SUPREME COURT OF QUEENSLAND

CITATION:	*Rubin v Buchanan and Anor* [2011] QSC 275
PARTIES:	**HELEN STONE RUBIN** (plaintiff) v **MATTHEW JOHN BUCHANAN** (first defendant) and **BANK OF QUEENSLAND LIMITED** **ACN 009 656 740** (second defendant)
FILE NO/S:	BS 9120 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application for trial by jury
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	21 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2011
JUDGE:	Boddice J
ORDER:	**1. The application is dismissed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – TRIAL – OTHER MATTERS – where the plaintiff makes application pursuant to r 475 of the *Uniform Civil Procedure Rules* 1999 (Qld) for an order that the proceeding be determined by trial by jury – where neither party elected trial by jury in their pleadings – whether it is necessary for a party to establish trial by jury is more appropriate – whether the case is an appropriate one for determination by a jury *Rules of the Supreme Court* 1991 (Qld)

Uniform Civil Procedure Rules 1999 (Qld)

Borland v Makavskas (unreported, QSC, 17 May 2000)

Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd [1999] QSC 384

McDermott v Collien (1953) 87 CLR 154

McLennan v Yared (unreported, QSC, 17 October 2001)

Neilsen v State of Queensland [2001] 1 Qd R 500

COUNSEL: Cooper SC for the plaintiff

Crowe SC with Porter, B for the defendants

SOLICITORS: Slater & Gordon Lawyers for the plaintiff

HWL Ebsworth Lawyers for the defendants

[1] The plaintiff, who is claiming damages from the defendants for breach of fiduciary duty, negligence and misleading and deceptive conduct, makes application pursuant to r 475 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") for an order that the proceeding be determined by trial by jury. The defendants oppose that application.

The claim

[2] The plaintiff alleges that in May and June 2005 she received written and oral financial advice from Storm Financial Services, and that on 29 June 2005 she met with the first defendant, a bank manager for the second defendant, seeking his professional advice as to the wisdom of acting on the advice from Storm Financial Services. The plaintiff alleges that in reliance upon the first defendant's advice she invested moneys which were subsequently lost.

Plaintiff's submissions

[3] The plaintiff submits trial by jury is appropriate in the present case as liability depends to a large extent upon a disputed conversation between the plaintiff and the first defendant, and such disputes are regularly determined by juries in criminal trials. Further, there is no evidence that trial by jury will cause any increase in costs or court time, or that the defendants will be prejudiced in any way.

Respondent's submissions

[4] The defendants submit the application should be dismissed on a number of bases. First, no explanation has been given by the plaintiff as to the reasons for her wish to alter her initial election. Second, the first defendant is a party "whose integrity and honour is impugned" and he does not wish the matter to be heard by a jury. Third, the events the subject of the claim concern the collapse of Storm Financial Services, which resulted in losses to many individuals. This raises the possibility a jury member could be personally affected or closely acquainted with someone who was affected or could be prejudiced by prior negative publicity. Fourth, the trial does not involve simple issues of fact or law. A jury will be required to make findings about the plaintiff's dealings with Storm Financial Services, and as to whether its

advice was misleading and deceptive. This will require a jury to decide what is or is not correct financial advice without expert guidance. Further, a jury will have to consider accessory liability and multiple separate breaches of fiduciary duties. A jury will also have to decide issues as to reliance and apportionment of liability. Finally, trial by jury will result in delay and additional costs.

The application

[5] The plaintiff and the defendants were entitled to elect trial by jury in their initial pleadings.[1] No party made any such election. Accordingly, the plaintiff's application is to change the mode of trial. Rule 475 provides:

> "475 Changing mode of trial
>
> (1) The court may order a trial by jury on an application made before the trial date is set by a party who was entitled to elect for a trial by jury but who did not so elect.
>
> (2) If it appears to the court that an issue of fact could more appropriately be tried by a jury, the court may order a trial by jury."

