

SUPREME COURT OF QUEENSLAND

CITATION: *Westpac Banking Corporation v Knight Property Investments No. 3 Pty Ltd & Anor (No 3)* [2014] QSC 270

PARTIES: **WESTPAC BANKING CORPORATION**
ABN 33 007 457 141
(plaintiff)
v
KNIGHT PROPERTY INVESTMENTS NO. 3 PTY LTD
ACN 123 215 154
(first defendant)
THOMAS PATRICK HAYES
(second defendant/plaintiff by counterclaim)
SEAN PATRICK DALLIMORE
(first defendant by counterclaim)
BALMAIN NB COMMERCIAL MORTGAGES LIMITED
ACN 074 619 980 trading as BALMAIN COMMERCIAL NB98174924 (NSW) (a firm)
(second defendant by counterclaim)
TIMOTHY LEO DOONEY
(third defendant by counterclaim)

FILE NO: BS No 7887 of 2007

DIVISION: Trial

PROCEEDING: Application

DELIVERED EX TEMPORE ON: 24 September 2014

DELIVERED AT: Brisbane

HEARING DATE: 19 September 2014; 23 – 24 September 2014

JUDGE: Peter Lyons J

ORDER:

- 1. The counterclaim against the first defendant by counterclaim and the third defendant by counterclaim is dismissed.**
- 2. Leave is granted to the second defendant to amend, by 25 September 2014, the defence and counterclaim in accordance with Exhibit 1 (from the application to amend) and to make such further amendments to paragraphs 20 and 22B as may be necessary to correct the company references and cross-referencing.**
- 3. To the extent necessary in light of order 2, the**

**counterclaim of the second defendant filed on 8
January 2013 is struck out.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – AMENDMENT – where the second defendant’s counterclaim was struck out – where the second defendant seeks leave to amend his defence and counterclaim under r 375 of the *Uniform Civil Procedure Rules 1999* (Qld) – where the proposed pleading adds a new cause of action against the plaintiff and second defendant by counterclaim – where the proposed pleading otherwise narrows the counterclaim and no longer pursues it against the first and third defendants by counterclaim – where the application to amend is opposed because it is submitted that the counterclaim is outside the limitation period, there is no sufficient explanation for its lateness, it causes strain on the other parties, the claim sought to be raised is weak, and it causes prejudice – whether the question about the expiry of the limitation period should be determined on an interlocutory application – whether the new cause of action arises out of the same or substantially the same facts – whether a grant of leave to amend the counterclaim and defence is appropriate

Uniform Civil Procedure Rules 1999 (Qld), r 375, r 376(4)

Mokrzecki v Popham [2013] QSC 123, followed

COUNSEL: E Goodwin for the plaintiff and first defendant by counterclaim
D J Campbell QC, with B A Hall, for the second and third defendants by counterclaim
P A Kronberg for the second defendant

SOLICITORS: Allens for the plaintiff and first defendant by counterclaim
Minter Ellison for the second and third defendants by counterclaim
No appearance for the second defendant

- [1] On 8 August 2014, I published reasons indicating that I was prepared to strike out the second defendant’s counterclaim against the plaintiff and three other parties who were defendants to the counterclaim. I was prepared to do that primarily because the loss which was pleaded in the counterclaim was not loss which the second defendant could claim. I indicated that I would be prepared to consider amendments to the counterclaim.
- [2] The second defendant was, at that time and for a much longer period, representing himself. He has recently obtained the assistance of counsel. A new proposed pleading has been prepared which seeks to amend both the defence and counterclaim.

The course the proposed pleading takes is broadly consistent with the course taken in the pleading containing the counterclaim I was prepared to strike out, the counterclaim being based to a significant extent on allegations made in the defence. The present application is for leave to make those amendments.

- [3] The counterclaim the subject of my earlier reasons alleged fraud and unconscionable conduct against the plaintiff and all of the defendants to the counterclaim. It also alleged misleading conduct under the *Trade Practices Act 1974* (Cth) against the plaintiff. It sought some other relief not relevant for present purposes.
- [4] The proposed pleading seeks relief on the grounds of misleading conduct, on the basis of provisions of the *Australian Securities and Investment Commission Act 2001* (Cth). Those provisions are analogous to the misleading conduct provisions of the *Trade Practices Act*.
- [5] The allegations of greatest relevance relate to the circumstances in which the second defendant came to execute a guarantee on which he is, in the present proceedings, being sued by the plaintiff. In particular, the proposed pleading alleges that, at the time he executed the guarantee, it was not specifically made known to him that a part of security being offered by another party participating in the project was to be provided through an entity known as Knight Property Investments No. 3 Pty Ltd, referred to as 'KPI3'. The participation of the other party in the project is what led to the application for and grant of the loan secured by the second defendant's guarantee.
- [6] The proposed pleading also alleges KPI3 was a shelf company, without assets and only partly under control of the other party and that another company associated with that party, Knight Corporation Limited, referred to as 'Knight', had already granted a fixed and floating charge over all its assets to the National Australia Bank Limited. These matters are pleaded in paragraphs 23A to 23C.
- [7] The proposed pleading alleges that the non-disclosure of these matters constituted misleading and deceptive conduct by silence, which led to the execution of the guarantee. The damages claimed are the amount for which the defendant would otherwise be liable under the guarantee.
- [8] The application is opposed. The parties opposing it submit that the amendment would add new causes of action outside the limitation period. It is not contentious that the counterclaim raises new causes of action. It is said that the limitation period has expired because the second defendant suffered loss more than six years ago. That is on the basis that more than six years ago he became liable to meet his obligations under the guarantee to pay at least some money, and perhaps the full amount claimed in the present action to the plaintiff.
- [9] That, however, is contested by the second defendant, it being alleged that there has been a waiver of the right to allege a cause of action then accrued. While that submission is not particularly compelling, I do not propose to rule on it. There are many authorities, some of which have been referred to by Philip McMurdo J in *Mokrzecki v Popham* [2013] QSC 123, which warn against deciding questions about the expiry of a limitations period on an interlocutory application such as the present one. It seems to me that that it is both undesirable and unnecessary to do so in the present case.

