

SUPREME COURT OF QUEENSLAND

CITATION: *Groves v Groves* [2011] QSC 411

PARTIES: **LE NEVE ANN GROVES**
(Plaintiff)

v

EDMUND STUART GROVES
(First Defendant)

and

**CITIGROUP GLOBAL MARKETS AUSTRALIA PTY
LTD ACN 003 114 832**
(Second Defendant)

and

BT SECURITIES LIMITED ACN 000 720 114
(Third Defendant)

and

CITIBANK, N.A.
(Fourth Defendant)

FILE NO/S: BS 10662 of 2008

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 21 December 2011

DELIVERED AT: Brisbane

HEARING DATE: 7 December 2011

JUDGE: Boddice J

ORDER:

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – where the plaintiff seeks to amend her claim against the defendants – where leave is required to amend – whether leave should be granted

AVS Property Pty Ltd v Qld-1 Pty Ltd [2007] QSC 365

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175

Hartnett v Hynes [2009] QSC 225

Issitch v Worrell & ors (2000) 172 ALR 586

Riverland Fruit Cooperative Ltd (in liq) v 007 953 380 Pty Ltd [2008] SASC 258

State of Queensland v Dale & Meyers Operations Pty Ltd [2010] QSC 361

Surfing Hardware International Holdings Pty Limited v McCausland [2008] FCA 1522 at 58.

The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd [2008] QCA 224

Tyco (Australia) Pty Ltd t/as ADT Security v Signature Security Group Pty Ltd (No 4) [2010] FCA 758

Virgtel Limited and Anor v Zabusky and Ors [2008] QSC 213

COUNSEL:

Franco, P for the plaintiff

Francis, C for the first defendant

Beacham , G for the second and fourth defendants

Pomerenke, A for the third defendants

SOLICITORS:

Cooper Grace Ward for the plaintiff

Hopgood Ganim for the first defendant

Mallesons Stephen Jaques for the second, third and fourth defendants

- [1] The plaintiff seeks leave to amend her claim against the defendants to include allegations of unconscionable conduct and undue influence, and claims for equitable relief. The application is opposed by the first, second and fourth defendants. The third defendant does not oppose leave, subject to conditions.
- [2] Should leave to amend be refused, the second and fourth defendants make application for the separate determination of an issue on the present pleadings. The first and third defendants support that application. The plaintiff opposes the separate determination of that issue.

Background

- [3] The plaintiff and first defendant were formerly husband and wife. Together they commenced operating child care centres. Ultimately, this business became a publicly listed company ABC Learning Centres Limited (“ABC”).
- [4] The plaintiff’s claim relates to the sale in February and March 2008 of some 23,000,000 ABC shares registered in her name. Those sales were effected pursuant to guarantees allegedly provided by the plaintiff to the second, third and fourth defendants. The proceeds of the sale of these shares were applied to reduce debts owed by the first defendant. The plaintiff claims that the first defendant has been unjustly enriched by the share sales. She also claims the first defendant failed to pay to the plaintiff dividends relating to the shares owned by her in ABC.

Pleadings

- [5] Central to the plaintiff's existing pleading is a denial that she signed the documents which formed the basis for the second, third and fourth defendants' sale of shares registered in her name. That denial is maintained notwithstanding the absence of any expert evidence to establish the signatures were not affixed by the plaintiff, and the defendants having expert evidence which concludes the signatures were affixed by the plaintiff.
- [6] The proposed amendments seek to plead an alternate case, in the event the plaintiff is found to have signed the documents relied upon by the second, third and fourth defendants in effecting the sale of the shares the subject of this proceeding. The plaintiff asserts in that event, that she executed those documents as a consequence of undue influence and/or unconscionable conduct and/or special disadvantage as a result of sustained domestic violence by the first defendant throughout their marriage.

