SUPREME COURT OF QUEENSLAND

CITATION:	*Cyonara Snowfox Pty Ltd v Global Management Corporation Pty Ltd* [2010] QCA 292
PARTIES:	**CYONARA SNOWFOX PTY LTD** (plaintiff/respondent) **v** **GLOBAL MANAGEMENT CORPORATION PTY LTD** (defendant/appellant)
FILE NO/S:	Appeal No 3717 of 2010 SC No 2904 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 2010
JUDGES:	McMurdo P, Holmes JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. The appeal is dismissed** **2. The appellant must pay the respondent's costs of the appeal to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – GENERAL PRINCIPLES – FUNCTIONS OF APPELLATE COURT – SUBSTANTIVE RIGHT OR MATTERS OF PROCEDURE – MATTERS OF PROCEDURE – INTERLOCUTORY ORDERS – where respondent commenced the proceeding against appellant in 2003 – where the respondent applied six years later for leave to file and serve the fourth amended claim and eighth amended statement of claim – where the primary judge gave the leave in relation to one claim only arising out of a written partnership agreement between the parties that had been raised previously in earlier versions of the statement of claim – where appellant appeals against the decision of the primary judge on the basis that the primary judge failed to take into account specific matters relating to the viability of the claim or failed to take into account or properly consider relevant discretionary considerations in

exercising the discretion to grant leave to the respondent – whether the primary judge failed to consider relevant matters – whether primary judge's discretion miscarried

Uniform Civil Procedure Rules 1999 (Qld), r 5

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27, considered

COUNSEL: R A Perry SC, and A L Wheatley, for the appellant
P D Tucker for the respondent

SOLICITORS: Minter Ellison for the appellant
Morgan Conley Solicitors for the respondent

[1] **McMURDO P:** I agree with Mullins J's reasons for dismissing this appeal with costs. I agree with the orders proposed by Mullins J.

[2] **HOLMES JA:** I agree with the reasons of Mullins J and with the orders she proposes.

[3] **MULLINS J**: This proceeding was commenced by the respondent, then known as Zonebar Pty Ltd, against the appellant on 1 April 2003. The claim and statement of claim have been amended numerous times. After many interlocutory applications, the parties on 17 June 2009 agreed to orders by consent that had the effect of dismissing all claims by the respondent against the appellant, except for those remaining in paragraphs 1 and 4 of the third amended claim (misdescribed in the document itself as the second amended claim) filed on 26 November 2008.

[4] Paragraphs 1 and 4 of the third amended claim claimed:

> "1. $1,817,798 as debts pursuant to specific indemnities in the Indemnity Contract and the Partnership Agreement plus interest of $1,392,476 as claimed in paragraphs 60-66 and Annexure H of the Sixth Amended Statement of Claim:
> …
> 4. And further to paragraph 2 herein, damages of $144,922.18 plus interest of $106,343 arising from an overpayment to Abigroup for the Lot 7 Works as claimed in paragraphs 77-84 of the Sixth Amended Statement of Claim;"

[5] The facts pleaded in paragraphs 60 to 66 and 77 to 84 of the seventh amended statement of claim (misdescribed in the document itself and the third amended claim as the sixth amended statement of claim) filed on 29 January 2008 concerned a development described as "Lot 7 Works" within the Springwood Central Project. In general terms, the respondent, as the owner and developer of land at Springwood, subdivided and used it for the construction of retail warehouses. The appellant was engaged by the respondent to provide project management services in connection with the development and construction of the project. Lot 7 was one parcel of land within the project on which a retail warehouse was constructed in 2001.

[6] By 17 June 2009 the respondent had made an oral application for leave to amend the third amended claim and seventh amended statement of claim and one of the consent orders made on 17 June 2009 provided for the adjournment of that

application for hearing on 10 August 2009. The appellant's application to dismiss the proceeding for want of prosecution was also adjourned, by consent, for hearing on 10 August 2009. On that date the respondent applied for leave to file a fourth amended claim and an eighth amended statement of claim.

