# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Australand Corporation (Qld) P/L v Tang & Ors* [2009] QSC 221 |
| PARTIES: | **AUSTRALAND CORPORATION (QLD) P/L** ACN 003 251 803 (applicant/plaintiff)<br>**v**<br>**TANG, Sze Kiat & Ors** (respondents/defendants) |
| FILE NO/S: | BS 8521 of 2003 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 7 August 2009 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 28 April 2009 |
| JUDGE: | McMurdo J |
| ORDER: | **1. In BS 8521 of 2003 it is declared between the applicant and the fifty-first, fifty-eighth, sixtieth, sixty-second, sixty-third, sixty-fifth, sixty-ninth, seventy-third, seventy-seventh and eighty-fifth respondents that the purported avoidance of their contracts with the applicant, as contained in the letter from Slater & Gordon to the applicant dated 8 September 2003, was of no effect.**<br>**2. The applications for summary judgment against the ninth, thirteenth, forty-seventh and eighty-third respondents are adjourned to a date to be fixed.**<br>**3. The counterclaims filed on 21 and 22 August 2008 in BS 8521/03 be permanently stayed.**<br>**4. In each of BS 1597/06, BS 2638/06, BS 2642/06, BS 2842/06, BS 2843/06, BS 2844/06, BS 2846/06, BS 2856/06 and BS 2857/06, it is ordered pursuant to r 24 of the *Uniform Civil Procedure Rules* that the claim be renewed to 21 August 2009.**<br>**5. It will be further ordered that those nine claims be tried together.** |

CATCHWORDS: PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – CROSS-CLAIMS: SET-OFF AND COUNTERCLAIM – COUNTERCLAIM – PRACTICE AND PLEADING – where r 179 *UCPR* requires a counterclaim to be "included in the same document and served within the same time as the defence" – where the defendants did not file a notice of intention to defend in the approved form but instead filed a purported "Defence" expressly admitting that their purported rescission of the contract was of no effect – where the defendants pleaded the counterclaim for damages for negligent misstatement in the same document – where r 371 *UCPR* states that a counterclaim that is not filed with a defence is not a nullity but is instead an irregularity for which the court has power to make certain orders – whether the counterclaims should be allowed to proceed in these circumstances

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – PRACTICE UNDER RULES OF COURT – SERVICE – where the defendants had commenced proceedings in the Federal Court against the plaintiff in 2003 and 2004 – where the defendants did not serve their claims but had instead been granted extensions of time until February 2006 within which to serve their claims – where the proceedings were transferred to the Supreme Court of Queensland pursuant to the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) – where it was agreed in January 2007 between the parties that the applications to extend time for service be adjourned until judgment had been given in the trial of separate proceedings, which were intended to run as test cases – where the plaintiff had, at that time, given an undertaking that it would not rely upon any delay from January 2007 until the hearing of the application – where the only relevant delay is the eleven months between February 2006 and January 2007 – where the plaintiff complains of insufficient particulars in the case pleaded against it – where the case pleaded by the defendants differed in some respects from the case pleaded in the test cases – whether there is "another good reason to renew the claim" pursuant to r 24 *UCPR*

*Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth), s 5(4), s 11(3)

*Limitation of Action Act* 1974 (Qld), s 42

*Uniform Civil Procedure Rules*, r 24, r 56, r 135, r 139, r 144, r 179, r 183, r 371

*Australand Corporation (Qld) Pty Ltd v Johnson & Ors* [2007] QSC 13, cited

*The IMB Group Pty Ltd v ACCC* [2007] 1 Qd R 148,

distinguished

COUNSEL: L F Kelly SC, with D O'Sullivan, for the applicant
D Collins SC, with D Skennar, for the respondents

SOLICITORS: McCullough Robertson for the applicant
Slater & Gordon for the respondents

**The applications**

[1] The applicant in BS 8521 of 2003 ("Australand") applies for summary judgment against ten respondents and for orders that the defences and counterclaims of nine of them be struck out or permanently stayed. Those counterclaims replicate the content of their statements of claim in several proceedings which those nine commenced in the Federal Court and which were transferred to this Court in 2006. Those proceedings ("the Transferred Proceedings") have not been served. Orders are sought here for extensions of time for that service, and for further orders for the conduct of those nine claims against Australand. Before going to the arguments, it is necessary to explain how the litigation has reached this point.

