SUPREME COURT OF QUEENSLAND

CITATION:	*Horton & Anor v Keeley & Ors* [2013] QCA 161
PARTIES:	**ROBERT WILLIAM HORTON & DESLEY MARGARET HORTON** (applicants) **v** **WILLIAM IAN KEELEY & LEANNE FAY KEELEY** (first respondents) **MARINE WAREHOUSE PTY LTD** ACN 066 954 112 (second respondent)
FILE NO/S:	Appeal No 10237 of 2012 DC No 3231 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	21 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2013
JUDGES:	Gotterson JA and Margaret Wilson and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to adduce fresh evidence refused.** **2. Leave to appeal refused.** **3. Applicants, Robert William Horton and Desley Margaret Horton, to pay the costs of the respondents, Willian Ian Keeley, Leanne Fay Keeley and Marine Warehouse Pty Ltd of the application for leave to appeal and of the appeal on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – where the trial was adjourned at the close of the plaintiff's case on the third day of a five day trial – where at the close of the plaintiff's case the trial judge raised with counsel that there was an apparent disjunction between the case as pleaded by, and the evidence led for, the respondents, the plaintiffs in the trial – where both parties agreed that the agreement in question was for the sale of shares and not the sale of shares and the underlying business of the corporation – where the adjournment was applied for and granted in order for the respondents to amend their Statement of Claim to correctly reflect their position –

where leave is now sought to adduce fresh documentary evidence, namely the amended statement of claim and a further report both filed in the District Court following the adjournment in the original proceedings – where no special ground for the reception of the documents pursuant to r 766(1)(c) is shown – whether leave should be granted to adduce these two documents now – where the amendment to the statement of claim has not visited any substantial injustice on the applicants – whether leave to appeal against a discretionary decision of a trial judge made during the course of a trial to permit amendments to the statement of claim should be granted

District Court of Queensland Act 1967 (Qld), s 118
Uniform Civil Procedure Rules 1999 (Qld), r 766, r 768

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175; [2009] HCA 27, applied
Cement Australia Pty Ltd v Australian Competition and Consumer Commission (2010) 187 FCR 261; [2010] FCAFC 101, applied
Groves v Groves [2011] QSC 411, cited
Hartnett v Hynes [2009] QSC 225, cited
Hockley v Sowden [2000] QCA 9, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Labaj v Brown & Anor [2005] QCA 54, cited
Pickering v McArthur [2005] QCA 294, followed
Rigney v Littlehales [2005] QCA 252, cited

COUNSEL: K C Kelso for the applicant
S J Given for the first and second respondents

SOLICITORS: Colville Johnstone Lawyers for the applicant
Files Stibbe Lawyers for the first and second respondents

[1] **GOTTERSON JA**: On 9 November 2007 William Ian Keeley and Leanne Fay Keeley ("the Keeleys") and a company in which they then owned all the shares, Marine Warehouse Pty Ltd ("the company") commenced proceedings in the District Court at Brisbane against Robert William Horton and Desley Margaret Horton ("the Hortons"). The relief claimed was judgment for the sum of $135,000 "damages for breach of contract and/or misrepresentation in relation to the sale of a marine business in 2004/5" together with interest and costs.[1]

[2] Immediately prior to the sale transaction, the Hortons together owned 74 per cent of the issued shares in the capital of the company, the remaining 26 per cent being owned by two employees, Mr Lin Liu and Mr Greg Smith, as to one-half each. By 4 January 2005, the Keeleys, the company and the Hortons had all executed an agreement styled "Agreement for the Transfer of Shares in Marine Warehouse Pty Ltd ACN 066 954 112".[2] Similar, but less complex, agreements were also executed

1 AB 718.
2 AB 384-549.

by the Keeleys, the company and Mr Lin Liu on the one hand, and Mr Greg Smith on the other, by that date.[3]

[3] Each agreement identified the subject of the sale as being shares in the company held by the respective vendor parties or party.[4] The consideration agreed to be paid to each employee vendor was $8,516.95. That to be paid to the Hortons was $48,481.10. Each vendor gave extensive warranties which were set out in Schedule 2 to each agreement.[5]

The sale agreement and the misrepresentation as pleaded

[4] The statement of claim[6] filed with the claim pleaded that the Keeleys agreed to purchase "the shareholding and business" of the company from the Hortons for the sum of $668,000.[7] The contractual components of this transaction were pleaded as being:

> "7. By agreements in writing dated the 3rd January 2005 between the Plaintiffs, the Defendants and the other Shareholders, the Defendants agreed to transfer their shares in the Second Plaintiff to the First Plaintiffs for a purchase price of $48,481.10.
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> 8. Collateral to that agreement was an agreement between the Plaintiffs and the Defendants for the Plaintiffs to pay the balance of the said purchase price of $668,000.00 to the other Shareholders for the agreed value of their shares, and the balance to the Defendants."[8]

[5] Significantly, these two paragraphs were admitted in the defence[9] filed by the Hortons on 21 December 2007.[10] However, on 10 November 2011, the Hortons filed an amended defence[11] in which paragraph 8 in the statement of claim was denied and an allegation was made to the effect that the only agreements entered into were the three share sale agreements to which I have referred and that the total purchase price paid by the Keeleys for the shares in the company was $65,515.[12] Leave to withdraw the admission of paragraph 8 had not first been obtained,[13] a point taken by way of pleading in an amended reply[14] filed by the Keeleys on 1 December 2011.[15]

[6] As to the misrepresentation, the Keeleys' case may be summarised briefly as follows. The company carried on the business of a wholesaler of marine products throughout Queensland, Northern New South Wales and the Northern Territory. The Keeleys alleged in the statement of claim that they negotiated with the Hortons

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3 AB 584-617; AB 550-583.
4 Clause 3.1.
5 Clause 7.1.
6 AB 713-718.
7 Paragraph 6.
8 AB 714.
9 AB 720-722.
10 Paragraph 1.
11 AB 727-731.
12 Paragraph 2A.
13 As required by *UCPR* r 188. It was granted on the first day of the trial after argument.
14 AB 732-736.
15 Paragraph 2A.

for the purchase "of the business and shareholding" of the company in 2004; that they agreed with the Hortons that the purchase price would be in accordance with a valuation to be provided by Ham Brothers Pty Ltd ("Ham"), chartered accountants, which would be based on information to be provided by the Hortons to Ham; that in December 2004, Ham valued the company's business at $668,000; and that the Keeleys agreed to purchase "the shareholding and the business" of the company for that sum in reliance upon the Ham valuation.[16]

[7] The major complaint levelled against the Hortons in the pleading is that they failed to disclose to Ham that in late October 2004, they had received correspondence from Hydrive Engineering Pty Ltd which indicated that, as from 1 November 2004, the company's sub-distributorship of Hydrive marine hydraulic steering kits and componentry would be cancelled and that the loss of the sub-distributorship would have an adverse impact on the company's income.[17] In consequence, Ham overvalued the company's business and, in reliance upon the valuation, they overpaid for it.[18]

[8] A second complaint was that in breach of an express warranty that there were no unusual or contingent liabilities against the company, the Hortons failed to disclose that on or about 4 January 2005, the company had settled a work related personal injury claim made by a former employee against it. It was alleged that as a consequence of the settlement, the company was exposed to an increase in WorkCover premiums to the order of $10,000.[19]

[9] The Keeleys alleged that calculated on a "gross profit contribution method", the value of the business was reduced by $125,000 on account of the loss of the sub-distributorship. That amount, together with the amount of the increased premiums, made up the claim of $135,000.

The trial and the adjournment

[10] The action was listed for trial over five days. The trial began on 16 October 2012 and continued on the following two days. Amongst the witnesses who gave evidence in the plaintiffs' case was Mr David Williams, a partner-in-charge of the Forensic Services Division of BDO, chartered accountants of Brisbane. In May 2007, Mr Williams had been a consultant at FWB Partners, Litigation Valuation and Forensic Accountants. On instructions given to him in January 2007 by the Keeleys' solicitors, Mr Williams had produced a report dated 28 May 2007, which was tendered,[20] in which he calculated the loss sustained by the Keeleys as a result of the non-disclosure of the termination of the sub-distributorship as being $98,000. His approach to calculating the loss was to adopt the valuation method used by Ham, namely, capitalisation of future maintainable earnings, and to use it to value the business on the footing that sub-distributorship had been terminated. He then subtracted that value from the $668,000 calculated by Ham to obtain the figure of $98,000.

