTATION EQUITY PTY LTD

(thirteenth defendant)

FILE NO: SC No 191 of 2000

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Mackay

DELIVERED ON: 5 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 11 September 2003

JUDGE: Mackenzie J

ORDER: **Application to further amend the claim on behalf of the first, fourth, seventh, twelfth, sixteenth to nineteenth and twenty-first plaintiffs refused**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – AMENDMENT – where reasons for judgment delivered earlier – where resolution of counterclaim and issue of costs and quantum deferred to later date – where application

brought to further amend claim on behalf of some plaintiffs after judgment delivered – where sought to add claim for relief against fourth and eight defendants requiring indemnification of any plaintiffs’ liability in respect of the thirteenth defendant arising out of the counterclaim – where plaintiffs claimed issue raised in the pleadings throughout and that amendment gave effect to that already in pleadings – where earlier amendment would have altered parties approaches to trial – whether interests of justice support granting leave to amend pleadings

Uniform Civil Procedure Rules (Qld), r 154

Commonwealth v Verwayen (1990) 170 CLR 394

Ketteman v Hansel Properties Ltd [1987] AC 189

State of Queensland v J L Holdings Pty Ltd (1997) 189 CLR 146

Ting v Blanche (1993) 118 ALR 543

COUNSEL: P E Hack SC for the plaintiffs
B D O’Donnell QC, with T Sullivan, for the 4th defendant
No appearance for the 8th defendant
C Wilson for the 10th and 13th defendants

SOLICITORS: Macrossan & Amiet for the plaintiffs
Phillips Fox for the 4th defendant
No appearance for the 8th defendant
Mullins and Mullins for the 10th and 13th defendants

- [1] **MACKENZIE J:** Reasons for judgment were delivered on 9 May 2003. Issues of costs and quantum were left to be resolved later in the light of findings of liability made in the judgment, the consequences of the decision of the Taxation Commissioner in relation to schemes of the kind involved in the litigation and any other relevant matters. The hearing of the counterclaim by the tenth and thirteenth defendants had also been deferred by agreement of the parties at the commencement of the trial.
- [2] These reasons are concerned with the application to further amend the claim on behalf of the first, fourth, seventh, twelfth, sixteenth to nineteenth and twenty-first plaintiffs. They are being delivered separately from reasons relating to other issues argued on 1 September 2003 and 11 September 2003 so that the parties are aware of their position in that regard before the resumed hearing on 10 November 2003 of the counterclaim by the 13th defendant, against the above described plaintiffs. The issue of costs will be reserved until one order that takes into account all aspects concerning costs of this issue is delivered.

History of matter since judgment

- [3] The matter was re-listed on 23 May 2003, shortly prior to my departure on leave, for the purpose of setting a date for the hearing of the counterclaim and otherwise giving directions to facilitate the further hearing. Arrangements were proposed by me to have a calendar change approved so that the matter could be heard in the week commencing 1 September 2003, the first reasonably available opportunity

upon my return. The 1st September 2003 was the preferred date for junior counsel for the tenth and thirteenth defendants and was acquiesced in by other counsel.

