SUPREME COURT OF QUEENSLAND

CITATION:	*Jenkins v Martin & Anor* [2004] QSC 225
PARTIES:	**ROBERT ALEXANDER JENKINS and BERICE HOPE JENKINS** (plaintiffs) v **WILLIAM JOHN MARTIN** (first defendant) **BARWICKS** (a firm) (second defendant)
FILE NO/S:	SC 3941 of 1997 and SC 2728 of 2000
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2004
JUDGE:	McMurdo J
ORDER:	**1. The plaintiffs' application for leave to file a statement of claim is dismissed** **2. The proceeding against the first defendant is dismissed for want of prosecution** **3. The proceeding against the second defendant is dismissed for want of prosecution, on condition that within fourteen days the second defendant undertakes that it will not pursue within the present proceeding or otherwise any claim for or in relation to fees and expenses as against the plaintiffs for which the second defendant sued in SC 3941 of 1997**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PLEADING – STATEMENT OF CLAIM – where application for leave to file tenth statement of claim – where cross-applications to dismiss proceedings – where defendants submit plaintiffs have failed to prosecute the claim – where defendants further submit that the statement of claim is embarrassing – whether leave should be given to file tenth statement of claim – whether proceedings should be dismissed *Limitation of Actions Act* 1974 (Qld), s 38

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, cited
Cooper v Hopgood & Ganim [1999] 2 Qd R 113, applied
Flower & Hart v White Industries (Qld) Pty Ltd (1999) 87 FCR 134, cited
Giannarelli v Wraith (1988) 165 CLR 543, cited
Keefe v Marks (1989) 16 NSWLR 713, cited
Quinlan v Rothwell [2002] 1 Qd R 647, applied
Wardley Australia Ltd v State of Western Australia (1992) 175 CLR 514, cited

COUNSEL: D A Savage SC for the plaintiffs
J B Sweeney for the first defendant
J C Bell QC, with J C Faulkner, for the second defendant

SOLICITORS: Cusack Galvin & James for the plaintiffs
Carter Newell for the first defendant
Coyne & Associates for the second defendant

McMURDO J:

Background

[1] From about 1973 the plaintiffs, Mr and Mrs Jenkins, were involved in a joint venture in relation to land at Airlie Beach. A co-venturer was a Mr Porter. In about 1977, he sold his interest in the venture to General Credits Investments Ltd, a subsidiary of General Credits Limited. He sold on terms that 10.8 acres of the venture's land would be transferred to his company, Langful Pty Ltd. The joint venture vehicle was a unit trust, of which the trustee was a company called Reef International Pty Ltd ("Reef"). General Credits was at all times the venture's financier and held a mortgage over the relevant land, which was owned by Reef.

[2] From 1977 until April 1994, Mr and Mrs Jenkins and General Credits were the co-owners of the units of the trust. Their relationship was not a successful one and by 1980 the Jenkins and General Credits were in dispute on a number of matters. One was the question of which area of 10.8 acres should be transferred to Mr Porter's company. Another was whether the Jenkins were themselves entitled to any transfer of land from Reef. There were also disputes as to Reef's indebtedness to General Credits, and whether the Jenkins had continuing obligations under guarantees they had given in relation to Reef's debts.

[3] The Jenkins and the relevant General Credits companies compromised these disputes by a deed executed in September 1985. By that agreement, General Credits was to pay the plaintiffs $750,000 and release them from any liabilities of any nature, including under any guarantee, and an identified 10.8 acres was to be transferred by Reef to Mr Porter's company. Although Reef was indebted to General Credits for in excess of $3.5 million, General Credits agreed to limit its claim against Reef to $2.82 million. It was agreed that once Mr Porter's company

had received its parcel, the balance of Reef's land was to be sold and the proceeds, after payment of that $2.82 million to General Credits, was to be divided equally between General Credits and the Jenkins, who agreed to give up possession of or any claim to a certain part of the land which they then occupied.

[4] Unfortunately, this compromise was to give rise to a further dispute and to litigation. The Jenkins subsequently claimed that the compromise was induced by misrepresentations by General Credits. In particular, they claimed that General Credits had fraudulently represented that there was certain evidence to demonstrate or support Mr Porter's claim to the particular 10.8 acres which, by the compromise, Reef was to transfer to his company. The Jenkins claimed that, in truth, Mr Porter had no basis for a claim to that land, and that had General Credits not fraudulently represented that he did, they would not have agreed in terms of the 1985 compromise. These claims were made in litigation issued in this Court as No 1596 of 1991. The trial of those proceedings commenced on 4 April 1994 and continued until they were settled on 18 April 1994. And the Jenkins also caused Reef to contest proceedings brought by Mr Porter's company for conveyance of the 10.8 acres. By April 1994, Mr Porter had become bankrupt and his company's proceedings were not prosecuted to a judgment. Under their settlement with General Credits in April 1994, the Jenkins were required to pay nothing to General Credits, but they agreed to transfer all of their units in the trust to General Credits for no payment. Each party bore its own costs.

