SUPREME COURT OF QUEENSLAND

CITATION:	*Park & McIntosh v Lanray Industries Pty Ltd & Ors* [2010] QCA 257
PARTIES:	**JOHN RICHARD PARK AND LACHLAN STUART MCINTOSH** (plaintiffs/respondents) **v** **LANRAY INDUSTRIES PTY LTD** ACN 010 737 943 (first defendant/first appellant) **SUNSHINE IMPORTS PTY LTD** ACN 009 937 722 (second defendant/second appellant) **ROUGHEND PINEAPPLE PTY LTD** ACN 074 982 559 (third defendant/third appellant) **SUNSHINE LAND NOMINEES PTY LTD** ACN 010 050 567 (fourth defendant/fourth appellant) **THE KING OF NUTS PTY LTD** ACN 085 903 895 (fifth defendant/fifth appellant) **ROOFHILL PTY LTD** ACN 078 777 867 (sixth defendant/sixth appellant) **SUNFARM PTY LTD** ACN 091 286 967 (seventh defendant/seventh appellant)
FILE NO/S:	Appeal No 3613 of 2010 SC No 5675 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	15 September 2010
JUDGES:	Holmes, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. ACN 009 826 528 Pty Ltd be included as second plaintiff in these proceedings;**

2. The respondents have leave to amend the claim and amended statement of claim in accordance with these reasons.

CATCHWORDS: LIMITATION OF ACTIONS – GENERAL MATTERS – AMENDMENT OF ORIGINATING PROCESSES AND PLEADINGS OUTSIDE LIMITATION PERIOD – AMENDMENTS INTRODUCING NEW PARTY OR CORRECTING ERROR IN NAME OF PARTY – where respondents liquidators of a company – where respondents filed a claim and statement of claim (subsequently amended) alleging that payments made by the company to the appellants were voidable transactions – where, in the alternative, the respondents sought restitution for unjust enrichment in respect of the payments – where respondents were named as plaintiffs without reference to their capacity as liquidators of the company – where the company was not named as a plaintiff – where respondents, acting in their capacity as liquidators, were the appropriate plaintiffs in relation to the voidable transactions claim – where the company was the appropriate plaintiff in relation to the unjust enrichment claim – where appellants made a strike-out application on the basis that the respondents had no standing to bring the voidable transactions and unjust enrichment claims – where respondents sought to file an amended claim and further amended statement of claim which properly reflected the capacities in which the claims were brought – where voidable transactions and unjust enrichment claims out of time – where respondents given leave to amend – whether learned primary judge right in giving leave to amend the claim and amended statement of claim to name the plaintiffs in their capacity as liquidators of the company – whether learned primary judge gave leave in terms which extended to naming the company as a plaintiff

Corporations Act 2001 (Cth), s 459G, s 477(2)(a), s 588FE, s 588FF(3)
Judiciary Act 1903 (Cth), s 79
Supreme Court of Queensland Act 1991 (Qld), s 81
Uniform Civil Procedure Rules 1999 (Qld), r 18, r 69, r 375(3), r 766(1)(a)

Greig v Stramit Corporation Pty Ltd [2004] 2 Qd R 17; [2003] QCA 298, considered
Macks v Tucker (2006) 202 FLR 427; [2006] SASC 272, distinguished
Re Jackaroo Agencies Pty Ltd [2006] 1 Qd R 332, [2005] QSC 333; distinguished

COUNSEL: D Rangiah SC for the appellants
P Dunning SC for the respondents

SOLICITORS: Piper Alderman for the appellants
Sajen Legal for the respondents

[1] **HOLMES JA:** The respondents, Mr Park and Mr McIntosh, are the liquidators of a company, ACN 009 826 528 Pty Ltd ("the company"), which was formerly Sunshine Plantation Pty Ltd. They had filed a claim and statement of claim (subsequently amended) against the appellants alleging, inter alia, that certain payments made to them by the company were "voidable transactions" within s 588FE of the *Corporations Act* 2001 (Cth) and seeking consequential orders pursuant to s 588FF(1) of that Act, or alternatively, restitution for unjust enrichment in respect of the payments. The respondents were named as plaintiffs in the title of the claim and amended statement of claim, without reference to their capacity as liquidators, and the company was not a party.