- [4] At the hearing on 23 May 2003 a draft order was produced by counsel for the plaintiffs. It included a proposed order that the first, fourth, seventh, twelfth, sixteenth, seventeenth, nineteenth and twenty-first plaintiffs have leave to further amend the amended statement of claim by adding a claim for relief against the fourth and eighth defendants, requiring each to indemnify the plaintiffs against any liability, including costs, that any of them may be found to have to the thirteenth defendant in respect of the counterclaim. It was suggested that the eighteenth defendant may also need to be included in that group. It was submitted, in skeleton form only, that the proposed amendment gave effect to what was already included in the statement of claim.
- [5] Because the draft had only lately been produced, junior counsel who then appeared for the fourth and eighth defendants asked for time to consider the amendment proposed in respect of each of the plaintiffs. He said he had no instructions to consent at that point. However, he would give the matter consideration.
- [6] It was proposed that it might be desirable to have the issue of the amendment resolved before the resumption of the hearing on 1 September 2003. An indication was given to counsel that this would have to be done (for calendaring reasons) by the first week in August if it were to be done in time for a hearing on 1 September. The understanding was that if it was necessary to have a further hearing, my Associate would be communicated with. In the meantime, the proposed draft order would be circulated to the parties. Costs of the hearing on this date were reserved.
- [7] In the period that followed, the plaintiffs' solicitors circulated a draft form of judgment, initially under the cover of a letter of 28 May 2003. Included as paragraph 72 was an order in general terms, giving leave to further amend the amended statement of claim in similar terms to that discussed on 23 May 2003. Directions with respect to the conduct of the counterclaim were also included. A request was made in the letter for other parties to identify any paragraphs they did not agree with, the reasons for their disagreement and the party's suggestion as to the form the judgment should take in respect of those paragraphs.
- [8] On 12 June 2003 a letter responding to concerns raised by solicitors for the tenth and thirteenth defendants was sent. On 17 June 2003 the then solicitors for the fourth and eighth defendants enquired of the plaintiffs' solicitors if any further material was to be relied on with respect to quantum. On 21 July 2003 the plaintiffs' solicitors asked the solicitors for the fourth and eighth and tenth and thirteenth defendants respectively for detailed advice about areas of disagreement and about proposals as to the form of the orders. It was foreshadowed that if such information was not received the matter would be referred back to the court. The solicitors for the fourth and eighth defendants asked for such action to be held off until after 31 July 2003.
- [9] Further correspondence ensued in which the plaintiffs' solicitors attempted to elicit informative responses from the other parties. It was apparent from it that by 5 August - and this accords with my own recollection - I had caused enquiries about progress to be made, not long after my return from leave. Those enquiries included advice as to any procedural matters any party wished to raise in relation to the

pleadings or the counterclaim (see letter 7 August 2003 from plaintiffs' solicitors to tenth and thirteenth defendants' solicitors).

- [10] On 12 August 2003 the solicitors for the fourth and eighth defendants asked for "an outline of the amendment sought by your clients to the claim, together with a summary of any submissions you may make as to why the amendment sought to be allowed at this stage of the hearing". The solicitors for the tenth and thirteenth defendants said in answer to the letter of 7 August 2003 that they would not be able to respond until 15 August 2003.
- [11] A letter of 14 August 2003 from the plaintiffs' solicitor to the solicitors for the fourth and eighth defendants says the following:
- "In relation to the claim our amendment sought is to seek indemnity from you clients, the 4th and 8th Defendants, for our client's damages, if any, in relation to the 13th Defendant's counterclaim. The basis for this is that should the 13th Defendant's counterclaim be successful those damages (ie. the amount of the counterclaim and its costs) are the damages ordinarily "flowing" from the actions of your client in relation to their breach of the *Corporations Law* as found by the judge. You will note that damage of this nature, that is the demand to repay the loan to Plantation Equity, is pleaded in the Statement of Claim. The amendment proposed simply brings the relief sought into line with that already pleaded."
- [12] It will be noted that at no time had the precise amendment been comprehensively formulated. On 18 August 2003 the plaintiffs' solicitors foreshadowed an approach to have the matter re-listed for hearing as to what the terms of the order should be. As events turned out this did not happen. When this was explored on 1 September 2003 counsel for the plaintiffs accepted that my Associate had been in contact and asked if there were any matters that needed to be dealt with as a preliminary matter. He said that he had responded that he would speak to counsel on the other side and see what could be raised, but "then that got nowhere".
- [13] At the hearing on 1 September 2003 there was an appearance for the fourth defendant by different counsel and instructing solicitors from those who had appeared at trial, and in the subsequent negotiations, and an application for leave to withdraw from the solicitors who had previously acted for the fourth and eighth defendants. The eighth defendant did not appear. He had been served at his address for service.
- [14] The basis for seeking leave to withdraw was a dispute over fees. New counsel for the fourth defendant informed me that he had none of the relevant documents because a lien was claimed by the former solicitor. He was not ready to argue issues relating to the form of the judgment that had been under negotiation or with respect to the plaintiffs' application for an amendment. It also turned out that, in any event, the proposed amendment had not been formulated in the form of amendments specific to each particular plaintiff. When pressed, counsel for the plaintiffs suggested that all that would be necessary was the insertion of the words "together with any amount including costs ordered to be paid by the (_____) plaintiff to the thirteenth defendant" in the relevant paragraph of the claim for relief of each of the plaintiffs involved. The template would be as follows:
- "as against the fourth, eighth and tenth defendants,