[6] The plaintiff submits she satisfies the requirements of r 475(1) as she was entitled to elect trial by jury but did not do so, and the application is made before the trial date has been set. She further submits that the case is an appropriate one for determination by a jury.

[7] The defendants accept the application is brought pursuant to r 475(1) but contend that in exercising its discretion under r 475(1), the Court needs to be persuaded that a jury trial is a more appropriate mode of trial than trial by judge alone.

Rule 475

[8] In *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*,[2] Douglas J held that in exercising the discretion under r 475(1), it was insufficient for a party to establish that the cause of action was of a kind that could be properly tried by jury, or that they would like to have tried by jury. To succeed, a party must persuade the Court that a jury trial is a more appropriate mode of trial than trial by judge alone.

[9] In reaching this conclusion, his Honour adopted the following dicta of Fullagar J in *McDermott v Collien*:[3]

> "The nature of the question involved is such that one can hardly expect much guidance from decided cases. Two things, however, seem clear enough. The first is that with the merits and demerits of trial by jury as a means of determining civil causes I have nothing whatever to do. *Dr Woinarski* referred me to the observations of *Bankes* L.J. and *Atkin* L.J. (as he then was) in *Ford v Blurton* (1922) 38 T.L.R 801, at pp.803, p804, which are quorted by *Lush* J. in

---

1 UCPR, r 472.
2 [1999] QSC 384.
3 (1953) 87 CLR 154 at 157.

> *Calcraft v London General Omnibus Co Ltd* (1923) 2 K.B. 608 at p612. But, so far as any question of general policy is involved, it is settled for me by the *High Court Procedure Act*. Trial without a jury is the normal mode of trial of actions in this Court, and some special reason must be shown for a departure in any particular case from that normal mode. The second thing that seems clear is that it is not enough to show that the cause of action is of a kind which could quite properly be tried with a jury and which was normally tried with a jury in England before the *Judicature Act* (1873) (36 & 37 Vict.c.66). The decisions of *Hodges* J. and of *Isaacs* J. perhaps suggest that the nature of the cause of action is not even a relevant consideration. I would not be prepared to assent to that as a general proposition: indeed I would rather have thought that it might in some cases be a potent consideration. But it is clear that it is not enough to say: 'This is a kind of action which is quite suitable for trial with a jury, and I would like to have it tried with a jury'.
>
> The plaintiff in this case cannot, in my opinion, say more than that. It seems to me that it is a complete answer to him for the defendant to say: 'This is a kind of action which is also quite suitable for trial without a jury'."

[10] A different interpretation of r 475(1) was adopted by Byrne J in *Neilsen v State of Queensland*.[4] His Honour concluded that to succeed in obtaining an order under r 475(1) it was not necessary for a party to establish that trial by jury was "more appropriate". It was sufficient to establish that the jury "could appropriately deal with the matter".[5] In reaching this conclusion, Byrne J rejected a contention that r 475(2) prescribes a condition necessary to the exercise of the power under r 475(1). The power provided by r 475(2) is separate, allowing a judge to order trial by jury of the Court's own volition.[6]

[11] The proper interpretation of r 475 has also been considered by Mullins J in *McLennan v Yared*,[7] and by White J in *Borland v Makavskas*.[8] Both Mullins J and White J preferred, and followed, the interpretation adopted by Byrne J in *Neilson*.

Discussion

[12] The right to trial by jury in civil proceedings stems from statute, not the common law.[9] Relevantly, that right is dealt with by rules 472, 474 and 475, UCPR. Those rules largely reflect the previous *Rules of the Supreme Court* 1991 (Qld).[10]

[13] In considering the proper interpretation of r 475, it is instructive to consider the terms of its predecessor. Relevantly, O 39 provided:

> "**[39.4] Trial by jury**

---

4 [2001] 1 Qd R 500.
5 *Neilson* at 502.
6 *Neilson* at 502.
7 (unreported, QSC, 17 October 2001)
8 (unreported, QSC, 17 May 2000).
9 *Smit v Chan* [2003] 2 Qd R 431 at 435.
10 *Rules of the Supreme Court*, O 39, r 4, r 5, r 8 and r 9.

