

SUPREME COURT OF QUEENSLAND

CITATION: *Toms & Ors v Fuller* [2009] QSC 415

PARTIES: **STEPHEN NORMAN TOMS**
(first respondent/plaintiff)
PHILLIP TOYNE
(second respondent/plaintiff)
CHARLES ERNEST BRIGHT
(third respondent/plaintiff)
BRETT HEADING
(fourth respondent/plaintiff)
v
DONALD FULLER
(applicant/defendant)

FILE NO: BS 3234 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 December 2009

DELIVERED AT: Brisbane

HEARING DATE: 25 September 2009

JUDGE: P Lyons J

ORDERS: **1. The defendant is refused leave to file the Further Amended Defence and Counterclaim.**
2. The plaintiffs are granted leave to discontinue their claim.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – GENERALLY – where the applicant seeks leave to read and file a further amended defence and counterclaim – where it was previously ordered by a Justice of the Supreme Court that the applicant could not file any subsequent pleadings without the leave of the Court – whether the applicant should be granted leave

Corporations Act 2001 (Cth), s 181, s 184, s 295A.
Uniform Civil Procedure Rules 1999 (Qld), r 149.

COUNSEL: The applicant appeared in person
K Barlow for the respondents

SOLICITORS: The applicant appeared in person
Mallesons Stephens Jacques for the respondents

- [1] **P LYONS J:** As a result of an order made on 24 July 2009, Mr Fuller is unable to file a pleading in this matter, unless he obtains the leave of the Court. He now seeks leave to file a document described as a Further Amended Defence and Counterclaim (*FADC*).

Background

- [2] Mr Fuller alleges that in 2008 he was leading negotiations on “a multi-billion-dollar buy-in-or-buy-out deal” relating to Australian Agricultural Company Limited (*AA Co*). The *FADC* suggests that, at various relevant times, Mr Fuller had access to the following documents:-
- (a) The Annual Report of *AA Co* for the year ending 30 June 2007 (including financial statements) (*the 2007 Report*);
 - (b) A “results presentation” by *AA Co* for the year ending 31 December 2007 (*the 2007 Results Presentation*);
 - (c) A document described as the “*AA Co* ASX/Media Release” of 31 December 2007 (*the December 2007 Media Release*);
 - (d) The final and audited financial report for *AA Co* for the year ending 30 June 2008, published on 10 February 2009 (*the 2008 Report*);
 - (e) A document described as “Additional Information Arising From 2008 Results Presentation Q&A,” dated 26 March 2009 (*the 2009 Additional Information*).
- [3] Between February and March 2009, Mr Fuller wrote a series of letters to various entities including the Australian Securities and Investment Commission (*ASIC*), and a number of companies involved in the pastoral industry, in relation to *AA Co*. At the time when the letters were sent, the plaintiffs held various offices with *AA Co*. It would seem that in the letters, Mr Fuller was critical of the contents of a number of these documents, and of the plaintiffs. On 27 March 2009, they commenced an action claiming damages for defamation based on these letters. A statement of claim was served on Mr Fuller. A document entitled “Initial Response to the Claim” was filed by Mr Fuller on 30 March 2009. A further document entitled “Conditional Notice of Intention to Defend and challenges to jurisdiction of court location and counterclaim” was filed on 15 April 2009. On 5 May 2009, Mr Fuller filed a further document entitled “Amended Conditional Notice of Intention to Defend and Changes to Jurisdiction of Court Location and Counterclaim”. By order dated 11 May 2009, all three of these documents were struck out. Mr Fuller was allowed 42 days in which to file an amended defence, or an amended defence and counterclaim.
- [4] On 30 June 2009, Mr Fuller filed an amended defence and counterclaim. This was struck out by order dated 24 July 2009. Further orders gave Mr Fuller until 24 September 2009 in which to file a further amended defence, or a further amended defence and counterclaim. However, he was required to obtain the leave of the Court before filing such a document. He now applies for leave to do so.
- [5] In the meantime, on 4 September 2009, the plaintiffs filed a notice of discontinuance of their claim. A question arose whether that action was effective without leave, and at a hearing on 21 September 2009, I held that it was not. The

plaintiffs then sought leave to discontinue their claim, that application being adjourned to be heard with Mr Fuller's application on 25 September 2009.

- [6] Notwithstanding the plaintiffs' intentions, Mr Fuller seeks leave to file the *FADC*.