**The litigation to date**

[2] In 1996/1997, Australand built in Surfers Paradise what became known as the Sovereign Hotel. The hotel included 153 apartments, each of which was the subject of a separate freehold title. Australand sold most of them off the plan, and the sales were settled in late 1997.

[3] The individual purchasers took subject to a registered lease granted by Australand to a company which would conduct the hotel business. For the first four years of the term of the lease, owners were guaranteed by Australand a certain rental. Beyond then, the rent was dependent upon the profitability of the hotel. That period commenced near the end of 2001, by which time it was clear that the hotel was not as profitable as had been indicated by the marketing material which had been provided to prospective purchasers.

[4] In September 2003, Slater & Gordon on behalf of the owners of 85 of these apartments purported to rescind the contracts under which their clients had purchased. In almost every case, the stated basis for the rescission was that Australand had offered the apartments for sale in contravention of what had been the "prescribed interest" provisions of the *Corporations Law*, which by then had been replaced by the *Corporations Act* 2001 (Cth).

[5] Australand commenced its proceedings, BS 8521/03, against those 85 purchasers on 25 September 2003. They were commenced by an originating application, but, as ordered by Chesterman J on 17 October 2003, they proceeded by pleadings. A statement of claim was filed on 6 November 2003. From April 2004, the proceedings became effectively confined, until further order, to Australand's claims against five (later six) respondents. That was by an order of Chesterman J on 27 April 2004, when his Honour ordered as follows:

> "1. The applicants file and serve an amended statement of claim … by 30 April 2004;

2. Five respondents file and serve a defence and counterclaim, if any, by 25 June 2004;

3. The balance of the respondents who do not file and serve a defence and counterclaim in accordance with paragraph [2] hereof be excused from doing so until further order."

In October 2004, five defences and counterclaims were filed and a sixth was filed in April 2005.

[6] Subsequently I ordered that the proceedings between Australand and those six purchasers be tried in advance of the other cases. There were issues of law which were common to all 85 claims and to a substantial extent the facts were the same. That trial was heard on various dates between 28 August and 19 September 2006. During the trial, the proceedings between Australand and two of those six respondents were settled. I delivered judgment on 7 February 2007, declaring that the purported avoidance of their contracts by the four remaining respondents was of no effect and I dismissed their counterclaims.[1] In that judgment I referred to the position of purchasers who were not amongst the six who had pleaded and participated in that trial:

"[7] Some owners brought their own proceedings against Australand, claiming not only a contravention of the prescribed interest provisions of the *Corporations Law* but also relief for alleged contraventions of s 52 of the *Trade Practices Act* 1974 (Cth). Some owners also claimed damages against Australand for negligent misstatements as to the likely income from their apartments. Many of the owners' proceedings were commenced in other courts but were transferred to this court under the cross-vesting laws.

[8] I directed that the proceedings between Australand and a small number of owners be tried in advance of the other cases. There are issues of law which are common to all claims by or against owners, and to a substantial extent, the facts are the same. So it was hoped that by a judgment involving a few of the owners, the litigation involving the others might be avoided or at least reduced in its scope.

[9] Within the group whose cases were to be tried first, there were some who claimed under the *Trade Practices Act*. Shortly after the trial commenced, it was conceded that their claims under the *Trade Practices Act* were statute barred and must fail. There were two within this group who also claimed damages for negligence, and the trial continued with evidence being given in relation to those claims, before those claimants, who are Mr Savage and Mr and Mrs Carey, settled all of the claims and cross-claims between them and Australand. That left effectively four owners within this trial …

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1 *Australand Corporation (Qld) Pty Ltd v Johnson & Ors* [2007] QSC 13.

> [11] Within this judgment, these issues are to be determined between Australand and the parties involved in this trial: Mr and Mrs Johnson, Mr and Mrs Delforce, Mr and Mrs Mytton and Mr Pih. I have not tried any part of a case between Australand and any other owner …"

[7] Each side of this litigation had agreed to the course put in place by Chesterman J and continued by me, that the litigation should proceed first against this small number of purchasers effectively as test cases. Australand did not express a concern that the ultimate disposition of other counterclaims would be inevitably delayed.