[5] From September 1991, the Jenkins' solicitors in that litigation were Barwicks, and throughout that litigation, their leading counsel was Mr Martin QC. Almost three years from the April 1994 settlement, Barwicks issued proceedings No 3941 of 1997 against the Jenkins, claiming $316,154.55 as outstanding costs and outlays for the General Credits case. In June 1997, the Jenkins defended and counterclaimed damages for the alleged misconduct of their case. They alleged that their claim against General Credits was worth $3 million but that by the solicitors' negligence, their prospects of recovering that sum had fallen from "85% to 20%" and that the solicitors "caused the situation that the defendants had failed or might have failed to prove their damages and might have costs awarded against them". However by 2000, the Jenkins' complaint had changed dramatically, from saying that a good case had been badly conducted, to saying that their case against General Credits was always a weak one, and that until April 1994 they had been wrongly advised by Mr Martin and Barwicks that it was a good case. In 2000 they amended their counterclaim accordingly, adding Mr Martin as a defendant to it. They also issued separate proceedings, being No 2728 of 2000, against Mr Martin on 27 March 2000.

[6] In March 2002, Moynihan SJA ordered these two proceedings to be consolidated and the Jenkins to file and serve a statement of claim in the consolidated proceedings by 28 March 2002. The Jenkins filed that pleading a month late. It was the fourth version of a pleading against Mr Martin. The previous pleadings against him were the statements of claim in 2728/2000 in March 2000 and February 2001, and the counterclaim when he was joined in August 2000 in 3941/1997. It was also the fourth pleading against Barwicks, being preceded by the respective versions of the counterclaim delivered or filed in June 1997, May 1999 and August

2000. A few days later,[1] the Jenkins filed what the present submissions refer to as the fifth statement of claim. A little over a year later[2] a further (sixth) statement of claim was filed, which was followed by the so called seventh statement of claim filed on 10 July 2003, and the eighth statement of claim filed on 30 September 2003. On 21 November 2003, I struck out the seventh and eighth versions and I ordered that the plaintiffs were not to file a further statement of claim without the consent of the defendants or the leave of the court. At the same time I declined to strike out the proceedings for want of prosecution. I said that if a proper pleading was not promptly delivered, then the defendants could make a further application for dismissal.

[7] No draft of a further amended statement of claim was delivered before the defendants filed applications for dismissal which were returnable on 12 February 2004. On that day, consent orders were made for the delivery of a draft by 8 March, in default of which the proceedings would be dismissed. On 8 March the plaintiffs delivered a draft statement of claim, which was the ninth version of their pleading. Each of the defendants objected to it and so it was necessary, pursuant to my order of last November, for the plaintiffs to obtain leave to file it. They filed an application for leave on 31 March but that application could not be heard by me in the Applications list in April because of a change to the Court calendar. The application came before me on 22 July. In the meantime, the plaintiffs had amended the ninth version and delivered a draft (tenth) statement of claim on 2 June.

The present applications

[8] The Jenkins apply for leave to file this tenth version of their statement of claim. Each of the defendants argues that the tenth statement of claim is embarrassing, and that it pleads a case which has no real prospect of success. Each of the defendants applies to have the Jenkins' claim dismissed for want of prosecution. I shall deal first with the Jenkins' application.

Case against the first defendant, Mr Martin QC

[9] In the prayer for relief there are claims for declaratory relief and for damages "for breach of contract and negligence", for which there is no distinction made between the relief claimed against Mr Martin, and that claimed against Barwicks. But it cannot be the Jenkins' intention to claim identical relief against each of the defendants. The case pleaded against the solicitors is that they are liable in contract and in tort, whereas the pleaded case against the barrister is in tort only. One declaration claimed is that "the plaintiffs are entitled to set off such damages as has (*sic*) been incurred by them as a consequence of the negligence and breach of contract of Barwicks and Mr Martin QC, as may extinguish any claim by Barwicks for costs as against the plaintiffs". Again, the reference to a breach of contract by Mr Martin QC seems to be mistaken. In the statements of claim which I struck out last year, there was an attempt to plead a contract case against the barrister, of which

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1 3 May 2002

2 13 May 2003

one difficulty was the absence of any alleged consideration for such a contract. In this tenth version, there is no such attempt and Mr Savage SC disavows a contract case against this defendant.

[10] The plaintiffs had previously pleaded a contract case against Mr Martin in an apparent effort to avoid a barrister's immunity from suit according to *Giannarelli v Wraith* (1988) 165 CLR 543. For Mr Martin, it is submitted that any advice involved work leading to a decision affecting the conduct of the case in Court against General Credits, for which he could not be liable: see *Giannarelli* at 560 per Mason CJ and *Keefe v Marks* (1989) 16 NSWLR 713 at 719 per Gleeson CJ. However the High Court has reserved its decision in *D'Orta-Ekenaike v Victoria Legal Aid & Anor*[3] in which the Court is being asked to reconsider *Giannarelli*. In that circumstance, I would not dismiss now the proceedings against the barrister on this ground, and it is unnecessary to consider it further.