- (i) damages in the sum of (\$) together with any amount, including costs, ordered to be paid by the () plaintiff to the thirteenth defendant representing the (plaintiff's name) Third Scheme damages, for breach of the *Corporations Law* and/or the *Fair Trading Act* and/or the *Trade Practices Act*;"

- [15] It may be observed that that formulation did not conform to that circulated in May by the plaintiffs' solicitors, since it sought to include the component as part of damages rather than as a claim for indemnity. Counsel for the fourth defendant said his initial view would be that there was potential for significant prejudice if the amendment was allowed at the stage that proceedings had reached, without being more specific.
- [16] Counsel for the plaintiff submitted that he would be relying on the argument that the amendment should be allowed because that issue had been one that was raised on the pleadings throughout. He said that the recommendations case was raised by the pleading that the eighth or alternatively the fourth defendant did not have a reasonable basis for making the recommendation pleaded with respect to each plaintiff. It was pleaded that, in reliance on and induced by the representations made in meetings between the respective plaintiffs and the eighth defendant about the scheme, the plaintiff claimed income tax deductions and entered into a loan agreement with the thirteenth defendant. The demand for repayment of the loan made against the plaintiffs by the thirteenth defendant was pleaded. It was also pleaded that as a result of the eighth defendant's conduct for which the fourth, tenth and thirteenth defendants were liable, the plaintiffs suffered loss and damage in the form of penalties imposed and the demand for repayment of the loan.
- [17] He submitted that the effect of the proposed amendment was simply to make explicit in the claim for relief what was already pleaded in the statement of claim elsewhere. He rejected any suggestion that the trial may have been conducted differently if it had been said explicitly that those damages would be sought, although contingently upon the counterclaim succeeding. He submitted that it had been an issue between the parties since the subject was raised in the proceedings of 23 May 2003 even though those discussions focused on a claim for indemnity rather than a claim for damages.
- [18] Counsel for the tenth and thirteenth defendants on being asked if he wished to make any submissions, confined himself to observing that what was being sought now was formulated differently from what was discussed on 23 May 2003, and that it had been pleaded as a present liability, defeasible by an order declaring the loan void ab initio rather than a contingent liability. He submitted that this may be relevant to the question whether a different case was now being raised.
- [19] A complaint was made by counsel for the fourth defendant that the plaintiffs should have applied sooner for an amendment. Counsel for the plaintiffs responded that negotiations had been ongoing (although it may be observed, it must have been unrealistically optimistic to expect that agreement would be reached concerning the amendment).
- [20] The problem created by the lien was resolved shortly after that hearing by a consent order. On 11 September 2003 the matter was re-listed. A list of issues was

prepared by counsel for the plaintiffs. They included the application for leave to amend, the form of the money judgments in respect of the Northern Rivers and Base Metals Schemes and a variety of costs issues. Counsel for the plaintiffs repeated the grounds justifying amendment in similar terms to those referred to above.

