

SUPREME COURT OF QUEENSLAND

CITATION: *Althaus & Anor v Australia Meat Holdings P/L & Anor*
[2009] QCA 221

PARTIES: **JOHN EDMOND ALTHAUS**
(plaintiff/first respondent)
REDMEAT PTY LTD ACN 064 838 982
(plaintiff/second respondent)
v
AUSTRALIA MEAT HOLDINGS PTY LIMITED
ACN 011 062 338
(defendant/first applicant)
CONAGRA FOODS INC
(defendant/second applicant)

FILE NO/S: Appeal No 2181 of 2009
SC No 7975 of 2004

DIVISION: Court of Appeal

PROCEEDING: Applications for Security for Costs
Applications to Strike Out

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 31 July 2009

DELIVERED AT: Brisbane

HEARING DATE: 17 July 2009

JUDGES: McMurdo P, Keane JA and Wilson J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Each application to strike out the notice of appeal allowed**
2. Notice of appeal struck out
3. Respondents to pay the applicants' costs of their applications and of the notice of appeal to be assessed on the standard basis

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – OTHER MATTERS – where respondents' appeal from decision of primary judge striking out pleadings and dismissing action – where applicants seek to strike out respondents' notice of appeal from that decision – where respondents failed to cure deficiencies in pleadings on appeal

Uniform Civil Procedure Rules 1999 (Qld), r 772

Althaus v Australia Meat Holdings Pty Ltd [2007] 1 Qd R 493; [\[2006\] QCA 412](#), cited
Althaus & Anor v Australia Meat Holdings Pty Ltd & Anor [2009] QSC 5, affirmed
Birch v Birch [1902] P 130, cited
Jonesco v Beard [1930] AC 298, cited
von Risefer v Permanent Trustee Company Limited [2005] 1 Qd R 681; [\[2005\] QCA 109](#), applied
Wentworth v Rogers (No 5) (1986) 6 NSWLR 534, cited

COUNSEL: A M Pomeranke for the first applicant
 S L Doyle SC, with S D Anderson, for the second applicant
 The first respondent appeared on behalf of the respondents

SOLICITORS: Allens Arthur Robinson for the first applicant
 Clayton Utz for the second applicant
 The first respondent appeared on behalf of the respondents

- [1] **McMURDO P:** The applications to strike out the appeal should be granted and the appeal struck out with costs for the reasons given by Keane JA. I agree with the orders proposed by Keane JA.
- [2] **KEANE JA:** On 2 February 2009 the learned primary judge refused the application by the plaintiffs for leave to deliver a further statement of claim in the action. His Honour went on to dismiss the plaintiffs' action against the defendants. The statement of claim presented to the learned primary judge was the plaintiffs' tenth attempt to plead their case for damages and other relief arising out of the alleged misuse of confidential information relating to an industrial food preservation process. The complete history of the plaintiffs' failed attempts at particularising their claim is detailed in his Honour's reasons:¹ the following brief review will suffice for the purposes of the applications presently before this Court.
- [3] The plaintiffs' action was commenced on 14 September 2004. On 6 December 2005, Philippides J ordered that the then amended statement of claim should be struck out, and that no further statement of claim be filed without leave.
- [4] On 20 October 2006, following further attempts by the plaintiffs to plead their case, this Court ordered that the plaintiffs seek leave of a judge of the Trial Division to file a further amended statement of claim within 21 days of that order.²
- [5] An initial attempt by the plaintiffs to obtain leave from Byrne J was unsuccessful. After five further amended proposed pleadings were propounded by the appellants, the matter was ultimately heard on 21 April 2008 by Byrne J. The plaintiffs conceded before Byrne J that their pleading was inadequate and sought "'one more opportunity' to prepare 'painstakingly' a pleading which 'exactly identified what is confidential about each drawing ... and manual' relied on by the plaintiffs."³ Byrne J dismissed the plaintiffs' application for leave and ordered that the plaintiffs' action stand dismissed unless a further amended statement of claim was delivered by

¹ *Althaus & Anor v Australia Meat Holdings Pty Ltd & Anor* [2009] QSC 5 at [4] – [13].

² *Althaus v Australia Meat Holdings Pty Ltd* [2007] 1 Qd R 493 at 504.

³ [2009] QSC 5 at [70].

31 July 2008. It was the further amended statement of claim delivered pursuant to this order which was the subject of the decision of 2 February 2009.

- [6] On that occasion, the learned primary judge struck out the latest version of the statement of claim on the basis that it still "exhibits the vices identified by the Court of Appeal in an earlier version of the pleading".⁴ Those vices concerned the plaintiffs' failure to specify what aspects of the process which is the subject of their claim was not in the public domain prior to the acts of misconduct with which the plaintiffs charge the defendants. His Honour concluded:⁵

"In a very real sense the plaintiffs' persistent, incompetent and ineffectual attempts to describe a case against the defendants is an abuse of process. It is not, I think, an exaggeration to describe the conduct of the action by the plaintiffs as scandalous. The attempts are a misuse of the rules which permit and control the institution of proceedings; and subject the defendants to repeated, defective processes which they must answer or apply to strike out. There is a responsibility on plaintiffs and those who advise them to put their cases in proper form and get on with them. These plaintiffs have been signally [sic] unable to discharge that responsibility. The time for indulgence has passed. They must suffer the consequence of their own failures."