[7] There were two causes of action pleaded in the proposed eighth amended statement of claim. The first claim alleged a partnership between the respondent and the appellant in respect of the development of the Springwood Central Project (the Springwood Central Project Partnership) and the second claim was based on a written partnership agreement between the respondent and the appellant dated 10 November 2000 in respect of the development of Lot 7. The learned primary judge reserved his decision after the hearing on 10 August 2009. While the decision was reserved, the respondent sought to adduce further evidence in the form of the affidavit of Mr Smits, who is the sole director of the respondent, that was sworn on 11 August 2009. That application was heard on 23 October 2009.

[8] The primary judge published written reasons disposing of the applications: *Zonebar Pty Ltd v Global Management Corporation Pty Ltd & Anor* [2010] QSC 67 (the reasons). The primary judge refused to give leave for the amendment of the pleading to make the claim based on the alleged Springwood Central Project Partnership. The primary judge did allow the claim based on the Lot 7 partnership to proceed and gave leave to file the fourth amended claim, excluding paragraph 1 of the relief claimed, and the eighth amended statement of claim, but excluding paragraphs 3 to 7 and paragraph 1 of the prayer for relief. The exclusions from the leave related to the claim in respect of the Springwood Central Project Partnership. The substantive claim for relief in paragraph 2 of the fourth amended claim that the respondent was permitted to prosecute seeks:

> "The sum of $1,890,656 as monies due and owing by the defendant to the plaintiff;"

[9] This claim relies on the terms of the written partnership agreement dated 10 November 2000 (and particularly clause 4.4) pursuant to which the respondent alleges the appellant agreed to indemnify it against any overrun in costs, claims, liabilities and obligations in relation to the Lot 7 works above the sum of $800,000. It is on the basis of that indemnity that the respondent claims the sum of $1,890,656 as monies due and owing by the appellant to the respondent.

[10] The appellant appeals against the leave given by the primary judge in respect of the fourth amended claim and the eighth amended statement of claim on the ground that the primary judge's exercise of discretion miscarried by failing to take into account or give sufficient weight to a number of matters including:

(a) the claim was based on an action in debt;
(b) the claim was inconsistent with a facsimile from the respondent to the appellant dated 13 November 2000 (the 13 November facsimile);
(c) the requirements of r 5 of the *Uniform Civil Procedure Rules* 1999 (*UCPR*);
(d) the respondent's delay generally in the proceeding and in properly formulating its pleadings;
(e) the complete absence of any explanations for the delay in applying for the amendment, the 13 November facsimile, and the changes in the respondent's pleaded case; and
(f) case flow management considerations.

Hearing before the primary judge

[11] In order to deal with the arguments that were advanced in support of the appeal, it is necessary to summarise the course of the hearing of the applications before the primary judge on 10 August and 23 October 2009. The primary judge had dealt with the proceeding on many occasions previously as the matter was on the court's supervised case list under the oversight of the primary judge. The procedural history of the matter which was incorporated by reference in the reasons was set out by the primary judge in his earlier decision of *Zonebar Pty Ltd v Global Management Corporation Pty Ltd & Anor* [2008] QSC 263 (the 2008 reasons).

[12] Prior to the hearing on 10 August 2009, the respondent's counsel provided the primary judge with a brief one page outline. The appellant's counsel had prepared an outline containing 34 pages and a list of authorities which included 47 cases. At the commencement of the hearing the respondent's counsel filed a three page outline in reply.

[13] One of the affidavits relied on by the appellant was the affidavit of Mr Jakeman who was a director of the appellant that had been filed on 6 September 2007 to oppose the respondent's application for summary judgment. Mr Jakeman deposed to the circumstances in which he said the partnership agreement dated 10 November 2000 was signed. He could not recall the exact date it was signed, but said it was after receiving the 13 November facsimile that was sent by Mr Smits to Mr Jakeman and stated:

> "Zonebar does not require indemnity from Global under clause 4.4 of the Partnership Agreement.
> Please execute and send the execution pages of the Building Contract and the Partnership Agreement."