Submissions

- [7] The plaintiff contends the proposed amendments can properly be made without the leave of the Court as they are not statute barred, and no request for trial has been signed or tendered by any party. Should leave be required, the plaintiff contends it ought to be granted as the issues the subject of the proposed amendments are properly to be determined in one trial rather than a separate trial.
- [8] The proposed amendments are opposed by the first, second and fourth defendants. The defendants submit that amendment of a pleading is not a right, and that it is necessary to balance the interests of justice in all of the circumstances. Whilst each defendant relies on slightly different grounds for opposition, the central thrust of the defendants' opposition is that the amendments are made late in a proceeding which is well advanced towards trial, involve the pleading of a completely new case which will necessitate the revisiting of disclosure and the evidence that may be given by witnesses identified as relevant to date, and involve the pleading of inconsistent assertions. Further, the proposed amendments involve allegations known by the plaintiff prior to the commencement of this litigation, and the plaintiff's failure to plead this case at an earlier time was a conscious decision on her part not to rely on such a case. The plaintiff has failed to personally swear to the issues now sought to be relied upon, and has failed to provide a sufficient explanation for her previous decision not to rely on such a case.

Principle for granting of leave to amend

- [9] Parties to litigation are required to conduct the proceedings with a view to the just and expeditious resolution of the true issues in dispute.¹ This requirement means a party may, if the interests of justice require, be denied the opportunity to amend proceedings, notwithstanding that the proposed amendment relates to a cause of action which is not statute barred.²
- [10] The principles relevant to a grant of leave to amend a claim were not in dispute. The plaintiff and defendants accepted that the relevant principles were summarised by Applegarth J in *Hartnett v Hynes*.³ After discussing the principles enunciated by

¹ UCPR, r 5.

² *The Beach Retreat Pty Ltd v Mooloolaba Marina Ltd* [2008] QCA 224.

³ [2009] QSC 225.

the High Court in *Aon Risk Services Australia Limited v Australian National University*,⁴ Applegarth J observed:

“[12] Justice is the paramount consideration in determining an application to amend pleadings.⁵ Lord Griffiths stated in *Ketteman v Hansel Properties Ltd*:⁶

“...justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties that are occasioned by facing new issues, the raising of false hopes...”

This statement commands acceptance in this country.⁷ In this case there are personal litigants, and there is evidence of the consequences to the defendant of allowing amendments in the form proposed by the plaintiff. Consideration is required as to whether the prejudice caused by an amendment made pursuant to *UCPR 378* can be remedied by an order for costs. The rules provide that the costs of and resulting from an amendment made under *UCPR 378* are to be paid by the party making the amendment unless the Court orders otherwise.⁸ However, the Court’s consideration of an amendment made pursuant to *UCPR 378* is not undertaken solely by reference to whether any prejudice to the other party can be compensated by costs. The right to amend pursuant to *UCPR 378* is qualified by a party’s obligations under *UCPR 5* and the Court’s own obligation to facilitate the just and expeditious resolution of the real issues in proceedings at a minimum of expense. Amendments made pursuant to *UCPR 378* may not comply with the rules of pleading or have a tendency to prejudice or delay the fair trial of the proceeding, in which event the Court may disallow the amendments on application, or direct a party to further amend the pleading so as to comply with the rules of pleading or to avoid such prejudice.

...

[19] *Aon Risk Services Australia Ltd v Australia National University* (“Aon”) concerned amendments to a pleading for which leave was required and which were sought during a trial. However, the High Court’s statements of principle and its consideration of a rule in similar terms to *UCPR 5* provide guidance in determining an application to disallow

⁴ (2009) 239 CLR 175.

⁵ *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 at 155 (“*JL Holdings*”); *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 at [30], [98] (“*Aon*”).

⁶ [1987] AC 189 at 220.

⁷ *Aon* (supra) at [100]-[101].