[11] The first complaint now made of the pleading against Mr Martin is that it fails to identify the matter or matters upon which Mr Martin was obliged to advise. The plaintiffs allege that Mr Martin was retained in 1988 to advise them on their dispute with General Credits, and that he advised them, either in conference or in writing, on several occasions in the period from 1988 until the settlement reached in April 1994. They plead that Mr Martin gave advice that the claims against the joint venture by Mr Porter, or his company Langful Pty Ltd, were unmeritorious and should be resisted and that the Jenkins should consider whether Australian Guarantee Corporation and Westpac Banking Corporation, the then controllers of the General Credits companies, had acted unlawfully with Mr Porter in relation to the joint venture. They plead that subsequently Mr Martin advised that there was a case of fraud against General Credits Ltd which should be litigated. It is further alleged that Mr Martin advised them not to accept General Credits' offer of settlement made in May 1991, and instead advised them to counter offer on certain terms. They also complain that he failed to advert to a fundamental flaw in their case, which was that if they were entitled to undo their 1985 settlement with General Credits, they would be returned to a position in which they would have a substantial personal liability to General Credits, which might not be exceeded by any claim which they had against it. There are complaints that Mr Martin overlooked critical documents which he inspected, or should have inspected. They complain of Mr Martin's pleadings which he drew against General Credits. There are also complaints of a failure by Mr Martin to advise them of certain matters.

[12] It is argued for Mr Martin that the plaintiffs have not articulated the questions upon which Mr Martin was asked to advise. It is submitted that the pleading lacks "specific particulars about what the Jenkins asked Mr Martin to advise about, or achieve, or what the Jenkins' commercial objectives were from time to time" so that absent particulars of those matters, Mr Martin would not know the alleged extent of his duty to advise. I accept, of course, that the scope or content of a barrister's duty depends on the content of the barrister's instructions. The present question is whether this tenth statement of claim enables Mr Martin to understand the case he must meet. In my view it does. I do not think that it is necessary for the plaintiffs to plead against Mr Martin what it was which the plaintiffs were looking to achieve

[3] Application M 61/2003

as an outcome of their dispute with General Credits or their "commercial objectives". The facts and circumstances by which Mr Martin owed them a duty of care and was obliged to advise them in relation to their dispute with General Credits are sufficiently pleaded in this tenth statement of claim.

[13] Another complaint is in relation to the allegations of loss and damage. Mr Savage SC ultimately conceded that there were further matters to be added to this tenth statement of claim before it represented what he says is the plaintiffs' real case. The most substantial component of the loss claimed is the lost opportunity to more favourably settle the litigation with General Credits. Paragraph 31 alleges that General Credits made an offer to settle on 20 May 1991. The pleading describes the dispute with General Credits after the 1985 compromise as "the second dispute". The relevant General Credits companies are described in the pleadings as GCL and GCI. The suit by Mr Porter's company is described as the "Langful proceedings". Paragraph 31 is in these terms:

> "On 20 May 1991 GCL and GCI offered to settle the second dispute on the following terms:
>
> (a) AGC/Westpac would meet the reasonable legal fees incurred by the Plaintiffs in the Langful proceedings.
> (b) The parties would join together to sell the Reef land and deduct the sum of $2.8 million plus the legal fees of Reef in the Langful proceedings.
> (c) The balance of the payment as above would be distributed equally between Jenkins and GCL."

[14] Paragraph 36 alleges that on 6 August 1991, GCL and GCI rejected the plaintiffs' counter proposals for settlement although, so the Jenkins allege, GCL and GCI would have been prepared to compromise on the basis that they had offered in the previous May, as pleaded in paragraph 31. In paragraph 67B of the pleading, it is alleged that had Mr Martin or Barwicks given advice on any of the occasions on which some breach is alleged against either of those defendants, or "on any occasion until the trial of the proceedings on 4 April 1994" then:

> "(i) the plaintiffs could have settled the proceedings on terms similar to those at paragraph 31;
> (ii) alternatively on terms more favourable than those at paragraph 68;
> (iii) such a settlement would not have obliged the plaintiffs to pay the defendants' professional fees under the plaintiffs' written retainer."

The terms pleaded at paragraph 68 are those of the settlement which was reached with General Credits on 18 April 1984 by which Mr and Mrs Jenkins received no money but were released from all claims.

[15] It is then necessary to set out paragraph 72 of this tenth pleading in full:

"As a consequence of the negligence of Mr Martin Q.C. and the negligence and breach of contract of Barwicks more particularly pleaded above:

(a) The value of the services provided by and purportedly charged by them to conduct the Langful proceedings (in respect of Mr Martin Q.C.) and to conduct the GCL proceedings and counterclaim was nil.

(aa) (in any event) the plaintiffs were not obliged to pay Barwicks professional fees and outlays since they did not receive an award of damages or favourable monetary settlement as provided by the retainers and would not have done so if Barwicks acted completely and had properly advised him as pleaded above.