- [7] His Honour proceeded to dismiss the plaintiffs' action because of:⁶
- "... the plaintiffs' serial failures to articulate their statement of claim and the inference to which the history of the action gives rise that they are incapable of doing so: the prejudice to the defendants and the fact that the precondition set by Byrne J for allowing the action to continue has not been satisfied."

- [8] The plaintiffs appealed to this Court against the decision of the learned primary judge.

The notice of appeal

- [9] The grounds of the plaintiffs' appeal are in the following terms:
1. His Honour erred in law in that His Honour failed to take into account relevant considerations, namely, there being a triable issue;
 2. His Honour erred in law in that His Honour failed to take into account relevant considerations, namely, by not considering the facts before the Court.
 3. His Honour erred in law in that His Honour failed to take into account relevant considerations, namely, by not identifying any of the following acts in the proceedings being; (first known date of commencement)
 - a. False and misleading information or withheld relevant information by the Second Defendant and their advisors and representatives from the patent office that the examiner would have considered

⁴ [2009] QSC 5 at [67].

⁵ [2009] QSC 5 at [74].

⁶ [2009] QSC 5 at [78].

- important in considering the patentability. (September 1998).
- b. Creation of a security by the Second Defendant and their advisors and representatives to deceive the Plaintiffs of the relationship between the First Defendant and Second Defendants and the market of its worth. (2002-2007)
 - c. Intentional misrepresentative behavior [sic] by the First Defendant and their advisors and representatives. (October 2004). Complained to and placed before the Court.
 - d. Intentional misrepresentative behavior [sic] by the Second Defendant and their advisors and representatives after filing the Claim and Statement of claims. (October 2004). Complained to and placed before the Court.
 - e. Destruction of the Plaintiffs' confidential information, property and evidence in breach of statute by the First Defendant and their advisors and representatives after the service of the proceedings and central to particularizing [sic] the confidential information. (February 2005). Complained to and placed before the court after admissions by the First Defendant and their advisors and representatives.
 - f. The digital manipulation and altering of key discovered documents as key evidence in breach of statute by the First Defendant and their advisors and representatives and after the service of the statement of claim. (April 2005) Complained to and placed before the Court and admitted to by the First Defendant.
 - g. Deceptive behavior [sic] in breach of statute by the Second Defendant and their advisors and representatives as collateral to the issues being considered in the matter depriving the Plaintiffs of their rights. (November 2005).
 - h. Deceptive behavior [sic] in breach of Commonwealth Statute by the First and Second Defendant and their advisors and representatives as collateral to the issues being considered in the matter depriving the Plaintiffs of their rights. (September 2006).
 - i. Unintentional deception or misrepresentation by the Plaintiffs' advisors and representatives that caused the Plaintiffs damage as so evidenced and material to the facts discovered upon the issuing of the orders. (June 2005 to February 2009). Herein complained to, or in the alternative;
 - j. A promise to perform made by the Plaintiffs advisors and representatives when there was no intention of performing the promise and as so evidenced and

material to the facts discovered upon the issuing of the orders. (June 2005 to February 2009). Herein complained to, or in the alternative;

- k. Intentional or deceptive behavior [sic] by the Plaintiffs' advisors and representatives depriving the Plaintiffs of full participation and the asserting of their rights and remedy in their statement of claim before the courts as so evidenced and material to the facts discovered upon the issuing of the orders. (May 2008 to February 2009). Herein complained to.
1. Perjured testimony by the First Defendant and Second Defendant and their advisors and representatives. (March 2005-2008) Herein complained to.
4. The Court has proceeded on the misapprehension of facts and the assumption that the Plaintiffs have not and cannot define the confidential information with specificity and novelty as directed to so do by the Court.
5. Arising from paragraph 3 and paragraph 4 the Applicants have been denied due process and a hearing on the issue central in the matter.
6. The Plaintiffs have been denied natural justice.
7. The Plaintiffs will rely on further evidence in the form of public security filings, expert evidence, expert analysis, privileged documents, confidential documents, admissions in other forums and supporting third party affidavits.
8. His Honour erred in law in that His Honour failed to take into account relevant considerations, namely the issues 3,4,5&6, in the granting of leave for the First and Second Defendants to dismiss the Plaintiffs' action."

The applications before this Court

[10] On 6 and 7 May 2009, the respondents to the appeal, who are the defendants in the action, each filed applications for security for costs of the plaintiffs' appeal. Those applications were mentioned before this Court on 14 May 2009. Directions were made whereby the plaintiffs were to serve copies of the documents upon which they intend to rely on the appeal on each of the defendants, together with a statement identifying the basis upon which each of the documents are to be relied upon and against which respondent. The directions also permitted the defendants to file and serve any application for security for costs or to strike out the appeal by 28 May 2009.

