SUPREME COURT OF QUEENSLAND

CITATION:	*Palmer & Anor v Finnigan & Ors* [2009] QSC 42
PARTIES:	**BRIAN GRAHAM PALMER** (First Plaintiff) **AND** **GAYE LESLEY PALMER** (Second Plaintiff) **v** **RUSSELL JAMES FINNIGAN** (First Defendant) **AND** **JESSICA FINNIGAN** (Second Defendant) **AND** **JOHN GORDON HEMPSTALK** (First Third Party) **AND** **CHRISTOPHER DAVID ENGLISH** (Second Third Party) **AND** **GOLD COAST CITY COUNCIL** (Third Third Party)
FILE NO/S:	BS 6033/04
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	6 March 2009
DELIVERED AT:	Brisbane
HEARING DATE:	19 December 2008
JUDGE:	Dutney J
ORDER:	**1. The application will be dismissed.** **2. The applicant plaintiffs are to pay the respondents' costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE-SUPREME COURT PROCEDURE-PROCEDURE UNDER RULES OF COURT-PARTIES -where limitations of actions- where personal injury -where application by first and third plaintiff to join as defendants- where building installation occurred 20 years prior - where

plaintiff did not act promptly in bringing application for extension of limitation period

Personal Injuries Proceedings Act 2002 (QLD), ss43, 59.
Uniform Civil Procedure Rules 1999 (QLD), s69.
Limitation of Actions Act 1974 (QLD), s31.

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, cited.

COUNSEL: Mr J Webb for the plaintiffs
Mr G Irving (solicitor) for the defendants
Mr T Palmer for the first third party
Mr P Woods (Counsel) for the second third party
Mr K Howe for the third third party

SOLICITORS: Robbins Watson Solicitors for the plaintiffs
Deacons for the defendants
McCowans Solicitors for the first third party
Stacks//The Law Firm Solicitors for the second third party
Michael Sing Lawyer for the third third party

[1] This is an application by the first and second plaintiffs to join the present first, second and third third parties as defendants to the action.

[2] The first plaintiff was injured on the 10th of July 2001.

[3] The first plaintiff was employed by the first and second defendants to perform carpet dyeing at their premises at 18 Gibralter Drive, Isle of Capri Queensland.

[4] During the course of performing the work for which he was engaged the first plaintiff fell from the first floor balcony when the railing gave way.

[5] The first and second defendants are sued as the registered proprietors of the dwelling. It is alleged that they failed to properly maintain or inspect the railing to ensure that it was safe.

[6] The third parties which the plaintiffs now seek to be join as defendants are respectively the owner of the property at the time the railing was installed, the builder who installed the railing and the local authority which inspected the railing.

[7] The railing was installed in 1987. It was installed as part of a renovation of the house for the purpose of which the first third party acted as owner/builder. The first third party engaged the second third party to carry out the work. The second third party is (or was) a builder. Upon completion, the work was inspected by the Gold Coast City Council and passed.

[8] On 25 November 2002 the first plaintiff served a notice of claim on the first and second defendants.

[9] On 5 July 2004 the second plaintiff served a notice of claim on the first and second defendants.

[10] On 9 July 2004 the plaintiffs obtained leave to commence proceedings against the first and second defendants pursuant to section 43 of the *Personal Injuries Proceedings Act* 2002. The limitation period expired on 10 July 2004.

[11] On 29 November 2004 the defendants' solicitors wrote to the plaintiffs' solicitors enclosing a copy of a notice seeking to join the third parties as contributors. Enclosed with the notice were reports from Wyatt Gallagher Bassett dated the 25 September 2001 and 14 January 2003. Wyatt Gallagher Bassett were loss adjustors engaged by the defendants insurer, Allianz Australia Advantage Limited, to investigate the claim.

[12] In the report dated 25 September 2001 the investigator reported at page 4:

> "There may appear to be recovery options against the original builder or architect given that the railing does not appear to be affixed to any vertical supports."

[13] A statement from the first defendant was attached to the report dated the 14th of January 2003. In that statement the first defendant said at paragraph [19]:

> "I located one of the anchor bolts from the railing and observed it to be approximately 2 inches in length. The anchor bolts were embedded into plastic anchors, which were approximately 1 inch in length and approximately 10 millimetres in diameter."

[14] Thus it appears that by the 29 November 2004, the plaintiffs' solicitors knew that the investigations carried out on behalf of the defendants' insurer revealed an absence of vertical supports and the possible use of inadequate anchors.

[15] The compulsory conference required under the *Personal Injuries Proceedings Act* was conducted on 8 June and 19 July 2006.