(b) The plaintiffs suffered loss and damage being the difference between the written offers of settlement from GCL and GCI of 20 May 1991 and 6 August 1991 ~~and 2 February 1993~~ (as referred to at paragraphs 31 and 36 above) and the settlement made in the GCL proceedings and counterclaim.

(bb) The plaintiffs have been put to cost and expense in defending Barwicks' proceedings against them.

(c) The plaintiffs are entitled to set off such damages in (b) and (bb) against any liability to Barwicks in respect of costs – which set off extinguishes any such liability."

The reference to "Barwicks' proceedings against them" in paragraph 72(bb) is to action number 3941/1997, so that the claim in paragraph 72(bb) is for the costs of resisting Barwicks' claim for fees and outlays. The matters pleaded in paragraphs 72(a) and (c) do not seem to be so much claims of loss and damage but assertions that the Jenkins are not indebted to Barwicks. Unlike some previous versions, this statement of claim does not plead that certain amounts were expended by Mr and Mrs Jenkins in the prosecution of the General Credits case, which are recoverable as damages. That leaves paragraph 72(b) from which it appears that the loss and damage claimed, for the negligence of each defendant, is the difference between the value of the 1994 settlement and the settlement they would have made had they accepted the 20 May 1991 offer.

[16] Paragraph 73 of this statement of claim then pleads as follows:

"The plaintiffs calculated their damages as follows: (on the basis that the plaintiffs would have bought out GCL's interest at August 1991)

(a) Value of Reef land as at August 199~~3~~1 - $3,350,000.00

(b) Less payout to GCL for the plaintiff's purchase of land - $1,400,000.00 – ~~as provided for in the GCL offer of settlement of 2 February 1993~~ - $1,950,000.00.

(c) Plus interest at a commercial compound rate averaged over the period August 1991 to date of judgement (say 12%) in the case of Mr Martin Q.C. and from 30 July 1992 in the case of Barwicks for loss of use of

the settlement proceeds which would have been invested by the plaintiffs at no less than that rate over that time.

(d) Plus solicitor/client cost of Barwicks' proceedings (say) $50,000.00."

Paragraph 73(d) seems to be a reference to what was pleaded in paragraph 72(bb). The claim in paragraph 73(c) is for compound interest, as against Mr Martin, from August 1991, a date which seems to relate to what is pleaded in paragraph 36. Paragraphs 73(a) and (b) claim damages in the sum of $1,950,000, calculated by subtracting "the (hypothetical) payout to GCL for the plaintiff's purchase of land", quantified at $1,400,000, from the alleged value of the Reef land as at August 1991 of $3,350,000. At least one difficulty with paragraph 73 is that nowhere else within this pleading is it said that with the proper legal advice, the Jenkins could and would have purchased the Reef land. The offer of May 1991 involved a sale of the Reef land, but it is not pleaded that the plaintiffs themselves would have purchased it, had they accepted the May 1991 offer. And pursuant to the terms of the offer, General Credits would have received $2,800,000 before distribution of the balance of the proceeds equally between it and the Jenkins. Assuming that the Reef land had been sold in August 1991 for its alleged then value of $3,350,000, the proceeds to be distributed could have been no more than $550,000, of which the Jenkins' share would have been one half. This would have yielded the Jenkins no more than $275,000, so that the difference for them between the 1991 offer and the 1994 settlement was that sum, and not $1,950,000.

[17] But Mr Savage SC said that there were elements of the damages claim which are not pleaded within this tenth statement of claim. One is an allegation that although the Reef land was worth $3,350,000 in August 1991, it would have been sold for about $6 million had its sale been deferred. And so he said that paragraph 31(b) should be understood as if the words "at a time to be determined which would have produced a sum of $6 million" appeared after the words "the parties would join together to sell the Reef land…" in that paragraph. From this pleading the defendants were supposed to understand that the benefit of accepting the May 1991 offer would have been a net sum to be distributed of the order of $3.2 million (being $6 million less the $2.8 million to be paid to General Credits), of which one half or $1,600,000, would have been distributed to the plaintiffs. Mr Savage added that paragraph 67B should be read as if there appeared at the end of paragraph 67B(b)(i) words such as "but on terms of an immediate sale and with a division of the *entire* proceeds of sale equally between the parties". From this, he says that there should be pleaded an alternative case that Mr and Mrs Jenkins could have procured a different and more favourable settlement under which the land would have been sold in about August 1991, for its then value of $3,350,000, but under which General Credits would have agreed to allow Mr and Mrs Jenkins to have one half of the entire proceeds of sale.

[18] It appears then that the plaintiffs wish to advance alternative cases, neither of which they have pleaded within this tenth statement of claim. The alternative formulations of a claim for damages are irreconcilable with what is pleaded in this version of the statement of claim, and in particular with what is pleaded in paragraph 73. And by neither of those formulations, could the plaintiffs hope to recover damages in the amount as claimed, which is $1,950,000.