4 (1) Subject to the provisions of rules 5 to 13, and to the provisions of any Act requiring the action to be tried without a jury, the plaintiff may in the plaintiff's statement of claim, and any defendant may, in the defendant's defence, require that the issues of fact shall be tried by a Judge with a jury and thereupon the same shall be so tried.

(2) Subject to rules 5 to 13, where a defendant by a counterclaim raises new issues of fact, the plaintiff may in the plaintiff's answer require the issues of fact to be tried by a Judge with a jury and thereupon the same shall be so tried.

[39.5] Trial by Judge

5 When neither the plaintiff nor the defendant requires the issues of fact to be tried by a Judge with a jury under the provisions of rule 4, the same shall be tried by a Judge without a jury, unless the Court or a Judge otherwise orders.

…

[39.8] Issue requiring prolonged examination of documents etc

8 The Court or a Judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their, his or her opinion conveniently be made with a jury or conducted by the Court through its ordinary officers.

[39.9] Changing mode of trial

9 In any case in which neither party has given notice under rules 4 to 8 that the party desires to have the issues of fact tried before a Judge with a jury, and in any case within the Judicature Act 1867, section 12 in which the plaintiff or any defendant desires to have the action tried in any other mode than that specified in the notice of trial, he or she must apply to the Court or a Judge for an order to that effect within 4 days after service of the notice of trial, or within such extended time as the Court or a Judge may allow.

[39.10] Court may direct trial with jury at any time

10 If in any cause or matter it appears to the Court or a Judge either before or at the trial that any issue of fact could be more conveniently tried before a Judge with a jury, the Court or Judge may direct that it shall be so tried, and may for that purpose vary any previous order."

[14] Order 39, rules 5 and 10 were considered by Stable J in *Lindeberg v Ingram & Ors*.[11] After noting that he had a discretion whether or not to grant the application, Stable J said:[12]

> "That discretion, it appears to me, must be exercised upon a judicial basis and not merely upon the basis that one party has, under the rules, lost a right which otherwise it would have, and therefore may not be able to have the action tried in the manner he desires. After all, a necessary corollary of one party, whatever may be the reason, lying back and losing his rights, is that the opposite party acquires rights under the rules … In the circumstances, it seems to me that the plaintiff, asking the indulgence which he does, must satisfy me of what is contained in r. 10 of O XXXIX that the issues of fact in the action could be more conveniently tried by a judge with a jury, and I hold it to be upon that basis that I should exercise my discretion in this matter."

[15] In reaching this conclusion, Stable J followed *Bertwhistle v Dalgety and Co. Ltd.*[13] where Macrossan SPJ, in rejecting an application to change the mode of trial from one that had been entered for trial without a jury to a trial with a jury, held that "no ground has been suggested (let alone established) why trial of the issues of fact in this action, by a jury, is preferable to trial of them by a judge".

[16] Whilst *Lindeberg*, and *Bertwhistle*, support a contention that the discretion to order a change of mode of trial to trial by jury requires an applicant to establish the action could more conveniently be tried by a judge with a jury, those decisions were made under O 39, rules 5 and 10. Those rules were materially different to r 475. Order 39, r 5 expressly provided that where no election for trial by jury had previously been made, the trial shall be "by a judge without a jury, unless the Court or judge otherwise orders". As such, O 39, r 5 prescribed a mode of trial where no election had been made, unless otherwise ordered. Rule 475 contains no such prescription.