⁸ *UCPR* 386.

amendments made without leave, particularly in cases involving unexplained delay in making amendments. There is “an irreparable element of unfair prejudice in unnecessarily delaying proceedings”.⁹ Undue delay can undermine confidence in the rule of law, and the modern common law adversarial system is not a system which permits disregard of undue delay.¹⁰ Case management principles do not supplant the objective of doing justice between the parties according to law. However, the interests of justice are not served by courts acceding to late amendments without explanation or justification. Rules such as *UCPR 5* that have been enacted since *JL Holdings* indicate that the rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the Court and upon other litigants.¹¹

- [20] The amendments in *Aon* were dependent on the exercise of the Court’s discretionary power. However, as I have observed, the right to amend pursuant to *UCPR 378* is qualified by *UCPR 5*, and *UCPR 5* resembles r 21 of the *Court Procedure Rules 2006* (ACT) that was considered in *Aon*.¹² *UCPR 5* seeks to facilitate the just and expeditious resolution of “the real issues in civil proceedings” at a minimum of expense. The just resolution of proceedings remains paramount, but speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings.¹³ Parties should have a proper opportunity to plead their case, but limits may be placed upon re-pleading when delay and costs are taken into account.¹⁴ The need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. It cannot be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs.¹⁵
- [21] The objectives of the rules of civil procedure do not require that every application for amendment should be refused, or amendments for which leave is not required should be disallowed, because the amendment involves the waste of some costs and some degree of delay.¹⁶ The nature and

⁹ *Aon* (supra) at [5].

¹⁰ *Ibid* at [24].

¹¹ *Ibid* at [93].

¹² Rule 21 of the ACT Rules was based upon *UCPR 5* and similar rules: *Aon* at [7].

¹³ *Aon* at [98].

¹⁴ *Ibid*.

¹⁵ *Ibid*.

¹⁶ *Ibid* at [102].

importance of the amendment is relevant.¹⁷ The extent of the delay and the costs associated with it, together with the prejudice which might reasonably be assumed to follow and that which is shown, are to be weighed against the grant of permission to a party to alter its case.¹⁸ Much depends upon the point the litigation has reached relative to a trial when the amendment is made or application to amend is made.¹⁹

- [22] These and other considerations apply where, in an application of the present kind, the plaintiff seeks leave to amend a pleading in which some of the amendments would be authorised by *UCPR 378* and others require leave. Amendments made prior to a request for trial and which, if allowed to stand, will not result in a trial being adjourned to the prejudice of the other party and other litigants awaiting trial dates do not raise all of the considerations that arose in *Aon*. However, *UCPR 5* and the principles stated in *Aon* do not support the proposition that a party has a right to amend as many times as it likes before a request for trial date, without explanation or justification. Such a course may involve a breach of the party's undertaking to the Court and to the other party, cause prejudice to the other party that cannot be remedied by an order for costs and be inconsistent with the just resolution of the real issues in civil proceedings at a minimum of expense.

...

- [27] The principles discussed by the High Court in *Aon* inform the exercise of the discretion to grant leave to amend a claim pursuant to *UCPR 377* and the discretion to allow or direct a party to amend a claim or a pleading pursuant to *UCPR 375*. I have already referred to some of these principles in discussing the operation of *UCPR 5* in the case of amendments made without leave pursuant to *UCPR 378* and the Court's power to disallow such amendments or make directions concerning further amendment of a claim or a pleading in order to avoid prejudice to the other party and to comply with the rules of civil procedure and their purpose. In the context of the present application and in respect of amendments to the claim or the statement of claim for which leave is required, the following principles assume importance:

1. An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation.²⁰

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ *Aon* at [5]; [111].