- [21] It was submitted on behalf of the fourth defendant that analysis of the original pleading showed that the plaintiffs, in a careful way, did not claim, against the fourth defendant, damages constituted by the value of the loans from the thirteenth defendant. The form of the pleadings suggested a deliberate structuring to seek a remedy of avoidance of the loan agreement against the thirteenth defendant and to seek damages in respect of the ATO penalties and the loan application fee against the fourth defendant, but not to claim against the fourth defendant the amount of liability under the loan. Reference was made to *Uniform Civil Procedures Rules (Qld) 154* in this context, the submission being that the claims were deliberately structured in a way that was not inconsistent with relief being sought in that way. If it were otherwise it offended against *UCPR 154*, because inconsistent claims were not pleaded as alternatives.
- [22] It was submitted that there would be a number of consequences for the fourth defendant. There would be a drastic increase in quantum. On the pleadings as they stood, the fourth defendant had no interest at trial in whether or not the agreement was set aside against the thirteenth defendant. However, if the amendment had been made at the outset, the fourth defendant would have had an interest in assisting the plaintiffs to have the loan set aside ab initio to avoid that increased liability. The opportunity to conduct its case in that way had been lost because the amendment was not made in a timely way. It was of no consequence that the fourth defendant had not specifically sworn to prejudice since the prejudice was inherent in the nature of the pleading.
- [23] It was submitted that the fourth defendant could also have pleaded authority of the thirteenth defendant and assisted the plaintiffs to succeed in that respect against the thirteenth defendant. It was pointed out that the findings in the reasons of 9 May 2003 from [101] to [106] were that there was not agency with respect to the recommendations case. Reopening would invite substantial further cross-examination of previous witnesses and calling further evidence. It would also put at risk the thirteenth defendant's benefit of the finding referred to above in its favour.
- [24] It was also submitted that the fact that no contribution claim had been made in the original pleadings by the fourth defendant was explicable. A contribution claim, which would have to be seriously considered if the pleadings were amended, would have been more commercially attractive if the damages sought against the fourth defendant had been at the level that will potentially flow if the amendment is granted than it was when the amounts were very small. It was also submitted that an amendment after the close of evidence was subject to more stringent requirements than an amendment before trial or at an early stage of the trial. It was submitted that the threshold for making a case that an amendment should be granted at this stage of the proceedings had not been reached. The absence of reasonable explanation was emphasised. The argument is encapsulated in the following passage:
- “MR O’DONNELL: We highlight, as our learned friend Mr Wilson has done, the absence of any credible explanation why this amendment is being made only now. It rather looks as though the

plaintiffs had decided to overcome their liability on the loans by having the loan agreement set aside. When they received reasons for judgment and failed against the 13th defendant, now they've had the bright thought to seek as damages against the fourth defendants the amount of their liability on the loans. It's unsatisfactory, to say the least, that someone seeks an amendment after they know the Court's reasons for refusing their relief and no other explanation is provided."

- [25] It was submitted that there was also an arguable case that the fourth defendant could have advanced on the basis of the admission referred to in paragraph [101] of the reasons for judgment, that the fourth and eighth defendants were authorised representatives and agents of the thirteenth defendant although it was conceded that the pleading did not specifically concede agency for the purposes of s 851 of the *Corporations Law*. Counsel for the thirteenth defendant said that if there was a risk that it may be held to be a sufficient admission and the amendment was allowed, he would need to consider applying to withdraw that admission.
- [26] Although the thirteenth defendant was not directly implicated by the proposed amendment it was submitted on its behalf that it would be affected if the fourth defendant (and the eighth defendant if he participated further in the proceedings) persuaded the court that the amendment should be allowed and the pleadings were subsequently amended. It was submitted the prejudice would occur because firstly it would enliven issues between the plaintiffs, the fourth and eighth defendants and the tenth and thirteenth defendants that had not been explored in detail at trial because of the state of the pleadings. Secondly, the admission of agency may need to be withdrawn, and thirdly it would be necessary in those eventualities to reopen the evidence with the prospect of having to recall the plaintiffs' witnesses and fourth and eighth defendants. It was conceded that justice is a paramount consideration but the amendment was sought very late. There had already been amendments before and during the trial. No adequate explanation had been given for the amendment, after the issues of fact and law had been determined. By way of reply, counsel for the plaintiffs pointed out that not all plaintiffs had made insignificant claims. In particular those relating to the twelfth and nineteenth plaintiffs exceeded \$20,000 without resort to the loan agreement moneys.