[11] On 29 May 2009, the first defendant sought an order that the whole of the notice of appeal be struck out and the second defendant sought an order that parts of the notice of appeal be struck out. The second defendant subsequently expanded its application to strike out to the whole of the notice of appeal. On the hearing before this Court, the plaintiffs did not suggest that they were disadvantaged by the expansion of the second defendant's strike out application and raised no objection to the Court dealing with that application. Each defendant also filed an application by which it seeks security for costs of the appeal pursuant to r 772 of the *Uniform Civil Procedure Rules 1999 (Qld)* ("the UCPR").

- [12] At the hearing before the learned primary judge, the plaintiffs were represented by Senior and Junior Counsel. In this Court, Mr Althaus represents both plaintiffs.
- [13] The plaintiffs' notice of appeal ranges widely over many grievances, but does not defend their pleading from the allegations of deficiency which led to the action being terminated. Nor do the plaintiffs seek to cure those deficiencies. Indeed, the plaintiffs barely address those deficiencies, preferring to emphasise the contention that the deficiencies in the plaintiffs' pleading are the fault of others, principally the lawyers who have previously represented them. But as I have noted, the plaintiffs' statement of claim was struck out because of deficiencies in their pleading which, in an adversarial system, are inevitably the responsibility of the plaintiffs.
- [14] At some points in the argument for the plaintiffs, it was suggested that the defendants have been complicit in the fraud or malpractice of which Mr Althaus accused his former lawyers; but there is no sufficient evidence of any basis for these allegations for this Court to entertain the argument that the judgment below was procured by fraud on the part of either of the defendants.⁷
- [15] The plaintiffs' appeal as presently formulated fails to come to grips in any coherent way with the reasons why their action was dismissed. In the plaintiffs' written submissions, Mr Althaus remarks:
- "Justice must prevail and not be stifled, in spite of those before His Honours having vested interests in, or standing to benefit from this matter, by assisting the Respondents in the theft of private property from John Edmond; Althaus [sic] and by removing the contractual rights of the Appellants for a fraction of their worth by using rules and procedures which are foreign to John Althaus and the Appellants and to due process arising from the laws of the land."
- [16] The arguments advanced for the plaintiffs fail to come to grips with the fundamental point that they must bear responsibility for the formulation and presentation of their case, and that the vice which led to the termination of their action was their longstanding failure, despite many opportunities afforded them, to present a sufficient and coherent pleading of the facts said to entitle the plaintiffs to the relief they seek.
- [17] The plaintiffs also challenge the jurisdiction of this Court to make the orders sought by the respondents. In relation to the application to strike out the plaintiffs' notice of appeal, the plaintiffs assert, inter alia:
- "The Court of Appeal does not have jurisdiction over this matter to strike out the Appellants [sic] orders sought as it is subject to the Commonwealth 1909 Bills of Exchange Act and the Commonwealth Criminal Code as defined in paragraph 8 and must be heard before a jury whose decision may be subject to an appeal.
- The appellants have never consented and do not consent and will not consent to the Court of Appeal having jurisdiction to strike out this order sought by the Respondents."

⁷ *Birch v Birch* [1902] P 130 at 136, 137 – 138; *Jonesco v Beard* [1930] AC 298 at 301; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534 at 538 – 539.

- [18] Two things may be said in respect of this contention. First, it is clear beyond any shadow of doubt that neither the *Bills of Exchange Act 1909* (Cth) nor the *Criminal Code* (Cth) deny this Court's inherent jurisdiction in respect of the proceedings or this Court's power to strike out the plaintiffs' notice of appeal in appropriate circumstances. Secondly, the power of this Court to strike out a notice of appeal as an abuse of process is well settled.⁸ The plaintiffs have submitted to the jurisdiction of this Court, including that inherent jurisdiction, by filing the notice of appeal. The plaintiffs cannot invoke this Court's jurisdiction while at the same time seeking to resist its authority.
- [19] As Mr Doyle SC, who appeared with Ms Anderson on behalf of the second defendant, said, the adoption of these inconsistent positions by the plaintiffs is symptomatic of the vexation which the plaintiffs seek to visit upon the defendants. The Court should put a stop to it.
- [20] The Court is always anxious to ensure that plaintiffs who do not have the benefit of legal representation should have every opportunity to present a viable claim if they have one. The Court is always reluctant to strike out an appeal where the defects may be explicable by the inability of a layman to articulate a reasonable argument. That having been said, however, unrepresented plaintiffs cannot be allowed to abuse the processes of the Court by using them as a vehicle for oppression or as an instrument of vexation.
- [21] The plaintiffs' attempts to justify their position are quite misconceived. I am unable to see how the learned primary judge could responsibly have taken any course other than to give their action its quietus.

Conclusion and orders

- [22] The defendants' applications to strike out the notice of appeal should be allowed.
- [23] The notice of appeal should be struck out. In the circumstances, it is not necessary to make orders disposing of the applications for security for costs.
- [24] The plaintiffs must pay the defendants' costs of their applications and of the notice of appeal to be assessed on the standard basis.
- [25] **WILSON J:** I respectfully agree with the orders proposed by Keane JA and with His Honour's reasons for judgment.

⁸ *von Risefer v Permanent Trustee Company Limited* [2005] 1 Qd R 681 at [11].