2. The discretion is guided by the purpose of the rules of civil procedure, namely the just and expeditious resolution of the real issues in dispute at a minimum of expense.
3. There is a distinction between amendments which are necessary for the just and expeditious resolution of “the real issues in civil proceedings” and amendments which raise new claims and new issues.
4. The Court should not be seen to accede to applications made without adequate explanation or justification.
5. The existence of an explanation for the amendment is relevant to the Court’s discretion, and “[i]nvariably the exercise of that discretion will require an explanation to be given where there is a delay in applying for amendment”.²¹
6. The objective of the Court is to do justice according to law, and, subject to the need to sanction a party for breach of its undertaking to the Court and to the other parties to proceed in an expeditious way, a party is not to be punished for delay in applying for amendment.
7. Parties should have a proper opportunity to plead their case, but justice does not permit them to raise any arguable case at any point in the proceedings upon payment of costs.
8. The fact that the amendment will involve the waste of some costs and some degree of delay is not a sufficient reason to refuse leave to amend.
9. Justice requires consideration of the prejudice caused to other parties, other litigants and the Court if the amendment is allowed. This includes the strain the litigation imposes on litigants and witnesses.
10. The point the litigation has reached relative to a trial when the application to amend is made is relevant, particularly where, if allowed, the amendment will lead to a trial being adjourned, with adverse consequences on other litigants awaiting trial and the waste of public resources.
11. Even when an amendment does not lead to the adjournment of a trial or the vacation of fixed trial dates, a party that has had sufficient opportunity to

²¹ Ibid at [102].

plead their case may be denied leave to amend for the sake of doing justice to the other parties and to achieve the objective of the just and expeditious resolution of the real issues in dispute at a minimum of expense.

12. The applicant must satisfy the specific requirements of rules, such as *UCPR 376(4)* where it seeks to introduce a new cause of action after the expiry of a relevant limitation period.”

[11] These principles apply whether or not leave to amend is required as amendments made without leave can be disallowed.²²

Discussion

[12] The plaintiff commenced these proceedings in 2008, less than eight months after the share transactions the subject of the dispute. The plaintiff has previously amended her claim and statement of claim in 2009. Extensive disclosure has been completed, expert evidence obtained and the matter has been supervised with a view to a trial next year.

[13] The proposed amendments involve the pleading of a very different case to that advanced by the plaintiff to date. It is premised on the plaintiff’s primary case not succeeding, and an acceptance of the defendants’ case that the plaintiff executed the documents relied upon by the defendants in effecting the share sales. To this extent, there is substance in the defendants’ contention that the proposed amendments advance a case inconsistent with the case the plaintiff has chosen to advance to date.

[14] Whilst the interests of justice may require a plaintiff, in an appropriate case, to be held to a prior election not to advance a case open to that plaintiff, all of the circumstances must be taken into account in determining whether, in the exercise of a court’s discretion, a plaintiff ought to be denied the opportunity to advance a case as part of a proceeding yet to be determined by the Court.

[15] The cause of action sought to be advanced in the alternative is related to the issues presently in dispute in the proceedings. That cause of action is not statute barred, and could be pursued by the plaintiff in separate proceedings. It is generally desirable for all claims to be litigated in one proceeding as otherwise there is the prospect of inconsistent judgments and obvious inconvenience and costs to the parties.²³

[16] A party is able to advance inconsistent allegations or claims, if pleaded as alternatives.²⁴ Accordingly, that fact, of itself, is no basis to refuse leave to amend. However, the defendants submit the proposed pleading does not merely advance inconsistent cases in the alternative. It pleads inconsistent factual allegations, with the plaintiff’s primary case remaining being based on the plaintiff having no recollection of signing the documents, and not believing she did, and the proposed amendments relying on allegations that the plaintiff did sign the documents. It is submitted this breaches the rule that a pleading not contain inconsistent factual

²² UCPR, r 388.

²³ *AVS Property Pty Ltd v Qld-1 Pty Ltd* [2007] QSC 365 at [53].

²⁴ UCPR, r 154(1).