- [10] Rule 375 of the *Uniform Civil Procedure Rules 1999* (Qld) authorises the court to allow a party to amend a pleading in the way and on the conditions the court considers appropriate. The second defendant needs leave in the present case because the trial is already part-heard, and the time has long passed when he might amend his pleading without leave.
- [11] Rule 376 applies if a relevant period of limitation has ended. As I have said, I do not intend to determine whether that is the case. Accordingly, it is not possible for me to determine this application by the direct application of rule 376. On the other hand, it seems to me that I can determine this application under rule 375, and if am satisfied that the circumstances demonstrate that rule 376(4) would apply, then I could simply grant leave. On the other hand, if I am not so satisfied, then I could grant leave, either on a condition or, as Philip McMurdo J did in some cases in *Mokrzecki*, by ordering that the amendments take effect as if the counterclaim had been instituted today, or perhaps recently, when this application was first made.
- [12] It is therefore necessary to focus on the provisions of rule 376(4). Its effect is to permit the court to grant leave to make amendments to a pleading to include a new cause of action, if the court considers it appropriate, and the new cause of action arises out of the same facts, or substantially the same facts, as a cause of action for which relief has been claimed in the proceeding, in this case, by the second defendant.
- [13] It was not contentious that the proposed pleading arises out of substantially the same facts as the causes of action raised by the second defendant in the counterclaim the subject of my earlier ruling. The real question is whether it would be appropriate to grant leave.
- [14] A number of matters were raised in support of the proposition that it would not be appropriate to do so. One was that the application is made at a very late stage. I have already mentioned that a substantial part of the trial has already taken place. It is obviously a relevant consideration, therefore, that the amendment is sought to be made at such a late stage. However, mere lateness is not itself an absolute bar to the grant of leave.
- [15] The amendments, it seems to me, identify a case which is narrower and better-focused than the case raised on the second defendant's present pleading. I recognise that, in view of my earlier reasons, that is of no real advantage to the second and third defendants to the counterclaim, but it is of advantage, it seems to me, to the court to have the case conducted on a more focused basis and is also of advantage to the plaintiff. It is likely to result in a substantial saving of time and cost, at least in respect of the plaintiff.
- [16] The second and third defendants refer to the fact that litigation always causes strain for the parties and that that is a factor which should be weighed up. It must be recognised that that is so. Nevertheless, the matters which are raised by the amendments represent, as I have indicated, a narrower case than the case which they have faced to date. Moreover, under the proposed pleading, the counterclaim would no longer be pursued against Mr Dooney, who at present is the third defendant to the counterclaim.