[8] The Transferred Proceedings were commenced in the Federal Court on various dates between 18 July 2003 and 1 March 2004 against Australand and other parties. The proceedings against those other parties have been discontinued. None of the Transferred Proceedings has been served. The time within which they were required to be served was successively extended by orders made ex parte by Weinberg J, the last of which extended time to 8 February 2006. It is clear that his Honour saw fit to extend then because that was consistent with the management of the litigation in this Court. On 8 February 2006, Weinberg J ordered that they be transferred to this Court pursuant to s 5(4) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth). The claimants in these Transferred Proceedings did not seek directions once the cases came here, as was required by *UCPR* r 56. Nor, at first, did they seek to further extend the time for service. It seems that on their side, it was assumed that they would have a year from the transfer to do so.

[9] On 21 December 2006, these nine claimants, together with another 15 claimants who similarly had brought proceedings in the Federal Court which had been transferred to this Court, filed an application seeking to consolidate their claims within the proceedings brought by Australand, BS 8521/03. That application, as filed, also sought an order to extend the time for service of the Transferred Proceedings. However, it was agreed between those applicants (including the presently relevant nine purchasers) and Australand that the applications be adjourned until I had given judgment in the trial of the test cases, and until the determination of an appeal from that judgment.

[10] On 21 September 2007 the Court of Appeal dismissed an appeal from my judgment. There was no application for special leave to appeal to the High Court.

[11] On 15 February 2008, Australand and the claimants in the Transferred Proceedings sought directions for the disposition of the application filed 21 December 2006. On 18 March 2008, Australand filed an application seeking summary judgment in its proceedings against all respondents save for those against whom judgment had been obtained already or with whom a settlement had been concluded. On 31 March 2008, these nine purchasers filed applications in the Transferred Proceedings seeking orders, effectively as had been sought by their application filed on 21 December 2006.[2]

[12] The applications filed on 18 and 31 March 2008 came before me on 12 May 2008. Summary judgment was entered by consent against many of the respondents to BS 8521/03. They did not include these nine respondents. In their cases, they were directed to serve draft amended statements of claim in the Transferred Proceedings

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[2] The December 2006 applications had been filed in BS 8521/03.

by 10 June 2008. The applications in relation to their cases were adjourned to 20 June 2008. On 11 June 2008 they served draft amended statements of claim. On 20 June 2008 the applications were adjourned by consent to a date to be fixed. Thereafter neither side seems to have been anxious to bring about the disposition of the applications. Ultimately they were set down for hearing on 28 April 2009.

[13] However, without any direction from the court or prior advice to Australand on 21 and 22 August 2008, these nine purchasers filed defences and counterclaims in BS 8521/03.

**Judgment for Australand**

[14] Australand seeks summary judgment against these nine, together with another respondent, Mr Hook. At the hearing, it did not press for a judgment at this stage against four other respondents,[3] because of doubts about whether they had been informed of this hearing. It seeks a declaration to the same effect as that which I made in my judgment in 2007. All respondents are in an identical position in this respect. Moreover, the nine purchasers represented at this hearing have expressly admitted, within their so-called defences filed last August, that their purported avoidance of their contract was of no effect. Although this would indicate that there is no longer an issue between them and Australand in that respect, I am persuaded to grant summary judgment against these nine and Mr Hook. There had been, of course, a substantial controversy between them and Australand, and it should have the protection of a final judgment.

[15] Accordingly, in BS 8521 of 2003 it will be declared between the applicant and the fifty-first, fifty-eighth, sixtieth, sixty-second, sixty-third, sixty-fifth, sixty-ninth, seventy-third, seventy-seventh and eighty-fifth respondents that the purported avoidance of their contracts with the applicant, as contained in the letter from Slater & Gordon to the applicant dated 8 September 2003, was of no effect.

**The purchasers' claims**

[16] The real contest is about whether these nine purchasers should be able to pursue their claims for damages against Australand, either by their counterclaims filed last August or by the Transferred Proceedings. They are claims for damages for negligent misstatements, alleged to have been made to induce them to purchase their apartment. The alleged losses are from the apartment being a poor investment. Had the purchasers' prescribed interests argument been upheld, there would have been little or no loss. In detail, these claims differ in some respects from the counterclaims in the test cases. But broadly speaking they are the type of case which Australand must have apprehended when it agreed that the cases of all but six purchasers be put on hold.

[17] Australand argues that the counterclaims should not have been filed and effectively constitute an abuse of process. And it resists the application to extend the time for service of each of the Transferred Proceedings. Australand says that no counterclaim should have been filed, as these were last August, without the permission of the Court. This is said to be the consequence of the orders made by Chesterman J on 27 April 2004, which I have set out above. However, that was not

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[3] The ninth, thirteenth, forty-seventh and eighty-third respondents.

the effect of the order. His Honour did not restrain the filing of a pleading. What was ordered was that other respondents be excused from doing so.