[19] In the eighth statement of claim, the plaintiffs had pleaded that General Credits had indicated a willingness to settle the proceedings in the course of certain correspondence, meetings or telephone conversations, including by a letter from its solicitors dated 2 February 1993, in which it had offered to sell the whole of its interest in the venture for the sum of $1,400,000. This seems to be the source of the allegation now in paragraph 73. Quite possibly, the damages which the plaintiffs now have in mind have been previously ventilated in an earlier version of their pleading. However, the statement of claim for which leave is now sought does not plead it. And if and when such a pleading was produced and allowed to be filed, it would require the defendants to undertake a factual enquiry as to what would have been the attitude of General Credits for certain settlements at various times over at least a three year period, which ended more than ten years ago.

[20] This tenth pleading introduces another cause of action against both Mr Martin and Barwicks, which is a claim of breach of fiduciary duty. It does so by paragraphs 74 to 76 as follows:

> "74. Further despite the male plaintiff's several requests neither Mr Martin Q.C. nor Barwicks:-
>
> (a) disclosed the true facts concerning the plaintiffs' claims as set out in this pleading;
> (b) advised the plaintiffs to seek independent advice concerning the conduct of his case by them.
>
> 75. Rather than act as above Mr Martin Q.C. and Barwicks pretended that the only reason for settlement of the proceedings was the male plaintiff's supposedly poor evidence in support of his case and the late discovered inability to stamp various necessary documents.
>
> 76. The defendants were in breach of their fiduciary duty to the plaintiffs in so acting."

It adds a paragraph to the prayer for relief for:

> "(d) A declaration in terms of paragraph 76 of the Statement of Claim."

There is no claim for compensation for the breach of this duty.

[21] However, during the argument, Mr Savage abandoned this claim and asked me to treat these paragraphs as deleted. He explained that they had been pleaded in anticipation of a plea by one or both defendants that the case is time barred, and that the relevant complaint behind these paragraphs, which he says the plaintiffs would plead in reply, is that the defendants fraudulently concealed the plaintiffs' rights of action thereby postponing the expiry of the limitation period pursuant to s 38 of the *Limitation of Actions Act* 1974 (Qld). The fraudulent concealment is said to have been undertaken by the conduct pleaded in paragraphs 74 and 75. Mr Martin's pleadings have consistently alleged that the proceedings against him were brought more than six years from the accrual of any cause of action, commencing with his

original Defence filed in October 2000. In Barwicks' Defence filed in August 2002, they also pleaded that the proceedings were time barred, although the basis for this is less clear because, by the Jenkins' counterclaim, Barwicks had been sued in 1997. But until now the Jenkins have not pleaded any fraudulent concealment. If the Jenkins are permitted to prosecute these proceedings the defendants can now expect such a plea in the Reply, it appears that for the first time in this litigation, they would have to defend allegations of fraud. In the light of this foreshadowed plea of fraudulent concealment, it would not be appropriate to determine summarily the question of whether the proceedings against Mr Martin or Barwicks are time barred. Proceedings should be summarily dismissed on this basis only in the clearest of cases: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533. However the relevance of the proceedings against Mr Martin being apparently statute barred, save for this question of fraudulent concealment, and the lateness of the allegation of fraudulent concealment, are important matters in the consideration of whether the Jenkins proceedings should be dismissed for want of due prosecution.

Pleaded case against Barwicks

[22] As I have mentioned, the plaintiffs claim the same relief against both Mr Martin and Barwicks. Accordingly what I have already said of the flaws in this pleading as to the alleged loss and damage applies also to the case against Barwicks.

[23] One difficulty from the pleading making no distinction between the respective defendants is that Barwicks are said to be responsible for precisely the same loss as was caused by Mr Martin, although Mr Martin had been advising the Jenkins from 1988 and Barwicks were retained only from September 1991. Moreover, Barwicks were retained after the May 1991 offer had been rejected.

[24] For Barwicks, Mr Bell QC submitted that the proposed pleading is embarrassing also in its allegations of the solicitors' retainer. Paragraph 53 alleges that the plaintiff retained Barwicks to act for them in relation to the General Credits proceedings on 15 September 1991, and that the retainer was "subsequently reduced to writing on 15 September 1993". It is pleaded that it was a term of that retainer that the Jenkins would be obliged to pay the Barwicks' professional fees only if they obtained an award of damages or a settlement that involved a payment of money to them. For Barwicks, it is submitted that this alleged term is inconsistent with the relevant clause of the document relied upon as the written retainer, which provides as follows:

> "6. The Client agrees that the Firm may render memoranda of fees and disbursements on a monthly or other interim basis, and that the amounts thereof shall be paid within 14 days of the Client receiving moneys either by way of settlement or an award of damages made in relation to Item 2. The Client agrees to pay memoranda of fees and disbursements rendered previously by the firm or Kenny & Loel and that such fees were fair and reasonable and that the Client does not require taxation of those memoranda."

It can be seen that clause 6 distinguishes between fees and disbursements charged prior to the date of the written agreement and those charged subsequently. In that sense at least, the written agreement could not have been to the same effect as the alleged oral retainer. However the case as pleaded, by its reliance upon the written agreement as constituting the relevant terms, might be understood as one whereby the terms before and after the written agreement were identical save for the change which appears from clause 6 of the written agreement.