[16] On the 25 August 2008 the second third party's solicitors received a report from Dr Justin Ludke, an engineer, suggesting that the rails had been improperly installed and in particular without vertical support and being fixed at the based only by rawl plugs rather than dyna bolts or another more sophisticated system of fixation. This report was passed on to the plaintiffs' solicitors.

[17] The third parties oppose being joined at this stage of the action on two bases. The first is the efluxion of time. The work in relation to which the plaintiffs seek to sue them was completed more than 20 years ago. The limitation period for bringing an action arising from the incident in 2001 expired in mid 2004.

[18] The second third party, the builder, was required at the time to take out insurance but such insurance was limited to six years from the date the work was carried out.

[19] The first third party sold the house in 1994.

[20] In any case it is submitted that a delay of 20 years is such that the third parties should not now be required to directly indemnify the plaintiffs.

[21] It is acknowledged that the third parties are liable to indemnify the defendants if their conduct 20 years ago was below standard. Such indemnity would be conditional upon the defendants being liable to the plaintiffs. Since the defendants are lay people and they were not responsible for the installation, the claim against them is only that they failed to observe the deterioration in the railings. The prospect of the plaintiffs succeeding against the defendants is far from certain. Undoubtedly, that is why the plaintiffs now wish to join the third parties as defendants.

[22] The plaintiffs' application is made pursuant to rule 69 of the *Uniform Civil Procedure Rules* 1999. Relevantly that rule provides:

> "(1) The Court may at any stage of the proceeding order that:
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> ….
>
> (b) any of the following persons be included as a party –
>
> …
>
> (ii) a person whose presence before the Court would be desirable just and convenient to enable the Court to adjudicate affectively and completely on all matters in dispute connected with the proceeding.

> (2) However, the Court must not include … a party after the end of a limitation period unless one of the following applies –
>
> …
>
> (f) or for any other reason –
>
> (ii) relief sought in the proceeding before the end of the limitation period cannot be granted: unless the new party is included … as a party."

[23] I do not consider that rule 69 is an appropriate vehicle for granting the relief sought by the plaintiffs. The examples of specific circumstances in which the rule applies make it clear that it is intended to be used where, in error, the action is wrongly constituted. This is not such a case. This is not a case where the relief sought cannot be granted unless the third parties are made defendants. The only relief sought in the action is damages against the defendants based on the failure to observe the deterioration in the railings. The joinder of additional defendants is not relevant to that relief. The plaintiffs made a deliberate decision to sue the present defendants.

[24] Rule 69 does not permit a plaintiff to add a new claim against a new and unrelated party after the limitation period has expired. The claims do not arise out of the same facts. The present defendants are sued on the basis that they were or ought to have been aware that the railings were unstable and did nothing. The proposed claim against the third parties relates to the original installation of the railings.

[25] In this case the plaintiffs became aware of the potential problems with the design of the railing, if not within the limitation period, then within a few months of its expiry. It is likely that an application made at that time under section 31 of the *Limitation of Actions Act* to extend the limitation period on the basis of new facts

would have been granted. That was four years before the present application was filed. I am not satisfied that there is anything new in the more recent report of Dr Ludke. Dr Ludke merely confirms the conclusion reached by Wyatt Gallagher Bassett in 2001 concerning the absence of vertical support and what the first defendant observed at about the same time in relation to the type of bolts. The twelve months following the discovery of relevant and decisive facts within which an application to extend the limitation period might be brought has long since expired. By failing to act in the four years after being notified of the defendants' intention to seek contribution from the third parties and the reasons for seeking that contribution, the plaintiffs must be taken to have made a deliberate choice to limit their claims to the existing defendants. What the plaintiffs really seek is to revisit that decision.

[26] The delay in bringing this application is such that, in the absence of a proper explanation, I can only conclude that the plaintiffs have now lost confidence in their ability to succeed in their claims against the present defendants. It is now too late to simply extend the limitation period by an application under s 31.

[27] In the context of section 31 of the *Limitation of Actions Act* in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552 McHugh J spoke of delay as follows:

> "The effect of delay on the quality of justice is no doubt one of the most important influences motivating our legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time goes by relevant evidence is likely to be lost. Second, it is oppressive, even 'cruel' to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. Insurers,

> public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period."