[2] The appellants sought at first instance to strike out the claim and amended statement of claim on the basis that the respondents had no standing to bring the claim for unjust enrichment, the company being the proper plaintiff, while in relation to the s 588FF claim, the respondents had sued in their personal capacities, whereas their right to apply for relief under that section arose from their position as liquidators of the company. This appeal turns on whether the learned primary judge was right to refuse the strike-out application and to permit the respondents to amend the claim and amended statement of claim to name them as plaintiffs in their capacity as liquidators of the company; and whether she gave leave to amend in terms which extended to naming the company as plaintiff.

The claim and amended statement of claim

[3] Rule 18 of the *Uniform Civil Procedure Rules* 1999 (Qld) requires that a plaintiff suing in a representative capacity state that representative capacity on the originating process. The respondents are named as plaintiffs in the title of the claim, without elaboration as to capacity. However, the claim seeks, as well as judgment under s 588FF, orders that the payments and transactions are "void against the liquidators". The amended statement of claim exhibits some confusion. In its first paragraph, it is pleaded that the respondents are "entitled to be appointed … liquidators of the Company" (not that they *are* the liquidators of the company) and that they are,

> "entitled to commence these proceedings on behalf of the Company pursuant to sections 477 and 588FF of the Act."

Section 477(2)(a) of the *Corporations Act* permits a liquidator to,

> "bring ... any legal proceeding in the name and on behalf of the company."

Clearly, this proceeding was not brought in the company's name. However, a later paragraph of the amended statement of claim pleads the respondents' appointment as the company's liquidators.

The hearing at first instance

[4] On the hearing of the application, the respondents provided a proposed amended claim and further amended statement of claim in the titles of which they were named as plaintiffs "as the official liquidators of ACN 009 826 528 Pty Ltd (in liquidation)". The learned primary judge held that so far as the unjust enrichment claim was concerned, the amendment was sufficient to rectify the defect in the pleadings:

> "The Company is the entity which sustained any loss whereby the defendants have been enriched. As the pleadings stood before the recent amendment, the liquidators as individuals were incompetent to sue to recover this alleged loss. Section 477(2) entitles the liquidator of a company to bring legal proceedings in the name of and on behalf of a company. The amendment rectifies the defect."[1] (footnotes omitted)

[5] The position in relation to the proceedings brought under s 588FF was more complex. Section 588FF, so far as is relevant here, is in these terms:

> "**588FF Courts may make orders about voidable transactions**
>
> (1) Where, on the application of a company's liquidator, a court is satisfied that a transaction of the company is voidable because of section 588FE, the court may make one or more of the following orders:
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> [The orders which the court may make are then set out]
> ...
>
> (3) An application under subsection (1) may only be made:
> (a) during the period beginning on the relation-back day and ending:
> (i) 3 years after the relation-back day; or
> (ii) 12 months after the first appointment of a liquidator in relation to the winding up of the company;
> whichever is the later; or
> (b) within such longer period as the Court orders on an application under this paragraph made by the liquidator during the paragraph (a) period … ."

[6] The limitation period provided in s 588FF(3) for the bringing of an application had expired, and the appellants argued that no discretion existed outside that period to allow an amendment changing the capacity in which the respondents sued. The learned judge ruled that the provisions of the *Uniform Civil Procedure Rules* applied, for reasons she had explored in an earlier decision, *Re Jackaroo Agencies Pty Ltd*.[2] In relation to the failure to identify correctly the capacity in which the liquidators sued, her Honour observed:

> "The error is that of the pleader. There is apparent confusion about proceedings brought by a liquidator as the alter ego of a company and proceedings only reposing in a liquidator as liquidator. They are different capacities and the error is closest to the wrong party provisions in r 69 of the *UCPR*." [3]

(Rule 69 enables the court to order the inclusion of a party after the end of a limitation period where certain circumstances are met.)

Her Honour closed this part of her judgment by saying:

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1 *John Richard Park & Anor v Lanray Industries Pty Ltd & Ors* [2010] QSC 82 at [9].
2 [2006] 1 Qd R 332.
3 At [15].