[14] The respondent's summary judgment application was dismissed on 20 September 2007.

[15] The appellant recited the history of these earlier applications in its outline before the primary judge in support of its contention that the respondent had not offered any explanation for seeking leave for either the completely new claim or the substantially reformulated claim. Paragraph 37 of the outline referred to the argument that was put by the appellant in the course of resisting the summary judgment application in reliance on the 13 November facsimile:

> "As was noted at the time, no explanation for this document, being the [respondent's] own document, was provided by the [respondent] (*sic*) this document constitutes, absent full and proper explanation, sufficient reason to refuse leave."

[16] Despite the appellant's reliance on that argument in September 2007, the parties gave mutual undertakings to the court and consent orders were made that included leave to the respondent to file and serve a fifth amended statement of claim. A description of what occurred on 20 September 2007 is set out in paragraph [4] of the 2008 reasons.

[17] The nub of the written submissions made by the appellant to the primary judge on 10 August 2009 on the relevance of the discretionary factors to the grant of leave to amend the claim and the statement of claim was set out in paragraph 44 of the appellant's outline:

> "Given the history of this particular claim, the way the claim has changed, the strike-out application and the material the subject of the summary judgment application (particularly in September 2007, referred to above), an explanation for the now further change in the [respondent's] case and the inordinate delay is mandatory."

[18] That written submission focused on the respondent's need to explain why the claim has reverted to a claim based on the indemnity in the written partnership agreement, and the associated delays, rather than an assertion that the 13 November facsimile means that the respondent's claim based on the indemnity provision in the written partnership agreement is futile. That also largely reflects the tenor of the oral submissions made by Mr Perry SC who appeared with Ms Wheatley of counsel before the primary judge (at Transcript 1-26, 10 August 2009):

> "MR PERRY: See, the curious thing about this lot 7 partnership indemnity, which is now the sole basis for this new pleading -----
>
> HIS HONOUR: Did I give reasons when I dismissed the -----
>
> MR PERRY: Summary judgment?
>
> HIS HONOUR: ----- summary judgment?
>
> MR PERRY: It was done by consent each time because the response was so - not surprisingly - overwhelming because it was Smits' own document that shot it. And that's referred to in our written outline and Mr Jakeman's affidavits before you. And that has that document annexed to it. So, after all of this, where there's been oral indemnities, representation cases, all massaging this frankly specious claim for a written indemnity under the lot 7 partnership agreement - all of that falls away and we come back to this core claim which cannot, under any circumstances, lie in the face of Smits' own document. And you have no explanation for this course of conduct in trying to re-invest a claim which has been the subject of two applications for summary judgment previously. But more importantly, bearing in mind the necessity for leave and the history that we have been through, no attempt either by Smits or anyone else in affidavit material, or indeed in this pleading. So, not withstanding this document - that is Smits' document saying we don't want the indemnity - we still have the claim for some reason. All it is is this bare faced assertion which we visited two and a bit years ago.
>
> HIS HONOUR: Yes.
>
> MR PERRY: And no explanation. There can be no basis for granting leave in the way in which this case has been conducted. Now, we say a number of other things in the written outline. I know it's lengthy – I apologise for that. And I mean that sincerely, but it has been such a long history and one has to compare so many different documents. Other than that - and the notion that this is somehow a speciality to have responded to, that's all I want to say, in addition to that which is said in the written outline."