- [17] It was also submitted that a reason why it would be inappropriate to grant leave at this stage is that no explanation was given for not raising the proposed cause of action earlier. In a sense, the reason why the proposed pleading has been prepared is relatively obvious. It is the result of a consideration of the case with fresh eyes and by a person who, unlike the second defendant, has legal qualifications. It is far from uncommon that when new legal representation is obtained by a party, the representative or representatives take a different view about the appropriate way to conduct the case. That is not, however, an explanation as to why the cause of action was not included in earlier pleadings.
- [18] For much of the course of the action, the second defendant has represented himself. It is unlikely that he would appreciate the nature of the claim in the proposed pleading and the possibility of raising it. In reaching this conclusion, I rely in part on my own observations of the conduct of the second defendant during the trial and at hearings prior to the trial. However, that does not explain why the pleadings previously prepared by lawyers did not include the claim. While that may be a matter which, to some extent, weighs against the grant of leave, I do not think the absence of an explanation from those lawyers to be of great significance.
- [19] A number of the submissions made by those opposing the application went to the weakness of the claim sought to be raised. They focused in particular on paragraph 23A of the defence which alleges that the second defendant was not informed that part of the security provided by the other party would be through KPI3. They refer to paragraph 20 of the proposed pleading, which alleges that on the day before the guarantee was executed, the plaintiff submitted a document which recorded the involvement of KPI3 and another entity, Knight.
- [20] The proposed pleading, however, alleges that on that day, the document – a letter of offer – was submitted to the third defendant by counterclaim, who, it would seem representing the second defendant by counterclaim, was performing the role of a finance broker. It does not go so far as to say that on that day, or even the following day, the second defendant received that letter of offer. Reference is also made to the fact that on 20 February 2007, the second defendant signed a loan agreement which recorded the involvement of KPI3 as providing a guarantee and a fixed a floating charge.
- [21] The significance of these things in the context of the allegations made in the proposed pleading and the claim made by the second defendant may be more fully assessed at trial. It seems to me there may well be some difficulties in that aspect of the case proposed to be pleaded but I do not think it appropriate to determine this application by reference to that weakness.
- [22] I note also that paragraph 23B and 23C make further allegations, in effect, as to the worth of KPI3 and to the value of a guarantee and charge given by Knight in view of the security given to the National Australia Bank. If there is strength in the proposed counterclaim, it is more likely to be located in those allegations and the consequential matters sought to be raised in the proposed pleading.
- [23] The matter which has troubled me most is the submission made on behalf of the plaintiff that it would suffer prejudice if the application were granted. That is because the amendments raise new factual matters and with the passage of time, it is

likely that memories have deteriorated as to the relevant events. It is therefore necessary to focus more carefully on what they might be and what information is available to indicate to what extent the plaintiff would be prejudiced if leave is granted.

- [24] In essence, the allegation of fact which would have to be addressed is the allegation of non-disclosure of the matters I have mentioned relating to KPI3 and Knight. The primary person who would deal with that allegation on behalf of the plaintiff is the first defendant by counterclaim who, at the time, was an employee of the plaintiff.
- [25] At this point, I should note something about the history of the pleadings of the matter. The action commenced in 2009. The second defendant's defence was first provided in September of that year. It contained allegations about a meeting which took place, it would seem, on 20 February 2007. The only time at which it is likely that the first defendant by counterclaim might have communicated anything about KPI3 or Knight was at that meeting. I say that because during the trial, he has given evidence that he did not communicate with the second defendant prior to that meeting, his communications prior to that being through the second and third defendants by counterclaim.
- [26] The 2009 defence alleged the second defendant was not provided with legal and/or financial advice, nor was he given an opportunity by the plaintiff to have the benefit of such advice before signing the guarantee. That defence also alleged that the guarantee was executed in circumstances of duress.
- [27] The reply of the plaintiff pleads to those and related allegations in considerable detail. That pleading could not have been prepared without recourse to the first defendant by counterclaim to obtain from him detailed instructions about the events which occurred at that meeting. There have been amendments both to the defence and the reply subsequently which, it seems to me, inevitably involved the taking of further instructions from the first defendant by counterclaim. His evidence in the trial deals with the meeting in considerable detail. It seems highly likely, therefore, that on a number of occasions, the first defendant by counterclaim has had to turn his mind with some care to the events which occurred at that meeting. It is not as if he is being asked for the first time after the passage of more than seven years to carry out that exercise.
- [28] While there has been disclosure of those documents which are required to be disclosed in these proceedings, there is nothing before me to indicate the extent to which the first defendant by counterclaim's recollection has been recorded, at any time since the provision of the September 2009 defence, of the events at the meeting of 20 February 2007. Such a record would be not uncommonly prepared, often in the form of a statement, and would be the subject of privilege. Nor is there evidence as to whether the first defendant by counterclaim has now a recollection about these matters, nor is there evidence about whether he did or did not have a practice of disclosing matters of the kind raised by, in particular, paragraphs 23B and 23C of the proposed pleading.
- [29] These are matters very much within the knowledge of the plaintiff and the first defendant by counterclaim. They are parties to the proceedings adverse to the second defendant. It was said that to rely on the fact that there is no evidence about these

matters in the present application would be to reverse the onus, but it seems to me where there are questions of privilege involved and where the information is in the possession of a party adverse to the second defendant who makes this application, it is not reversing the onus to take note of the absence of any such evidence.

- [30] Reference was also made to the fact that a Ms Gordon was present on behalf of the plaintiff at the meeting. It is apparent from the plaintiff's opening of the case that she had a lesser and limited role. She was described as being there as a transactional associate to help with the execution of documents so that the prospect that she might have had some relevant knowledge is not easily assessed. Again, there is nothing before me about the state of her recollection. It is obvious that, at the time of these events, she was an employee of the plaintiff; however, I am not aware of whether the material indicates that she still is.
- [31] In the end, it seems to me, notwithstanding a recognition that memories are typically adversely affected by the passage of time, the issues which are raised are very close to issues which have been previously canvassed extensively. I consider, therefore, that the raising of some additional matters as appear in the proposed pleading does not prevent the plaintiff from having a fair trial. I accordingly propose to grant leave to the second defendant to amend the defence and counterclaim.