[11] On the morning of the third day of the trial, the last of the witnesses in the plaintiffs' case was called. When that witness was excused, counsel for the Keeleys indicated

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16 Paragraphs 2-6.
17 Paragraphs 16, 17.
18 Paragraph 18.
19 Paragraph 19.
20 AB 634-657.

that the plaintiffs' case was closed.[21] The learned trial judge then raised a concern he had with an apparent disjunction between the case as pleaded by, and the evidence led for, the Keeleys. He did this before the defence case was opened for the Hortons.

[12] His Honour's concern was that the only evidence of contracts led was of the three share sale agreements. Other evidence, he said, was "all one way", indicating that the company continued to conduct the business after the transaction had settled, a factor which strongly suggested that there was no sale by the company of its business.[22] The Keeleys' counsel requested a short adjournment and upon resumption of the trial later that morning, he asked for leave to amend the statement of claim, presaging that the as yet unformulated amendments would plead that the transaction was one for sale and purchase of the shares in the company only and not of its business.

[13] The learned trial judge also expressed concern that Mr Williams had calculated loss by reference to the Ham valuation, also tendered,[23] which, in turn, had been prepared on an understanding that it was the company's business that was being sold;[24] although, the Ham report did canvass an alternative in which the company, rather than its business, might be purchased.[25]

[14] The matter was stood down late in the morning to allow the Keeleys' counsel time to formulate amendments and the Hortons' counsel to consider them.[26] Upon resumption that afternoon, the Keeleys' counsel made two applications for leave: one was to amend the statement of claim; the other to adduce further evidence from Mrs Keeley on one matter and Mr Williams on another. A draft amended statement of claim was handed to the learned trial judge by the Keeleys' counsel who noted that the amendments were not complete and had some minor errors.

[15] Argument ensued during the course of which the learned trial judge expressed a further concern with respect to the pleading of the content of the contractual arrangements; this time, concerning the amended defence. His Honour observed that whilst it was uncontentious that about $600,000 had been paid in addition to the consideration stated in the three share sale agreements, the Hortons had not clearly pleaded whether the payment of that amount was pursuant to a contract and, if so, what that contract was.[27]

[16] Upon the conclusion of argument, his Honour delivered reasons *ex tempore* for the orders he was about to make. He referred to the decision of the High Court in *Aon Risk Services Australia Ltd v Australian National University*,[28] and the decisions in *Cement Australia Pty Ltd v Australian Competition and Consumer Commission*,[29] *Hartnett v Hynes*[30] and *Groves v Groves.*[31] His Honour took direction from *Aon* noting:

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21 AB 209; Tr3-20 L2.
22 AB 209; Tr3-20 LL3-55.
23 AB 368-376.
24 AB 212; Tr3-23 LL28-38.
25 AB 368.
26 AB 214; Tr3-25 LL18-20.
27 AB 221 Tr3-32 L28 – AB 222 Tr3-33 L36.
28 (2009) 239 CLR 175; [2009] HCA 27.
29 [2010] FCAFC 101.
30 [2009] QSC 225.
31 [2011] QSC 411.

> "… In paragraphs [111] and [112] of the plurality judgment in the High Court the various aspects that are to be taken into account are there detailed. They include the fact that there is no automatic entitlement for leave to amend the pleading and that all matters relevant to the exercise of the power to permit an amendment should be weighed. I'm required to take into account many factors: substantial delay and wasted costs (the concerns of case management); and issues as to what choices parties made in the pre-trial conduct of the particular matters. I am to take into account, as well, the particular rules that now govern case management procedure.
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> As illustrated by the following decision of the Full Court of the Federal Court, in *Cement Australia Pty Limited and others v ACCC* [2010] FCAFC 101 – in the joint judgment of the Court in that case – it is noteworthy that the *Aon Risk* application is "not a one size fits all": see paragraph [51].
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> As indicated there, while various factors are identified as being relevant, the weight to be given to those factors individually, and in combination, and the outcome of that balancing process, may depend upon the facts of the individual case. I have mentioned some of those already."[32]

[17] As to case management issues, the learned trial judge further observed:

> "In this particular case, since I am the Trial Judge and since I have control of when this matter might be set down for further hearing, I am in a position, as I see it, to make conscious decisions as to the effect of delay and the effect on all litigants – perhaps some being shut out by this matter being adjourned. I acknowledge that there are some aspects of that in this particular case. But it is important to note that in the Full Court decision of *Cement Australia* it is stated that the objectives of case management "do not require that every application for amendment should be refused" simply "because it involves the waste of some cost and some degree of delay as it inevitably will" in such cases: at [67].[33]

[18] His Honour expressed the results of his considerations as follows:

> "The general conclusion I reach in this case is, since the trial has already started and substantially all of the eventual evidence which will be led in the plaintiff's case has already been heard, and since it is clear that both parties are now agreed that the agreement in question was for the sale of shares and not the sale of shares and the underlying business of the corporation, Marine Warehouse Pty Limited, that it does indeed need to be sorted out as to what consequences flowed from that particular agreement.
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> Accordingly, bearing in mind the case management matters, including the fact that inevitably some other litigants will suffer as a result of the adjournment that will be necessary, I intend to permit the amendment, and its consequent adjournment."[34]

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32 AB 703; Ruling Tr3-3 L52 – AB 704; Ruling Tr3-4 L41.

33 AB 705; Ruling Tr3-5 LL2-25.

34 AB 705 Ruling Tr3-5 L55 – AB 706 Ruling Tr3-6 L25.

[19] The learned trial judge then made the following orders:

> "1. That the Plaintiffs have leave to amend their Statement of Claim.
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> 2. That the amended Statement of Claim be filed within fourteen (14) days from today's date.
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> 3. That the Defendants have leave to file a further Further Amended Defence within twenty eight (28) days of receipt of the Amended Statement of Claim.
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> 4. That the Plaintiffs have leave to file an Amended Reply within fourteen (14) days of service of the further Further Amended Defence.
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> 5. That the matter be listed for review at 9.15am on 14 December 2012.
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> 6. That the Trial be listed for further hearing on Monday 18 February 2013. The matter will be set down for 5 days.
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> 7. That costs of and incidental to the amendments ordered and to the adjournment of this Trial are reserved."[35]

The appeal

[20] On 1 November 2012, the Hortons filed a notice of appeal[36] against these orders. The leave of this Court to appeal is required under s 118(3) of the *District Court of Queensland Act* 1967. On 13 February 2013, the Hortons filed an application for leave to appeal.[37] Given that the notice of appeal had been filed within 28 days of the making of the orders under appeal,[38] this application ought to be seen as one made for the grant of leave to appeal *nunc pro tunc*.

[21] This application also sought leave to adduce fresh evidence pursuant to *UCPR* r 766(1)(c) or alternatively r 768(1). The fresh evidence is documentary evidence, namely, an amended statement of claim[39] filed in the District Court on 22 November 2012 in reliance upon the leave granted to do so in the orders under appeal and a further report of Mr Williams dated 16 November 2012.[40] These documents are annexed to affidavits of Mr Steven Colville, solicitor for the Hortons, sworn on 16 January[41] and 11 February 2013 respectively,[42] both of which were read without objection at the hearing.

[22] It is not clear from the application whether leave is sought to adduce the fresh evidence for the purposes of the appeal only or of both the application for leave to appeal and the appeal. I shall treat it as referring to both and deal with it first.

Application for leave to adduce fresh evidence

[23] The amended statement of claim repleads the contract as one for purchase by the Keeleys of the issued shares in the company for $668,000 with a collateral

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35 AB 709.
36 AB 737-739.
37 Supplementary Appeal Book ("SAB") 1-3.
38 See *UCPR* r 748.
39 SAB 79-87.
40 SAB 6-61.
41 SAB 4.
42 SAB 62-64.

agreement between them and the Hortons that the consideration be paid as to $65,515 to the respective vendors of the shares pursuant to share sale agreements, and as to the balance, together with any settlement adjustment items, to the company which would then make on-payments at the direction of the Hortons. The amended statement of claim also repleads that the Ham valuation for $668,000 was a valuation of the company (and not of its business), and repleads the loss sustained as being $120,000 on account of the reduced value of the shares acquired by the Keeleys, and the $10,000. Mr Williams' further report calculates the difference in value between the agreed consideration of $668,000 and his valuation of the company excluding the benefit of the Hydrive sub-distributorship as being $119,562. He explains that on this occasion he used his preferred methodology for valuation whereas for his earlier calculation of difference he used the valuation methodology that Ham had used.

[24] The question for this Court is whether leave should be granted to adduce these two documents now. I am unpersuaded that on an appeal against the grant of leave to amend a pleading, it is appropriate to have regard to an amendment or amendments which are proposed or made pursuant to the leave, but subsequently to the grant of it, in order to determine whether leave to amend was correctly granted in accordance with legal principle. I find it difficult to see how, in principle, an amendment of that kind which is proposed or made after the grant of leave, can be influential in, much less determinative of, whether it was correct to grant the leave to amend in the first place. No authority was cited to the Court to suggest that it is.