[25] A similar point was made by Mr Bell QC in relation to clause 2 of the document which was in these terms:

> "2. The Client expressly authorises the Firm to act on its behalf in relation to the matters described in Item 2 of the Schedule and to receive and act on instructions provided by the Client or his authorised agents, namely Bill Martin Q.C. and/or Messrs John Ryan and Co."

It is argued that the clause uses prospective language, rather than terms which record a retainer under which the solicitors had been acting for years. But the pleaded case is (with the necessary exception of the matter in clause 6 just discussed) that the solicitors were retained in 1991 on identical terms to those of the 1993 document. The plaintiffs may or may not be able to establish that fact, but the case is clearly enough pleaded and it is not so implausible that the plaintiffs should be prevented from pleading it.

[26] It was argued for Barwicks that this pleading does not indicate the facts and circumstances by which Barwicks owed duties to assess the Jenkins' prospects, undertake inspection of discovered documents or prepare particulars, which duties the Jenkins plead were breached. Again, although it is clear that the content of a duty owed by a lawyer depends upon the content of the lawyer's instructions, the question is whether this pleading fairly informs Barwicks of the case to be put against them. In my view the pleading is not deficient in this respect. It alleges that no competent solicitors in Barwicks' position as the solicitors on the record in the conduct of this litigation, could have failed to advise the Jenkins that their case was hopeless. Because there is no allegation of any specific instruction that Barwicks should advise, the Jenkins would have to prove their case on the basis that the flaws in their case against General Credits were so obvious that any competent solicitor would have recognised them and advised of them. As to the duties to undertake inspection and to prepare particulars, again it is the proposed case that those obligations came by implication from a retainer to act as the solicitors on the record in the litigation. Again, the boundaries of the Jenkins' case against Barwicks seem clear enough. And the case is not so lacking in apparent merit that, delay aside, the plaintiffs should not be allowed to plead it.

Disallowance of the proposed statement of claim

[27] As I have mentioned, Mr Savage conceded that there were amendments which would have to be made to this tenth version of the statement of claim. In my view,

the most serious of the matters for amendment is the case as to damages. If these proceedings were to go forward it would be essential for the defendants to be properly informed of the facts relied upon to establish a certain loss or losses. As any loss claimed would involve an allegation of a basis upon which General Credits would have settled at a particular time, it would be necessary for the Jenkins to plead the terms of that (lost) compromise, when it would have been acceptable to General Credits and the facts and circumstances from which any inference as to General Credits' likely attitude to a certain settlement is to be drawn.

[28] The pleading is also defective by the prayer for relief not distinguishing the relief claimed against Mr Martin from that claimed against Barwicks. Further, the pleading wrongly asserts a right to set off against Barwicks' claim for costs the amount of any damages from the defaults of Mr Martin. And Mr Savage now disavows the allegations of breach of fiduciary duty, which in any case were pleaded without proper particulars, such as those of "the male plaintiff's several requests".

[29] Accordingly, the plaintiffs' application for leave to file this tenth version of the statement of claim must be dismissed.

Applications to dismiss the Jenkins' proceedings

[30] In *Cooper v Hopgood & Ganim* [1999] 2 Qd R 113 the Court of Appeal emphasised that the exercise of the Court's discretion to dismiss an action for want of prosecution is not to be fettered by rigid rules, but requires a decision to be reached upon a balance of the relevant circumstances. At 124, McPherson JA said that:

> "The power so to dismiss is one that is confined to a judicial discretion, and, for that if no other reason, is incapable of being exhaustively defined or delimited in a detailed and binding fashion. *Birkett v James* suggests only some of the factors relevant in exercising the discretion, which include matters such as the duration of the time lapse involved; the cogency of any explanation for delay; the probable impact of procrastination on fading recollection; the death or disappearance of critical witnesses or records; costs already or likely in future to be expended or thrown away; the apparent prospects of success or otherwise at a trial of the action; and the progressively growing problem of effectively hearing and determining questions of fact arising out of events that have taken place many years before. The list is not, and is not intended to be, exhaustive; and it takes no account of another factor that is often likely to be material, which is that ordinary members of the community are entitled to get on with their lives and plan their affairs without having the continuing threat of litigation and its consequences hanging over them. The psychological as well as the commercial effects of such a state of affairs ought not to be underestimated."