Reasons of the primary judge

[19] The primary judge noted (at paragraph [11] of the reasons) that the alleged Springwood Central Project Partnership was never previously asserted by the

plaintiff in the earlier versions of the statement of claim and (at paragraph [13] of the reasons) that no explanation was given for why that claim had not been previously made and why it emerged for the first time in the proposed eighth amended statement of claim. The primary judge also identified (at paragraphs [26] and [27] of the reasons) that the claim was "hopeless" in that there was no allegation as to the business that was alleged to be carried on by the parties in common and the allegation that a partnership existed was contrary to the express allegation that the appellant was engaged by the respondent to act as project manager of the project.

[20] In relation to the claim based on the Lot 7 partnership, the primary judge concluded (at paragraph [36] of the reasons) that the allegations in the proposed eighth amended statement of claim did not raise any new matters of fact or claim which had not been pleaded previously as part of the earlier versions of the statement of claim. The primary judge found (at paragraph [40] of the reasons) that the claim pleaded in the eighth amended statement of claim in respect of the Lot 7 partnership generally correlated with the relief sought in paragraph 1 of the third amended claim which remained extant as a result of the orders made on 17 June 2009. The primary judge concluded (at paragraph [44] of the reasons) that the paragraphs of the proposed eighth amended statement of claim relating to the Lot 7 partnership "succinctly state the material facts in respect of this claim on which the plaintiff will rely" which could be compared "with previous versions of the pleading, which were convoluted and dense documents… ."

[21] The primary judge then proceeded to deal with the appellant's application to strike out the respondent's claim, although observing (at paragraph [47] of the reasons) that the decision to grant leave in respect of parts of the fourth amended claim and the eighth amended statement of claim made it unnecessary to do so.

[22] At paragraph [50] of the reasons, the primary judge recorded the appellant's contention that Mr Jakeman's affidavit amounted to a complete answer to any and all claims which the respondent might seek to pursue against the appellant in reliance upon the indemnity provision of the partnership agreement.

[23] The primary judge stated at paragraph [51] of the reasons:

> "Curiously, and indeed almost inexplicably, despite that evidence having been before the court, and on notice to the [respondent], since September 2007, no affidavit in response was sought to be adduced by the [respondent] until after the conclusion of the hearing before me. In argument before me, counsel for the [appellant] made extensive reference to this affidavit in the course of pursuing the argument for the alternative application for dismissal of the proceeding, and there was simply no response in that respect by or on behalf of the [respondent]. It was only after the conclusion of the hearing, when I had reserved judgment, that the [respondent] then sought to put before me a further affidavit sworn by Mr Smits in which he effectively joined issue with Mr Jakeman,…"

[24] After setting out the content of Mr Smits' affidavit that dealt with conversations and correspondence between Mr Smits and Mr Jakeman after the sending of the 13 November facsimile that Mr Smits alleged displaced the position reflected in the 13 November facsimile, the primary judge (at paragraph [52] of the reasons) concluded that in view of his decision to allow leave to deliver part of the eighth

amended statement of claim, it was not necessary to determine the question of whether leave ought to be granted to the respondent to rely on Mr Smits' affidavit. The primary judge indicated (at paragraph [52] of the reasons) that, had it been necessary to determine that question, he would have refused leave for the respondent to rely on the affidavit, as there was no explanation for the respondent's failure to rely on the affidavit at the hearing on 10 August 2009.

[25] In dealing with the strike out application, the primary judge referred (at paragraph [56] of the reasons) to the appellant's argument, that given the history of the matter, the claim should be dismissed for want of prosecution, in reliance on r 5 of the *UCPR* or the court's inherent jurisdiction, on the basis of that it had taken six years for the respondent to come up with a statement of claim that was amenable to proper prosecution, there had been a history of lack of compliance with court orders and directions by the respondent, and there was inevitable prejudice caused to the appellant from the delay in the prosecution of the proceeding.