> "I have concluded that the [respondents] may make the necessary amendments to the claim and statement of claim to reflect the several capacities in which they sue the defendants. The defendants have laboured under no misunderstanding about the liquidators' capacities."[4]

At the end of her judgment the learned primary judge observed:

> "There are other problems with the identification of the relevant provisions of the *Corporations Act* in the prayer for relief. Mr Dunning concedes that the pleading needs some work and will, no doubt, take the opportunity to make some further 'tidying up' amendments. The appropriate course is to give leave generally to file a further amended statement of claim consistent with these reasons and such other cosmetic amendments as the [respondents] are advised to make."[5]

The unjust enrichment claim

[7] The respondents here accepted that the proper plaintiff in the unjust enrichment claim was the company and that the failure to proceed in its name was not remedied by the proposed amendment which identified the respondents as suing in their capacity as liquidators. However, they argued, the passages from her Honour's judgment set out above indicated that she was granting leave to amend the claim so as to permit substitution of the company as the plaintiff for the unjust enrichment claim. The respondents sought leave to file an affidavit exhibiting a further amended statement of claim which had been amended in accordance with that view. If they were wrong as to the extent of the leave to amend granted, the respondents pointed to r 766(1)(a) of the *Uniform Civil Procedure Rules*, which confers on this Court all the powers of the court at first instance, and urged us to make an order for the joinder of the company as plaintiff.

[8] The appellants, however, pointed out that the respondent's primary submission at first instance was that the claim for unjust enrichment was one which a liquidator could bring for the benefit of the company. The learned judge in her judgment accepted that submission: she made it clear that she regarded the proposed amendment to the respondents' pleadings naming them in their capacity as liquidators as sufficient to correct the defect. Her Honour's reference to the respondents suing in "several capacities" supported the view that, misapprehending the effect of s 477(2)(a), she regarded the respondents as able to bring the claim as liquidators. That view was erroneous.

[9] The appellants' contentions as to the learned judge's approach must, in my view, be accepted. Her Honour clearly regarded the amendment in the proposed amended claim and further amended statement of claim, in which the respondents were identified as liquidators, as sufficient to overcome the difficulty that the company was not named as plaintiff. That view seems to have been based on a misapprehension of the respondents' entitlement under s 477(2)(a) to bring legal proceedings "in the name of and on behalf of [the] company". As the respondents now accept, the claim had to be brought in the company's name.

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4 At [16].

5 At [19].

Section 477 permitted the respondents to do so; but that was not what they did in the proposed amended claim and statement of claim. The learned judge erred in considering that the proposed amendment was sufficient to make the unjust enrichment claim. The question is whether this Court should now exercise its powers to permit the joinder of the company.

[10] At first instance, the respondents did make, in oral submissions, something which could be characterised as an application to join the company as a plaintiff:

> "[I]f your Honour took the view that it ought to have been in the name of a company rather than the liquidator, then it's really in the category of re Jackeroo [sic] Agencies. There's no doubt as to the nature of the claim being made; it's just the – it's just the misnomer----
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> ...
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> And if your Honour were to take the view that the matter might be arguable either way, then in our respectful submission the proper course would be to permit both to be parties so that there would be no risk of falling between two stools."

[11] Counsel for the appellants, in his reply, accurately described this to the learned judge as "half an application". It should, he said, be made formally, with an explanation as to why the company was not joined originally and giving the appellants the opportunity to make submissions as to why the discretion ought to be exercised against the respondents, including any point to be taken about delay. Here the appellants again opposed the making of any order. They did not contend that r 69(1)(b) did not apply, by implication accepting that the company's presence "is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding" and that the proceeding was started in the name of the wrong person as a party. But, they submitted, it was to be borne in mind that the limitation period for the unjust enrichment claim had expired and the delay in seeking such an order was significant. They conceded, however, that they could not point to any specific prejudice.