[18] These other respondents were not a party to my judgment. It was open to them to attempt to resist Australand's claim, although the trial judge in that event would have been bound to find for Australand consistently with the judgment of the Court of Appeal. Recognising that, none of these respondents intended to defend Australand's claim. As already noted, in the pleadings filed by each of them last August, there was an express admission that the purported avoidance of their contract with the applicant was of no effect. That admission constituted the purported "Defence". In the same document was pleaded the counterclaim for damages for negligent misstatement.

[19] The advantage of a counterclaim for three of these respondents[4] was from s 42 of the *Limitation of Action Act* 1974 (Qld), which provides that a claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded. Their contracts were made less than six years from the commencement of Australand's proceedings. Clearly these respondents were concerned that the Transferred Proceedings would not be allowed to go forward and it was thought that they could avoid the consequence of commencing new proceedings as late as 2008 by utilising the procedure of a counterclaim. Rule 179 of the *UCPR* requires a counterclaim to be "included in the same document and served within the same time as the defence". Of course the time prescribed by the rules for a defence had long expired. But that time had been effectively extended by the order of 27 April 2004. But was this counterclaim included in the same document as a defence? Chapter 5 of the *UCPR* is headed "Notice of Intention to Defend". Rule 135 provides that a defendant may take a step in a proceeding only if the defendant has first filed a notice of intention to defend. That notice must be in the approved form and have the defendant's defence attached to it: r 139(1). It need not have a defence attached to it in a case within r 144(1), i.e. where a defendant proposes to challenge the jurisdiction of the court or to assert an irregularity. The prescribed form of notice of intention to defend[5] was not used here. The explanation for that is that none of these respondents had any intention of defending the claim. What was pleaded under the heading "Defence" was an unequivocal admission of the claim. Now r 183 provides that a counterclaim may proceed after judgment is given in the original proceeding. But r 179 clearly provides that a counterclaim should accompany a defence.

[20] Therefore each counterclaim is irregular because it was not filed with a defence. The document which purported to be a defence was no such thing. But the counterclaim is not, on that account, a nullity: r 371(1). It is an irregularity for which the Court has power to make any of the orders set out in r 371(2).

[21] In my view the counterclaims ought not to be allowed to be prosecuted. They were filed in an endeavour to take advantage of s 42, where it was obviously thought that the respondents might not succeed in obtaining the indulgence of an extension of time within which to serve the Transferred Proceedings. If it would not be just to

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4 The sixty-ninth, seventy-third and seventy-seventh respondents.

5 Form 6.

extend the time for that service, then these respondents ought not to have the same outcome from these irregular proceedings.

**The applications to extend time**

[22] I go then to the applications to extend that time. Rule 24 of the *UCPR* provides that a claim remains in force for one year starting on the day it is filed. Section 11(3) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) provides that where a proceeding is transferred, the transferee court shall deal with it as if, subject to any order of the transferee court, the steps that had been taken for the purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court. Each of the arguments accepts then that the Transferred Proceedings should be treated as if they had been commenced in this Court on the dates on which they were commenced in the Federal Court and that they had been renewed on terms corresponding with the orders made in that court. The outcome would appear to be that the proceedings required renewal the day after they were transferred on 8 February 2006. For the respondents it is argued that no extension of time was necessary when they filed their applications for extension in December 2006. That is incorrect.

[23] When agreeing in January 2007 that the applications for extension of time should be adjourned until my judgment or judgment upon any appeal, Australand gave an undertaking that in resisting the application for extension of time, it would not rely upon any delay from 22 January 2007 until the hearing of the application. That agreement and undertaking are significant. Australand cannot be heard to complain of any delay since then. Neither party has been expeditious since the judgment of the Court of Appeal in September 2007. But the present application has to be decided by reference only to the suggested delay up to January 2007. That is one but not the only difference between this and the authorities relied upon by Australand, in particular the decision of the Court of Appeal in *The IMB Group Pty Ltd v ACCC*.[6]

[24] In *IMB Group*, the plaintiff sought to explain its delay in serving its proceedings on the basis that it was awaiting the outcome of related proceedings in the Federal Court. It was held that that was not a good explanation for failing to serve its claim as required by the rules. In the present case, these respondents were awaiting the outcome of the test cases. Some of the six respondents involved in the test cases had counterclaimed for damages for negligent misstatement. Although the oral representations were relied upon, a substantial part of their cases was in reliance upon written material used to market the apartments, which was likely to feature in the counterclaims of other purchasers. There were issues about the existence or otherwise of a reasonable basis for forecasts of returns from the apartments which were within that material. Ultimately, I did not have to decide those questions because the counterclaims of those parties (and Australand's claim against them) was settled during the trial. Before that occurred, I heard expert evidence going to that case. In summary, the outcome of those counterclaims would have been very relevant to a decision by any of these respondents to prosecute his or her own damages claim. Nevertheless, according to what was said in *IMB Group*, that might not have provided a sufficient excuse for not serving these claims.