[26] The primary judge's conclusion in relation to why the proceeding should not be dismissed summarily at that stage was set out at paragraph [58] of the reasons:

> "As events have transpired in the present applications, I have found that the lot 7 partnership case now sought to be pleaded and advanced by the [respondent] is one which has been on foot and pursued by it for some time, although previously obscured by a thicket of other claims and factual and legal allegations in the previous versions of the pleading. The [respondent] should, however, not be under any misapprehension as to the diligence which will be required of it in respect of the further prosecution of this case. The [appellant] could justifiably expect that the [respondent] has now been given its very last chance. The [respondent] can expect that it will be required to scrupulously observe further directions to bring this matter to trial as soon as possible."

[27] The primary judge ordered the respondent to pay the appellant's costs of the application for leave to amend the claim and the statement of claim.

The appellant's submissions on appeal

[28] The appellant's primary submission is that the primary judge's exercise of discretion to grant leave to amend the claim and statement of claim based on the Lot 7 partnership miscarried, whether due to the primary judge's failure to take into account matters specifically relevant to the Lot 7 partnership claim or failure to take into account or properly consider all the discretionary considerations relevant to granting the leave required in relation to the Lot 7 partnership claim. The appellant argues that Mr Jakeman's affidavit was an insurmountable hurdle to the respondent being able to succeed against the appellant on the Lot 7 partnership claim and that factor should have precluded the granting of the leave to amend that allowed the respondent to pursue the Lot 7 partnership claim. The appellant contends that the primary judge failed to consider the shortcomings of the Lot 7 partnership claim being framed as a debt claim, when it had previously been pursued as a claim for damages. The appellant relies on paragraph [51] of the reasons to submit that the primary judge failed to take into account the factors that he had expressly considered in relation to the strike out application in determining whether to give leave to make the amendments to allow the claim based on the Lot 7 partnership to continue.

Did the primary judge's discretion miscarry?

[29] The primary judge's decision in relation to the amendment of the claim and the statement of claim was made against the background of the history of the proceeding and the numerous attempts that the respondent had made in endeavouring to plead its case against the appellant of which the primary judge was keenly aware, as reflected in both the reasons and the 2008 reasons. Because of the chequered procedural history, the application for leave to amend the claim and the statement of claim was able to be considered in the light of the material that had been relied on by the appellant to oppose two earlier applications for summary judgment brought by the respondent. It did not follow, however, from the appellant's successful reliance on Mr Jakeman's affidavit to resist summary judgment that the evidence in that affidavit, including the 13 November facsimile, became uncontradicted evidence in the proceeding. It was sufficient evidence to achieve success for the appellant (and Mr Jakeman) on the earlier occasions when it was the appellant that was opposing summary termination of the proceeding. The existence of that evidence was not irrelevant to the application for leave to amend the claim and the statement of claim, but it was one of many factors that were before the primary judge. After all, the application was for leave to amend the claim and the statement of claim and not for the determination of any factual issue.

[30] In the reasons, the primary judge focused on the issue that made the difference, in his evaluation of the matter, as to whether or not the leave to make the amendments to the claim and the statement of claim in respect of the Lot 7 partnership would be given. That is clear from paragraph [58] of the reasons which, although in that part of the reasons under the heading dealing with the appellant's application to strike out the proceeding, puts the decision made by the primary judge in respect of the leave to make the amendments relating to the Lot 7 partnership in the context that the decision was made to give the leave, despite the primary judge's familiarity with the procedural history that included the respondent's numerous attempts at pleading its case and that its prosecution of the proceeding fell extremely short of the expedition that r 5 of the *UCPR* anticipates will apply to litigation.

[31] The respondent seeks to maintain its claim pleaded in the eighth amended statement of claim in reliance on the express indemnity in the Lot 7 partnership agreement, despite the existence of the 13 November facsimile. If the appellant considers that does not warrant a trial of the action, the appellant can pursue a summary judgment application. When the primary judge dealt with the leave question in relation to the amendment of the fourth amended claim and the eighth amended statement of claim, it was unexceptional for the primary judge to decide the issue of leave in the context of the progression and state of the pleadings, rather than attempting to deal with the merits of the claim upon incomplete evidence and before the pleadings had been finalised.