Pincus JA, at 121, summarised the circumstances that justified the striking out of that professional negligence action in a passage which suggests some resemblance to the present matter:

> "In my opinion, although I see difficulty in fitting the case into what was described in *Wright v Morris* [1997] FSR 218 at 227 as the "straitjacket of the guidelines laid down in *Birkett v James*", the judge's order should stand. This Court should hold that the circumstances are such as to necessitate putting an end to the suit, under the inherent jurisdiction. Despite much encouragement on the part of the respondent, the appellant has not yet, in 1998, properly set out his allegations against the respondent, in an action begun in 1994 in relation to events which seem principally to have taken place in 1987 and 1988. It is desirable that litigants and their lawyers be given to understand that the Court will not necessarily countenance such a long delay in achieving a formulation of the allegations on which the action is based. The delay should in my view be treated as inexcusable.
>
> It is necessary to refer to two other points. Mr Dorney argued that we should decide the matter on the basis that if the action was struck out, another could be instituted, within time; he said that there was a case of concealed fraud which would enable that to be done. The relevance of this contention is to one of the *Birkett v James* guidelines, to the effect that an action should not be dismissed for want of prosecution before the limitation period has expired, other than in exceptional cases ([1978] AC at 321). There is no way of telling whether there has been concealed, or any, fraud, so that principle cannot apply."

[31] *Cooper v Hopgood & Ganim* was decided under the previous rules, but in *Quinlan v Rothwell* [2002] 1 Qd R 647, the judgments in *Cooper* were held to guide the discretion under the *UCPR*; see Thomas JA at 658 (with whom de Jersey CJ and Mackenzie J agreed). Thomas JA there said:

> "Subject to what is said below, the wide-ranging factors that have been identified as potentially relevant to such applications, such as those mentioned in *Cooper v Hopgood & Ganim*, will continue to guide courts in exercising the power. In addition, r5 gives express recognition to the importance of expeditious resolution of issues in proceedings. In my view the nature of the power of this court has not been altered, but the rules are a clear indication of the change in attitude that has independently taken place in courts throughout Australia. They suggest that courts will now be less tolerant of delay and that the expedition of proceedings should be encouraged to a greater extent than was formerly the case."

In *Quinlan*, the Chief Justice said at 652:

> "I at once observe that the discretion to dismiss for want of prosecution may these days confidently be exercised, in appropriate cases, with more robustness than would previously have been considered appropriate. *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551-552 jurisprudentially signalled that shift, and it is legislatively suggested through the *Uniform Civil Procedure Rules*. The focus of r5 rests strongly on "the just and expeditious resolution of the real issues ... at a minimum of expense", and avoiding undue delay, expense and technicality. The rule has gone to the length of expressly confirming that breach of a party's "implied undertaking" "to proceed in an expeditious way" may attract sanctions including, as per the proffered example, dismissal of the proceeding."

[32] I turn then to the circumstances affecting the application to dismiss the proceedings against Mr Martin. There is an aspect of the case against him which requires some explanation, for the relationship between the barrister and the lay client in this case was closer than in the usual case. That is illustrated by the term of the Barwicks' written agreement with the Jenkins, by which instructions were be received *by* the solicitors *from* Mr Martin. His involvement in this case, at least on the plaintiffs' allegations, predated that of Barwicks by some years, and apparently he was communicating directly with Mr and Mrs Jenkins on what must have been very many occasions during the relevant six years. In some cases where a barrister might be sued for negligent advice, the relevant occasion upon which the advice was sought or given can be easily identified, and the content of the instructions or the advice would be indisputably proved by documents such as the counsel's brief or opinion. In other cases where an advice was given in conference, the content of the advice, as well as of the questions upon which counsel was asked to advise, might be precisely and comprehensively recorded by the solicitors' notes. But in the circumstances of this case, there is a greater potential for controversy as to what questions were asked of counsel, when they were asked of him, and in what circumstances. If this case was tried tomorrow, Mr Martin would have to turn his mind to a long series of meetings and other occasions upon which it is possible that he gave some advice or that he should have given advice. In that regard, the evidence is that he no longer has notes or relevant records.

[33] The essence of the proposed case is that the proceedings against Mr Porter's company and General Credits were without merit, and that the Jenkins should never have been advised to engage in this litigation and to reject offers to settle it. That requires not only an identification of the facts as they were presented to Mr Martin but also some inquiry as to the true merit of the Jenkins' case in those proceedings. If the Jenkins had a fairly arguable case against General Credits, rather than a hopeless one as they now allege, that would probably defeat the present claims. The events going to the merits of the General Credits matters predated the 1985 settlement. A relevant enquiry in this case would then involve a consideration of facts which occurred between the Jenkins, Mr Porter and General Credits in the years leading up to the 1985 settlement, as well as a consideration of what the present defendants knew or should have learnt of those matters.

[34] Then there would be further factual questions involving the likely attitude of General Credits to the settlement of the proceedings. That would involve, at the least, an inquiry as to its willingness to settle the case on certain terms at different times from 1991 to 1994. But it is also likely to involve the question of its attitude to settlement in the context of certain events which did not occur, such as the withdrawal of critical allegations, and in particular allegations of fraud, which had been made against it. On the case proposed to be made by Mr and Mrs Jenkins, it is said that Mr Martin and Barwicks should have advised at various points that the Jenkins did not have a case of fraud of any substance. Had they so advised, then presumably the allegations of fraud would have been abandoned[4] and a relevant question would then be whether General Credits would have been prepared to settle on terms more favourable to the Jenkins than the ultimate settlement of 1994.