Relevant pleading rules

- [7] The following rules of pleading are relevant to Mr Fuller's application:-
- (a) A pleading must be as brief as the nature of the case permits;¹
 - (b) A pleading must contain a statement of the material facts on which the party relies, but not the evidence by which the facts are to be proved.²
- [8] It follows from the requirement that pleadings be limited, with certain exceptions not relevant for present purposes, to material facts, that a pleading is not the place to set out a party's arguments. Nor, as the rules expressly state, is it the place to set out the evidence which proves the material facts.
- [9] The function of a pleading is to state, with sufficient clarity, the case that a party must meet.³ Pleadings serve a basic requirement of procedural fairness in litigation, by ensuring a party has the opportunity of meeting the case made against that party; and they also serve the important purpose of defining issues for decision.⁴ While procedural fairness is a matter of great importance in litigation, the definition of the issues for decision is also important, as it identifies the matters which the Court must deal with in its decision.
- [10] A person who wishes to draw a pleading claiming relief against other parties will therefore need to have a good understanding of each cause of action which that person wishes to rely on. The person will also need to be able to identify the material facts which are required to be established for each cause of action, and state them with clarity and succinctness in the pleading.

Should leave be granted?

- [11] By way of overview, it may be noted that the *FADC* is some 88 pages in length. It consists of 184 paragraphs, many of which include numerous sub-paragraphs.
- [12] The first 76 pages appear to constitute the defence. There then follows four pages which appear to be intended to identify the relief sought by Mr Fuller by way of counterclaim. Much of this is taken up with stating "findings" which Mr Fuller seeks. He also seeks an order that the "matter" be referred to ASIC, pursuant to the *Corporations Act 2001* (Cth); and damages for defamation and fraudulent misrepresentation; as well as interests and costs. The balance of the document appears to be intended to provide the basis for the counterclaim.

¹ Rule 149(1)(a) *Uniform Civil Procedure Rules 1999* (UCPR).

² See r 149(1)(b).

³ *Banque Commerciale S.A., en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279, 286, citing *Gould v Mount Oxide Mines Ltd.* (in liq) (1916) 22 CLR 490, 517.

⁴ *Banque Commerciale* at 286.

- [13] There is an obvious difficulty in granting leave to file a document which includes a defence to a statement of claim, when the plaintiffs seek leave to discontinue the claim. However, the difficulties with the *FADC* are considerably greater.
- [14] After the *FADC* sets out the “relief” which Mr Fuller seeks, it continues with some 68 paragraphs. The first paragraph incorporates all of the allegations in the defence. It does so without any attempt to limit the incorporation to identified matters, which may arguably be relevant to any relief sought. For that reason alone, it is embarrassing. It deals with matters which may possibly be relevant to pleadings in the plaintiffs’ action, but which are plainly not material facts for any action by Mr Fuller.
- [15] Beyond that, the *FADC* is a mixture of narrative, often flamboyantly expressed, argumentative material, and evidence. It represents a departure from the rules of pleading on an extensive scale. Even if one’s attention were confined to the counterclaim, this conclusion is not substantially altered.⁵
- [16] Mr Barlow of Counsel who appeared for the plaintiffs made a number of specific criticisms of the *FADC*. One was that Mr Fuller could not claim relief under s 181 and s 184 of the *Corporations Act*, such relief being available to *AA Co* but not to Mr Fuller, who was not a shareholder of the company. He also submits that a breach of s 295A of the *Corporations Act* does not give Mr Fuller a cause of action. He submits that the allegations in support of the cause of action for fraudulent misrepresentation are defective, in that they do not specifically plead the involvement of each defendant in the events on which Mr Fuller relies. He also submits that virtually no facts are pleaded in support of the defamation claim; and no basis is pleaded for the damages claimed.
- [17] It is not necessary to rule on these submissions. If Mr Fuller were to choose to obtain competent legal representation, it is possible that a good answer to at least one or more of them might be found; and accordingly, it is undesirable that I rule on them now.

Plaintiffs’ application

- [18] It was convenient not to dispose of the plaintiffs’ application for leave to discontinue their claim, until a decision had been made whether Mr Fuller should be granted the leave which he sought. No other reason has been shown to refuse that application of the plaintiffs. Mr Fuller having been refused leave to file the *FADC*, there is no reason to refuse the plaintiffs’ application. I propose to grant it.

Conclusion

- [19] I propose to refuse to grant Mr Fuller leave to file the *FADC*, and to give the plaintiffs leave to discontinue their claim. The plaintiffs have submitted that they should be awarded costs on an indemnity basis, but I shall give Mr Fuller a further opportunity to make submissions on that matter. I shall hear further submissions as to any other order that may be appropriate.

⁵ See for example paragraphs 128-132; 136-153 and 155-170.