[32] In the eighth amended statement of claim the respondent has confined its claim for an indemnity to a debt claim based on the terms of the written partnership agreement. That will involve the construction of the terms of the written partnership agreement. It is an arguable construction that the indemnity in clause 4.4 of the written partnership agreement contained a promise by the appellant to pay the respondent an ascertainable sum on certain conditions. The fact that the respondent had previously pursued the claim based on the indemnity provision as a claim for damages for breach of contract may reflect the respondent's difficulties in formulating its claim. It does not follow, however, that the claim has no prospect of success in being pursued as a debt claim.

[33] Another aspect of the appellant's complaint on this appeal about the manner in which the respondent has pleaded the Lot 7 partnership claim is that the respondent has made no attempt in its statement of claim to address the impact of the 13 November facsimile which it was common ground was sent before the partnership agreement was executed by the appellant, even though the partnership agreement was dated 10 November 2000. By the time this appeal was heard, the pleadings had progressed and the appellant alleged in its defence that it executed the partnership agreement in reliance on the 13 November facsimile. The respondent in its reply made a number of allegations that address why the respondent claims the appellant was not entitled to rely on the 13 November facsimile, including that the 13 November facsimile should be construed as not amounting to an agreement to the excision of clause 4.4 from the written partnership agreement, that there was no reliance by the appellant on the 13 November facsimile that was communicated to the respondent and that the terms of the written partnership agreement were clear and unambiguous.

[34] The course that the pleadings had subsequently taken in relation to the 13 November facsimile is unremarkable, in that the matters raised by the respondent in its reply were not matters that it was bound to plead in its statement of claim, where it has elected to base its claim on the terms of the written partnership agreement, despite the existence of the 13 November facsimile. The subsequent progression of the pleadings in the proceeding is not relevant to the appellant's appeal against the leave given by the primary judge for the amendments to the claim and statement of claim in relation to the Lot 7 partnership claim which is based on the matters that were canvassed before the primary judge.

[35] The primary judge was entitled to weigh the various factors relevant to the exercise of the discretion whether or not to grant leave to make the relevant amendments without feeling obliged to recite every nuance of the appellant's lengthy submissions that traversed six years of procedural skirmishes. A fair reading of the reasons does not support the appellant's claim that the primary judge overlooked case management considerations and the lack of explanations offered by the respondent to the primary judge for its delay in prosecuting the proceeding and in formulating its claim and the impact of the 13 November facsimile on its claim.

[36] Rule 5 of the *UCPR* emphasises that the philosophy of the *UCPR* is directed at both the just and expeditious resolution of the real issues in a civil proceeding. The public interest and the parties' interest in the diligent and cost effective prosecution of a civil proceeding and case management and like considerations must also be balanced with the interests of justice. In this case the interests of justice include the importance of the proposed amendment to the respondent in the circumstances: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [98], [102]. After the primary judge refused leave to the respondent to pursue the claim based on the alleged Springwood Central Project Partnership, the proceeding could continue only if the respondent were given leave for the amendments relating to the Lot 7 partnership claim. The history of the proceeding persuaded the primary judge to focus on the fact that the Lot 7 partnership claim was not a new claim, but had been previously pleaded in earlier versions of the statement of claim, and was the subject of the claim for relief that remained as a consequence of the primary judge's orders made on 17 June 2009. In the circumstances where this proceeding was still at the pleading stage, the primary judge's granting of the leave to make the amendments to the fourth amended claim and the eighth amended statement of

claim which allowed the Lot 7 partnership claim to continue, and therefore the proceeding to continue, where it was made clear that the respondent could not expect any further indulgences, was not outside a sound exercise of the relevant discretion.

Orders

[37] I would make the following orders:

1. The appeal is dismissed.
2. The appellant must pay the respondent's costs of the appeal to be assessed.