Conclusion – further amendment of pleadings

- [27] The philosophy of *UCPR* is to allow amendment at any time (Ch 10, Part 3, Division 1). Leave is necessary at this stage of the case. The proposed amendment is now incorporated in a draft circulated by the plaintiffs to the other parties. The plaintiffs' submissions in favour of granting the amendment are set out in paragraphs [16] and [17]. Submissions on behalf of the fourth defendant appear in paragraphs [19] to [25]. The amendments are not of direct concern to the tenth and thirteenth defendants but comments made to assist the court are to be found in paragraph [18].
- [28] As a general proposition the interests of justice are the paramount consideration in determining whether leave to amend should be given (*State of Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146; *Ketteman v Hansel Properties Ltd* [1987] AC 189). However each case has to be decided on its own facts. In this case there

are in my view three primary factors and one associated factor which point in the direction of refusing leave.

- [29] The first is the point pressed by counsel for the fourth defendant that the pleading was deliberately structured in the form in which it went to trial, with particular relief being sought against the respective parties. In my view this submission has considerable weight. The case was not one where the pleadings were in disarray. For a trial of its kind, the pleadings were generally precise and logical. The construction advanced by counsel for the fourth defendant was not cogently rebutted and was certainly not confronted by a direct explanation of why it was misconceived. I do not consider the submission that the issue had been raised, although not articulated expressly in the pleadings, is any way decisive.
- [30] The second factor is that the application comes at a time when reasons have been given and the desire to make the amendment has apparently been generated by the consequences of the reasons. The application has not been made in a timely way, either in the chronology of the action or in the sense that it may conveniently be dealt with within the framework of the evidence already given. This is not to deny that late amendments may not be made (*Commonwealth v Verwayen* (1990) 170 CLR 394). But the extent to which prejudice can be overcome is a relevant factor. Adapting observations in *Ketteman v Hansel Properties Ltd* at 220 by Lord Griffiths, allowing an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful party an opportunity to renew the fight on an entirely different basis.
- [31] The third factor is that there is a public interest in achieving finality in litigation. The need to allow repleading and in all probability hearing further evidence in what has already been lengthy litigation will be inevitable. As Hill J said in *Ting v Blanche* (1993) 118 ALR 543, 551, the public interest as well as the private interests of the litigants is something that must be taken into account. A decision to commit more resources to a case in circumstances where the amendment is sought for the benefit of hindsight when there are grounds for thinking that a choice was made to adopt a different strategy earlier is a serious one.
- [32] Fourthly it is not possible to predict the extent to which prejudice may flow if an amendment is granted. There are a number of contingencies such as how some of the suggested strategies may sit comfortably with evidence already given that make it difficult to make any confident prediction. One example that has already intruded (and it is only used for purposes of giving an example) is that the eighth defendant who would be a pivotal witness if the matter developed in the matter foreshadowed, has for the time being lost contact with the case. If he were not to be found prejudice would be highly likely. Plainly if he is found and is available it will cease to be a source of prejudice, at least to the parties who may wish to rely on his evidence. Returning to the main point, all that can be said is that there is no assurance that there will not be prejudice to one party or another if the amendment is allowed.
- [33] I consider the fourth factor to be of minor weight compared to the first three factors. I also consider that, while the failure to formulate exactly the form that the amendment would take in a draft amended pleading is undesirable, it was perfectly clear from an early stage that, whether as an indemnity or damages, the thrust of the claim was to recover from the fourth and eighth defendants the amount of any

liability to the thirteenth defendant. Any real prejudice in connection with forming a decision about objecting to it was minimal. Taking into account the analysis above I have concluded that the amendment proposed should be refused.