[28] At page 555 McHugh J went on:

> "If the action had been brought within time, it would have been irrelevant that by reason of the delay in commencing the action, Dr Chang might have had little independent recollection of his conversation with the applicant and that the defendant might have had difficulty in fairly defending itself. But once the potential liability of the defendant has ended, its capacity to obtain a fair trial, if an extension of time were granted, was relevant and important. To subject a defendant once again to a potential liability that has expired may often be a lesser evil then to deprive the plaintiff of the right to reinstate the lost action. This will often be the case where the plaintiff is without fault and no actual prejudice to the defendant is readily apparent. But the justice of the plaintiff's claim is seldom likely to be strong enough to warrant a Court reinstating a right of action against the defendant who, by reason of delay in commencing the action, is unable to defend itself or is otherwise prejudiced in fact and who is not guilty of fraud, deception or concealment in respect of the existence of the action."

[29] In my view 20 years is too long a period after which to sue the third parties in this case. The prejudice those parties suffer is not negated by the fact that they are third parties already. They may never be called upon to actually justify their position because the plaintiffs may fail against the defendants. The prospects of the plaintiffs failing against the defendants is a real one.

[30] Where the plaintiffs are not able to extend the limitation period legitimately pursuant to section 31 of the *Limitation of Actions Act*, it seems to me that they ought not to be entitled to achieve that result by reliance on rule 69 where the need to employ that method arises from a four year delay in seeking to join the new parties. No satisfactory explanation for that delay has been advanced. I do not accept that Dr Ludke's report is a genuine explanation where it does not contain any decisive new facts. The first and second third parties are prejudiced in being able to

defend the proceedings properly at this point in time. It is unlikely they have retained records of the renovation of the house over such a long period or that they have any real recollection of the railings. The third third party is likely to have some records which will assist it in its preparation of its defence but even in its case there is likely to be significant real prejudice by reason of the expiration of more than two decades. For this reason alone I would be inclined to refuse the application.

[31] The second basis for resisting the application raised by the third parties is the impact on rule 69 of section 59 of the *Personal Injuries Proceedings Act*. That section provides:

> "(1) If a complying Part 1 Notice of Claim is given before the end of the period of limitation applying to the claim, the claimant may start a proceeding in a Court based on the claim even though the period of limitation has ended.
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> (2) However, the proceeding may be started after the end of the period of limitation only if it is started within –
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> (a) six months after the complying Part 1 notice is given or leave to start the proceeding is granted; or
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> (b) a longer period allowed by the Court.
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> (3) Also, if a proceeding is started under subsection (2) without the claimant having complied with Part 1, the proceeding is stayed until the claimant complies with the Part or the proceeding otherwise ends.
>
> (4) If a period of limitation is extended under the *Limitation of Actions Act* 1974 Part 3, this section applies to the period of limitation as extended under that part."

[32] Section 43 of the *Personal Injuries Proceedings Act* permits the Court to grant leave to commence a proceeding in cases of urgency. If such leave is granted however the proceedings are stayed until the provisions of the *Personal Injuries Proceedings Act* are complied with. Leave was sought under this section in relation to the

existing defendants but not in relation to those persons arguably responsible for the installation of the railings.

[33] It was submitted on behalf of the third parties that s 59 of the *Personal Injuries Proceedings Act* constitutes the only way in which a claim for damages for personal injury, not being a claim under the *Workers Compensation and Rehabilitation Act* or the *Motor Accident Insurance Act*, can be brought. Since no notice of intention to claim has been served on the third parties by the plaintiffs and the limitation period has expired, it is no longer possible to comply with s 59.

[34] This would not present a problem to the plaintiffs if they had acted promptly and brought an application for an extension of the limitation period within 12 months of becoming aware of new facts such as the method of fixation of the railing. By delaying for four years, however, the plaintiffs are no longer able to bring such an application.

[35] Section 43 is of no assistance to the plaintiffs because it does not extend the limitation period.

[36] Because of my conclusion regarding the scope of rule 69 and my conclusion that in any event I would decline the application in the exercise of my discretion, it is not necessary for me to rule on whether provisions of the *Personal Injuries Proceedings Act* displaces rule 69 of the UCPR in this case. Without forming any final opinion on the matter, the argument does not appear to be frivolous.

[37] I should add, whatever else might be the case, the potential claim against the first third party does not seem to be a strong one. The first third party was the owner of

the property at the time and although renovating the house as an owner/builder he engaged a qualified person to perform the work and had the results inspected and passed by the council. It is not obvious to me that there has been any actionable breach of duty by him in those circumstances.

[38] I do not propose to make any comment on the strength of the case against either the council or the builder.

[39] The application will be dismissed. The applicant plaintiffs are to pay the respondents' costs of and incidental to the application to be assessed on the standard basis.