[17] This difference is significant as the authority relied upon by Douglas J in *Labrador Holdings* in support of his interpretation of r 475(1) dealt with Rules of Court that also specified a mode of trial. That factor was specifically relied upon Fullagar J in *McDermott* as being a relevant factor in the exercise of his discretion.[14]

[18] Where the relevant Rules specifically provide that trial shall be by judge alone, unless the Court or Judge otherwise orders, it is not surprising an applicant to change the mode of trial is required to establish that the matter could be more conveniently tried before a Justice with a jury. The situation is, however, very different where no mode of trial is specified in the Rules.

[19] Having regard to this important difference between O 39, r 5 and r 10, and r 475, the proper interpretation of r 475 is not to be governed by *Lindeberg* and *Bertwhistle*.

[20] A reading of r 475, in context with rules 472 and 474, favours the interpretation adopted by Byrne J in *Neilson*. That interpretation accords with the plain ordinary reading of r 475. I respectfully decline to follow *Labrador Holdings*. Its

---

11 [1960] QWN 39.
12 At p 54.
13 [1941] QWN 53.
14 *McDermott* at 155.

interpretation was reliant upon *McDermott*, which concerned materially different Rules.

[21] Rule 475(1) provides an unfettered discretion to change the mode of trial in specified circumstances. The exercise of that discretion is not subject to r 475(2), which provides a separate power for the Court, of its own volition, to order trial by jury in specified circumstances. The existence of a separate power for the Court, of its own volition, to order trial by jury is compatible with the power given to the Court in r 474, to order that a trial be held by judge alone rather than by a jury in specific circumstances.

[22] The plaintiff's application is to be determined on the basis the Court has a discretion to order trial by jury, if satisfied the proceeding could appropriately be tried by jury. That discretion is not qualified by any requirement that the party seeking that order need show that the proceeding could "more appropriately be tried by a jury".

[23] The discretion to order trial by jury is to be exercised having regard to all of the circumstances of the case. Relevant factors include, but are not limited to, the nature of the proceeding, the issues in dispute, whether there is likely to be extensive expert evidence, and whether any trial is likely to be unduly and unnecessarily lengthened by an order that it be tried by jury. Another relevant factor is that the parties were entitled to elect trial by jury in the pleadings, and have not done so.

[24] Having considered the pleadings, the affidavit material, and the submissions of the parties, I am satisfied, in the exercise of my discretion, that this proceeding could not be appropriately tried by jury.

[25] The pleadings are extensive, and involve multiple issues. Those issues not only include resolution of disputed conversations based on findings of credit, but also consideration of various different factual scenarios when determining issues of reliance and causation. A jury would need to give its verdict through answers to specific questions. Those questions are likely to be numerous, having regard to the issues. Lengthy oral addresses will be required before the jury retires to consider its verdict. Trial by jury is likely to therefore significantly increase the length of any trial, with a consequent increase in the costs to the parties. The proceeding has been litigated for almost two years, with neither party wanting trial by jury. The issues in the claim do not call for trial by jury. The present claim may be contrasted with a claim for defamation where trial by jury is often appropriate having regard to the test of the ordinary reasonable reader.

[26] Balanced against those factors is the fact that the plaintiff would have been entitled to trial by jury had she so elected at the commencement of the proceeding. That fact, however, does not detract from the position that the plaintiff, having not so elected, now requires the Court, in the exercise of its discretion, to change the mode of trial. In exercising that discretion, all the circumstances of the case are relevant. The factors referred to in [25] render the proceeding one that is not appropriately tried by jury.

[27] In reaching this conclusion I have had regard to the defendants' submission that involvement of Storm Financial Services renders the proceeding not appropriate to be tried by jury due to potential prejudice from publicity, or the risk a juror or a family member may have suffered losses due to Storm's collapse. I have not

decided the application on that ground. Juries in criminal proceedings regularly decide criminal responsibility in cases that have attracted wide publicity. There is no reason to believe a jury would not consciously decide this case on the evidence, as directed by the trial judge.

Orders

[28] The application is dismissed.

[29] I shall hear the parties as to costs.