- allegations.²⁵ This rule applies whether or not the inconsistent facts are pleaded as alternatives.²⁶ The defendants contend that the plaintiff is required to elect between those inconsistent positions.²⁷
- [17] Viewed as a whole, the proposed amendments do not involve making inconsistent factual allegations in the one claim. The plaintiff seeks to plead an alternate case in the event the defendants succeed in their allegation that the plaintiff signed the guarantees as alleged. Whilst such a position will provide significant challenges, particularly where the plaintiff's credit is already squarely in issue having regard to the lack of expert evidence to support her primary case, the pleading does not offend pleading rules.
- [18] The proposed pleading pleads an alternate case in the event the defendants' case succeeds. It does so by seeking to rely upon a history of relationship rather than pleading facts specific to the circumstances of the actual signing of the particular guarantee. As such, it does not plead, positively, facts inconsistent with the primary case. It would be a different matter if the plaintiff sought, by way of alternate case, to plead that she recalled the circumstances in which she signed the particular guarantee. That form of plea would breach the rule as it would amount to pleading inconsistent sets of facts in the alternative in circumstances where one of those versions must be known to be false.²⁸
- [19] It is further submitted that it is impermissible for the plaintiff to seek to advance an alternate case in equity based on an acceptance of the defendants' pleaded case when the plaintiff is not prepared to plead that case positively herself.²⁹ That submission does not give due recognition to the pleaded basis for the proposed amendments. It is an alternate claim, in the event the plaintiff's primary case fails and the defendant's case is accepted at trial.
- [20] The primary difficulty found by the plaintiff is the lateness of the proposed amendments, and the fact that they amount to the pleading of a new case at a time when extensive disclosure has been completed and the parties have been progressing toward a hearing. Those factors weigh heavily when considering the interests of justice.
- [21] The plaintiff has provided an explanation for not having advanced that case to date, namely, that she wished to resolve the matter without the need to rely on such a case but was left with no choice but to seek to amend her statement of claim when resolution by mediation was no longer open. Having regard to the personal nature of the allegations now sought to be advanced, that explanation provides a sufficient reason for the plaintiff's failure to plead the case to date.
- [22] Further, whilst the plaintiff has not personally sworn to the issues now sought to be relied upon by her, her solicitor has annexed a written summary of the evidence the plaintiff would give at trial. That summary is detailed, and any departure from it is likely to result in submissions being made at trial in respect of the plaintiff's credibility. Against that background, the risk of prejudice from allowing the plaintiff to advance the alternate case now foreshadowed is limited. Whilst the first

²⁵ *Issitch v Worrell & Ors* (2000) 172 ALR 586 at [32]-[33].

²⁶ *Riverland Fruit Cooperative Ltd (in liq) v 007 953 380 Pty Ltd and Ors* [2008] SASC 258 at [15]-[20].

²⁷ *Surfing Hardware International Holdings Pty Limited v McCausland* [2008] FCA 1522 at 58.

²⁸ *Virgtel Limited and Anor v Zabusky and Ors* [2008] QSC 213 at [27].

²⁹ *Riverland Fruit Cooperative Ltd (in liq) v 007 953 380 Pty Ltd* [2008] SASC 258 at [27].

defendant contends he is prejudiced as the allegation concerns events up to 25 years ago, I am not satisfied the prejudice is such as to deny him a fair trial.

- [23] Neither the plaintiff's failure to previously plead this case nor her failure to positively swear to the issues of themselves provide a sufficient ground, in the exercise of the Court's discretion, to deny her the opportunity of pleading a case in the present proceeding which is not statute-barred.
- [24] Whilst the case now sought to be advanced by the plaintiff raises a substantially different and inconsistent case to the primary case advanced to date, advancing that case is unlikely to significantly increase the number of witnesses to give evidence or, indeed, the documentation to be tendered at trial. The very nature of the allegations of domestic violence render it unlikely many additional witnesses will be able to give evidence as to those events. It is also unlikely there would be significant documentary material relevant thereto. Issues going to the plaintiff's credit in relation to the new allegations are likely to be similar to those already raised by her primary plea that she did not sign the documents. For example, other security documents signed by her in the past were likely to be the subject of cross-examination when considering the likelihood that the signatures affixed thereto were not her signatures.
- [25] Having considered all of the circumstances, I am satisfied the interests of justice in having all relevant issues determined in the one hearing rather than in separate proceedings, favours the granting of leave to amend in the present case. In this respect, the observations of Perram J in *Tyco (Australia) Pty Ltd t/as ADT Security v Signature Security Group Pty Ltd (No 4)*³⁰ are apposite:

“... a proper case for leave is shown. Even if I had not been of the view that there was no relevant delay on Signature's part I would still have granted it leave. No trial date has yet been fixed and, if leave had been refused, the most likely outcome would have been the filing of a separate proceeding by Signature. The prospect of the same case, albeit with partially different parties, being heard by the court twice is one which is to be avoided if at all possible. It involves duplication, wasted expense and the possibility of inconsistent judgments. There may well be cases in which it is appropriate to force the filing of separate proceedings or the severing of cross-claims but the procedural difficulties thrown up by such a course require one to pause long before taking it. This is not one of those cases.”

- [26] Further, the likely length of any trial means that any hearing of the proceeding is at least six months away, with trial dates unlikely to be available until well into the second half of 2012. A timetable could be put in place to ensure that all relevant steps by way of pleadings and further disclosure could be undertaken promptly so as not to prevent a trial proceeding in the second half of 2012.
- [27] The defendants submit any grant of leave should be on conditions.³¹ A central condition, it is submitted, is that the plaintiff abandon her primary case, namely that she did not sign the guarantees relied upon by the defendants. Such a condition is just in all the circumstances having regard to the inconsistent nature of the alternate

³⁰ [2010] FCA 758 at [30].

³¹ UCPR, r 375(1).

case now sought to be advanced and the dearth of expert evidence to support the plaintiff's contentions in respect of the signatures on those documents. Whilst the plaintiff's case provides significant challenges having regard to the current state of the expert evidence, I am not satisfied that it is so hopeless as to not properly be able to be advanced in the proceeding. I decline, in the exercise of my discretion, to impose as a condition upon the grant of leave a requirement that the plaintiff abandon her primary case.

- [28] A further condition sought is that the plaintiff pay the defendant's costs of the application consequent upon the amendments on an indemnity basis, and that the action be stayed until those costs have been paid. However, the plaintiff's conduct of the litigation to date has not been of a nature that would justify such a condition. I decline, in the exercise of my discretion, to impose such a condition.
- [29] The second and fourth defendants further contend that if leave is to be given, security for costs should be ordered, and leave given to deliver interrogatories. Whilst the power to order security for costs is broad,³² I am not satisfied such an order should be made in the present case. There is no good reason to link any grant of leave to amend to an order for security for costs. If the defendants believe there is a basis to obtain an order for security in this case, application should be brought in the usual way, on appropriate notice.
- [30] Similarly, there is no proper basis to link the grant of leave to amend to the delivery of interrogatories. Again, if leave to deliver interrogatories is appropriate, an application, on appropriate notice, can be brought by the defendants.
- [31] The first defendant also submits that leave to amend should be refused as the particulars provided in the proposed amended pleading contain evidence, and include irrelevant matters. A perusal of the particulars does not support those assertions. The very nature of the plea means particulars are likely to be discursive, and wide ranging. In any event, the particulars are not so defective as to justify, in the exercise of my discretion, refusal to grant leave to amend.

Separate determination

- [32] The application for a separate determination was only pressed in the event the plaintiff did not obtain leave to amend. In those circumstances, it is unnecessary to further consider that application.

Orders

- [33] The plaintiff's application to amend is allowed. The defendants' application for a separate determination of an issue in the proceedings is dismissed.
- [34] I shall hear the parties as to the form of orders, and costs.

³² UCPR, r 671(8).