[25] Besides, no special ground for the reception of the documents pursuant to r 766(1)(c) is shown. Plainly, r 768(1) is inapplicable.

Accordingly, I would refuse the application for leave to adduce fresh evidence.

Application for leave to appeal

[26] This application is for leave to appeal against a discretionary decision of a trial judge made during the course of a trial to permit amendments to the statement of claim. A consequence of that decision was that the trial needed to be adjourned in order to allow sufficient time for such amendments, and any consequential amendments to the defence and then to the reply, to be made. No order was made permitting (or refusing) leave to the Keeleys to adduce further evidence at the trial. That is a matter which, in the ordinary course, the trial judge would determine once the amendments had been finalised.

[27] The difficulty that a party in the position of the Hortons faces in obtaining leave to appeal under s 118(3) against a discretionary procedural ruling is reflected in the following observations of Keane JA, with whom McMurdo P and Dutney J agreed, in *Pickering v McArthur*:[43]

> "…Leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant,[44] and there is a reasonable argument that there is an error to be corrected.[45] Where there is a challenge to the exercise of a discretion in respect of

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43 [2005] QCA 294.

44 See, eg, the comments of this Court in *Hockley v Sowden* [2000] QCA 9; Appeal No 10317 of 1999, 3 February 2000.

45 See, eg, *Labaj v Brown & Anor* [2005] QCA 54; Appeal No 403 of 2004, 7 March 2005; *Rigney v Littlehales & Ors* [2005] QCA 252; Appeal No 11267 of 2004, 22 July 2005.

> a matter of pleading or procedure, it will usually be difficult to satisfy the first of these criteria, especially where the discretion in question was exercised so as to permit the continuation of proceedings towards a hearing on the merits. …"

His Honour's reference to error need be understood as a reference to an error of the kind explained in *House v The King*:[46] see *Cement Australia* at [23].

[28] To my mind, the decision to allow the amendment to the statement of claim has not visited any substantial injustice on the Hortons. Whilst inconvenience in terms of a delayed trial and determination of it and possible increase in costs were mentioned in argument, no element of injustice was identified in submissions on their behalf.

[29] Nor has any error been demonstrated. The purpose of allowing amendment was to bring pleading clarity to the respective allegations of what it was for which the Keeleys had agreed to pay, and did pay, $668,000. As his Honour observed, by the close of the plaintiffs' case, neither the statement of claim nor the amended defence dealt comprehensively with that topic. What the payment was for is, of course, no mere technicality. However, its relative forensic importance is to be seen in the context of a dispute in which the payment is uncontroversial and the essential controversial components always have been the Keeleys' allegations that due to a non-disclosure of the impending loss of the sub-distributorship, they agreed to overpay for what they were to acquire. The nature and scale of the loss for which they have claimed compensation has remained substantially unchanged throughout.

[30] The learned trial judge referred to authorities which enunciate the principles upon which amendments to pleadings are allowed. The submissions in support of the application have not sought to identify any misunderstanding or misapplication of them as might amount to an error of the relevant kind. Consequently, I am firmly of the view that an appeal against the orders made by the learned trial judge would fail.

Disposition

[31] Consistently with these reasons, I would refuse leave to appeal.

[32] I would add that if there are challenges to be made concerning either the amendments to the statement of claim or to Mr Williams' further report, the appropriate forum for making them is before the learned trial judge, and not before this Court. I express no view on whether those amendments made are within the scope of the leave to amend or are otherwise properly made, or whether leave should be given to adduce further evidence in the plaintiff's case at the trial, including evidence by way of oral testimony of Mr Williams or the tendering of his second report.

Orders

[33] I would propose the following orders:

1. Leave to adduce fresh evidence refused.
2. Leave to appeal refused.
3. Applicants, Robert William Horton and Desley Margaret Horton, to pay the costs of the respondents, Willian Ian Keeley, Leanne Fay Keeley and Marine Warehouse Pty Ltd of the application for leave to appeal and of the appeal on the standard basis.

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46 (1936) 55 CLR 499 at 505.

[34] **MARGARET WILSON J:** I agree with the orders proposed by Gotterson JA, and with his Honour's reasons for judgment.

[35] **DOUGLAS J:** I also agree with the orders proposed by Gotterson JA and with his Honour’s reasons.