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6 [2007] 1 Qd R 148.

[25] The significant difference from *IMB* in this respect is that by its orders made without objection by Australand, this court has approved the course of awaiting the outcome of the test cases. Those orders were for pleadings in Australand's proceedings and did not extend to the Transferred Proceedings which were then in the Federal Court. But it would have been quite inconsistent with the agreed course of the litigation in this court for the respondents to have prosecuted the Transferred Proceedings. That course was for the benefit of both sides to the litigation. Australand was right to agree to it because it avoided the expense and delay which would have resulted from its having to prosecute its case against 85 defendants and defending as many as 85 claims for damages. Australand agreed to a course whereby the claims of other purchasers would be delayed. Now Australand complains of the delay, and says that it is fatal to these claims.

[26] In my opinion, by these particular circumstances, it is demonstrated that there is "another good reason to renew the claim" for the purposes of r 24.

[27] Australand says that it would now be prejudiced in meeting these claims. It emphasises the length of the delay in the service of these proceedings. Considered alone, the delay would appear to be substantial. But that must be assessed, of course, in the context of the above circumstances. Australand prepared for the trial of the counterclaims which commenced in 2006. It may be accepted that, all other things being equal, it would be more difficult to defend these nine claims in 2009 than it would have been in 2006. But because of its undertaking Australand cannot be heard to complain of any delay from the beginning of 2007. Moreover, the respondents were given extensions of time by orders of the Federal Court which were, with respect, correctly made. The only period of which Australand could complain is from February 2006 to January 2007. That is the extent of any relevant delay. But it was inconsequential. Australand concedes that it knew of these proceedings well before 2006, although it did not know of their transfer to this court until shortly prior to the trial before me in August 2006. And had the respondents applied for an extension in February 2006, inevitably that would have been granted but the proceedings would have been put on hold.

[28] Australand complains that it is prejudiced by the lack of particulars in the case pleaded against it. In my view the complaint of inadequate particulars is not a strong consideration against a grant of an extension. If parts of the pleading are not properly particularised, that can be met by orders to strike them out absent the provision of further particulars.

[29] It is also said to be prejudiced by the cases pleaded in the draft statements of claim served in June 2008 differing from the cases pleaded for the trial conducted by me, on issues such as the identity of individuals who are said to be relevant to the making of representations and what was represented. But to the extent that those differences might be significant, that is a consequence of the course to which Australand agreed. It must have appreciated that by purchasers being excused from filing a counterclaim, there was a risk that their consequent delay might be detrimental to its prospects of meeting those claims when the detail of them was pleaded. In some respects, these claims raise new allegations of representations from those which Australand had prepared to litigate in 2006. But overall the outcome is more likely to depend upon what was alleged in writing and findings about the basis for representations which were thereby made, or said to have been made by Australand or on its behalf.

[30] The considerations here are not all one way. But in my conclusion, in the circumstances where the respondents acted consistently with the agreed and court-directed program for the disposition of these disputes, it would be unjust now to preclude the respondents from prosecuting their claims.

**Orders**

[31] Accordingly, there will be orders in each of the Transferred Proceedings extending the time for service of that proceeding to a date which is 14 days from this judgment. The respondents sought also to have the Transferred Proceedings stand as counterclaims in BS 8521/03 and for the application for summary judgment to be adjourned until those proceedings were consolidated within that action. But counsel for the respondents agreed that the same outcome can practically be achieved by simply renewing the Transferred Proceedings and enabling them to go forward as they are presently constituted. That would permit BS 8521/03 to be finally determined. As I have said, Australand will have summary judgment. It will be further ordered that the counterclaims filed on 21 and 22 August 2008 in BS 8521/03 be permanently stayed. The Transferred Proceedings will not be consolidated but it will be ordered that they be tried together. I will hear the parties as to costs.