[12] On balance, I conclude that the Court ought to make the order sought by the respondent, pursuant to its powers under r 69(1)(b). The mistake was, plainly, the product of simple error; and the delay in correcting it similarly the result of continued error. The appellants have not been under any misapprehension as to the nature of the unjust enrichment claim against them and, indeed, they very properly concede that they can identify no particular prejudice to them should the order be made. In those circumstances, I would order that the company be included in the proceeding as a plaintiff. The respondents should have leave to make the amendments consequent on that inclusion, as proposed in the amended claim and further amended statement of claim exhibited to the affidavit of Ms Markula.

The s 588FF claim

[13] Neither party challenged the correctness of this Court's conclusion in *Greig v Stramit Corporation Pty Ltd*[6] that:

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[6] [2004] 2 Qd R 17.

> "… the time prescriptions in s. 588FF(3) constitute an insurmountable boundary which cannot be overcome by recourse to a general power such as conferred on the Court by s. 81."[7]

(Section 81 of the *Supreme Court of Queensland Act* 1991 (Qld) permits the court to grant leave to amend even though it will add a new party.) The majority in *Stramit* distinguished between (a permissible) amendment to an existing proceeding commenced within time under that section, and what was effectively the commencement of a fresh proceeding against an added defendant after the expiration of the relevant time limitation.[8] The difference between the parties here was that the appellants contended that the "time prescriptions" in s 588FF(2) operated so as to preclude amendment to name the respondents in their capacity as liquidators, while the respondents asserted that all that was involved was the correction of a misnomer.

[14] The learned judge at first instance referred to *Stramit*, but relied on her reasoning in an earlier decision, *Re Jackaroo Agencies Pty Ltd*. In that case, her Honour had considered the application of s 81 of the *Supreme Court of Queensland Act* and r 69 of the *Uniform Civil Procedure Rules* to amendment of an application to set aside a statutory demand made under s 459G of the *Corporations Act*. Section 79 of the *Judiciary Act* 1903 (Cth) applies State laws relating to procedure to courts exercising Federal jurisdiction "except as otherwise provided". The learned judge concluded that neither the *Corporations Act* nor the rules made under it "otherwise provided" for amendment; nor did s 459G "otherwise provide" so as to exclude the application of s 81 and the *Uniform Civil Procedure Rules*. Her Honour applied that reasoning in the present case to conclude that the respondents were entitled to amend the claim and statement of claim to reflect the real capacity in which they sued the appellants.

[15] The appellants relied here on the decision of Bleby J in *Macks v Tucker*,[9] in which his Honour distinguished between the capacity in which the plaintiff in that case sued, as trustee of a bankrupt estate, and his personal capacity, in which he was sued by way of counter-claim. The relevant rules required that a counter-claim be instituted against the same plaintiff who had brought the action; they did not, Bleby J considered, authorise the counter-claim to be brought against the same person in an entirely different capacity. I do not think that case is really relevant here, where there was only one capacity in which the appellants could bring the application.

[16] With respect, I would come to the same conclusion as the learned primary judge as to the propriety of giving leave to amend, but by a different route. The question which must be asked here, as it seems to me, is whether the claim which originally named the respondents only in person was, in truth, an application under s 588FF, that is to say, "the application of a company's liquidator". In my view, it was. The respondents were, in fact, the company's liquidators and they pleaded that fact. Their breach of r 18 by failing to state their representative capacity did not affect their entitlement to bring the application. Nor did their mistake in the amended statement of claim as to the source of their entitlement mean they were any the less competent to make their application under s 588FF(1).

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7 Per Williams and Jerrard JJA at 38, 46.

8 At 37.

9 (2006) 202 FLR 427.

[17] What the respondents sought, then, was an amendment to an existing application. The addition in the proposed amended pleading of their correct description as liquidators did not introduce any new party, nor did it commence a fresh application. This was, in my view, purely a case of misnomer, properly corrected under r 375(3). Section 588FF(3) had no application.

Orders

[18] I would order:

1. that ACN 009 826 528 Pty Ltd be included as second plaintiff in these proceedings;
2. that the respondents have leave to amend the claim and amended statement of claim in accordance with these reasons.

In view of the appellants' mixed success, I would make no order as to costs.

[19] **FRASER JA:** I agree with the reasons of Holmes JA and the orders proposed by her Honour.

[20] **CHESTERMAN JA:** I agree with the orders proposed by Holmes JA and with her Honour's reasons.