[35] If this case were ever to proceed to a trial, it therefore would involve factual questions in relation to at least three matters:

1. The instructions to, and advice from, Mr Martin;
2. The correctness of that advice viewed against the relative merits of the Jenkins' complaints against General Credits from the 1985 settlement; and
3. The prospects that at one point in time or another, another but more beneficial settlement might have been procured from General Credits.

All of these matters would require an extensive examination of the facts and circumstances as they existed at least prior to 1994, and in some cases prior to 1985, and so far as the first of those matters is concerned, it involves Mr Martin in a factual issue for which he does not have what used to be his records. They are factual questions for which any contemporaneous documents which are still available are unlikely to give a complete picture, and for which fading recollections of facts and events could result in an injustice.

[36] The risks to a fair outcome from the delay between the events in question and the trial of a case are well established. It is clear that in some cases the actual prejudice to a party can exist without its existence or extent being recognisable.[5] In the present case, the proceedings against Mr Martin began more than six years from the occurrence of the events said to give rise to the causes of action against him, at least insofar as there was an attempted pleading of those causes by the proposed (tenth) statement of claim. Mr and Mrs Jenkins might seek to explain that on the basis of what they now would allege was the fraudulent concealment by their former barrister and solicitors of their rights of action. Their only apparent basis to resist the argument that they sued Mr Martin out of time is an assertion, now made for the first time, that he and the solicitors defrauded them.[6] There is no explanation for why this fraud is raised only now. Nor is there any explanation as to why the Jenkins have still failed to deliver a pleading of their intended case in terms which substantially comply with the rules.

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4 *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134

5 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551-552; *Quinlan v Rothwell* at 657 per Thomas JA

6 Any cause of action had occurred by the time any more favourable settlement was not procurable. It is not suggested that, for some reason, that occurred only after 27 March 1994.

[37] Insofar as the merits of their case against Mr Martin are relevant, it is my view that their case is not obviously so hopeless that it would be struck out on that ground alone. Otherwise, I am not in a position to fairly assess whether they have a good cause of action against Mr Martin. The merits depend upon the outcome of factual enquiries, which I have described above. So too do the merits of their proposed claim that Mr Martin fraudulently concealed their rights of action.

[38] Mr and Mrs Jenkins appear to have been prompted to make claims against their solicitors, and then their counsel, by the proceedings which Barwicks brought in 1997. I see no satisfactory explanation as to why, if there was a case against Mr Martin, it was not pleaded by at least 1997. Even then, there would have been substantial difficulties for him. But by this stage, it seems to me that Mr Martin is very seriously disadvantaged if he has to defend whatever is the case to be pleaded against him. I have concluded that these proceedings, as against him, should be struck out for want of prosecution.

[39] I turn then to the case against the solicitors. Most of the considerations which result in unfairness to Mr Martin from a continuance of these proceedings apply also to the case against them. There are the same difficulties in investigating events which have taken place so long ago. Although the Jenkins claimed against Barwicks in 1997, it was quite a different case to the present claim that Barwicks failed to advise that the Jenkins' case was hopeless. There is no explanation offered as to why the present complaint was not made until 2000.

[40] It can also be said that insofar as the prospects of success against either defendant can be assessed at present, the case against the solicitors seems to be somewhat weaker than that against Mr Martin. There is no allegation that they advised in writing and as I have mentioned, Mr Martin had a singular role in not only taking instructions from the solicitors, but giving instructions on the Jenkins' behalf to the solicitors. This gives the impression that they were to leave matters, for the most part at least, to Mr Martin. Further, the offer of May 1991 was made and rejected before the solicitors were retained.

[41] The solicitors do not seem to have a strong basis for saying that the case against them is time barred. But it is seven years since a claim was first made against them although the statement of claim in a proper form is yet to be filed. Again, the Jenkins' failure to properly plead their case is largely unexplained. But for one consideration, it would be my view that for substantially the same reasons as applied to the case against Mr Martin, the interests of justice require by this stage that the proceedings against Barwicks be dismissed for want of due prosecution.

[42] That consideration is that Barwicks have their own proceedings against Mr and Mrs Jenkins. The matters ultimately to be pleaded against Barwicks could be used as a defence to that claim. The substantial difficulties in meeting the Jenkins' complaints against them would have to be overcome by Barwicks if they were to prosecute their claim for fees and outlays. However, Mr Bell QC informed me that should I otherwise be persuaded to strike out the proceedings against Barwicks, it is

likely that Barwicks would forego their claim for costs and outlays as the price of freeing themselves from this litigation.

[43] In these circumstances, I have concluded that the case against Barwicks should be dismissed for want of prosecution, but on condition that Barwicks undertake that they will not pursue within the present proceedings or otherwise any claim for or in relation to fees and expenses as against Mr and Mrs Jenkins. I have concluded that if Barwicks so undertake within 14 days of the publication of these reasons, the proceedings against them should be dismissed. If that undertaking is not forthcoming, it is my view that the proceedings against Barwicks should not be dismissed, for Barwicks would have to meet the same matters in answer to their claim for fees and outlays.

[44] I shall hear the parties as to costs.