SUPREME COURT OF QUEENSLAND

CITATION:	*Eversden Pty Ltd v Miladi* [2015] QCA 126
PARTIES:	**EVERSDEN PTY LTD** ACN 105 484 240 (appellant) **v** **ARMIN MILADI** (respondent)
FILE NO/S:	Appeal No 8398 of 2014 DC No 3991 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – Unreported, 8 August 2014
DELIVERED ON:	10 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2015
JUDGES:	Holmes and Philippides JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The orders made by the learned primary judge on 8 August 2014 be set aside and in lieu thereof it is ordered that:** **(a) the further amended application filed 29 July 2014 be dismissed;** **(b) the respondent pay the appellant's costs of that application.** **3. The respondent pay the appellant's costs of the appeal.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PARTIES – AMENDMENT – where respondent issued proceeding against Aussie Country Leisure Entertainment Pty Ltd (Aussie Country) for damages for personal injuries allegedly sustained when assisting another person who was engaged in target shooting at a resort at Canungra (the premises) – where Aussie Country was alleged to be the owner, operator and occupier of the premises – where the respondent obtained default judgment for damages to be assessed against Aussie Country – where Aussie Country

	was subsequently deregistered – where the appellant was in fact the owner of the premises at the material time – where the respondent obtained orders that the default judgment be set aside pursuant to r 290 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR), that the appellant be added as a defendant under r 69(1)(b)(i) and r 69(2)(f) UCPR and that leave be given to make an amendment to the statement of claim, after the expiry of the limitation period, under r 376(4) UCPR – whether the primary judge erred in the exercise of the discretions under r 290, r 69(1)(b)(i) and r 69(2)(f), and r 376(4) UCPR
	Corporations Act 2001 (Cth) *Limitation of Actions Act* 1974 (Qld), s 11 *Personal Injuries Proceedings Act* 2002 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld), r 69(1)(b)(i), r 69(1)(b)(ii), r 69(2)(f), r 290, r 376(4)
	House v The King (1936) 55 CLR 499; [1936] HCA 40, cited *Macquarie Bank Ltd v Fu-Shun Lin* [2002] 2 Qd R 188; [2001] QSC 341, cited *Pianta v BHP Australia Coal Limited* [1996] 1 Qd R 65; [1995] QCA 53, cited *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; [1998] HCA 5, cited *Wolfe v State of Queensland* [2009] 1 Qd R 97; [2008] QCA 113, cited *Yi v The Service Arena Pty Ltd* [2001] NSWCA 400, cited
COUNSEL:	C Jennings for the appellant K C Fleming QC, with A J See, for the respondent
SOLICITORS:	Nyst Legal for the appellant Kerin Lawyers for the respondent

[1] **HOLMES JA:** I agree with the reasons of Philippides JA and the orders she proposes.

[2] **PHILIPPIDES JA:** On 17 October 2012, the respondent, Armin Miladi, as plaintiff, commenced a District Court proceeding against Aussie Country Leisure Entertainment Pty Ltd (Aussie Country), as defendant, claiming damages for personal injury allegedly caused on 30 January 2011 by Aussie Country's negligence and breach of contract.[1]

[3] On 14 January 2014, the respondent obtained default judgment with damages to be assessed. Soon after, on 17 February 2014, at ASIC's instigation, Aussie Country was deregistered. It remains deregistered.

[4] The limitation period applicable to the respondent's claim expired on 31 January 2014, three years after the date of the alleged injury.[2]

[5] On 8 August 2014, the respondent was successful in obtaining the following orders under the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR):

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1 Aussie Country did not participate in the pre-action procedures required by the *Personal Injuries Proceedings Act* 2002 (Qld) and consequently the respondent obtained orders under that Act dispensing with the pre-action procedures and giving leave to commence a proceeding against Aussie Country.

2 *Limitation of Actions Act* 1974 (Qld), s 11.

(a) that the default judgment be set aside pursuant to r 290 of the UCPR;

(b) that Eversden Pty Ltd be added as a second defendant under r 69(1)(b)(i) and r 69(2)(f) of the UCPR; and

(c) that the respondent be given leave to make an amendment to the pleadings after the expiration of the limitation period under r 376(4) of the UCPR.

[6] Eversden Pty Ltd appeals against those orders. The grounds of appeal raise the following issues:

1. Whether the learned primary judge erred in finding that the appellant was able to be joined as a second defendant in the proceeding against Aussie Country under r 69 and, in particular, whether:

   (a) in terms of r 69(2)(f), its absence from that proceeding was an impediment to the maintenance of the claim made or the granting of relief sought against Aussie Country (ground 1); and

   (b) in terms of r 69(1)(b), the appellant was a necessary party to enable the Court to adjudicate effectually and completely on all matters in dispute connected with the proceeding between the respondent (as plaintiff) and Aussie Country (ground 2).

2. Whether the learned primary judge erred in finding that the new cause of action sought to be pursued against the appellant arose out of substantially the same facts as the cause of action for which relief had been claimed, such that the Court could give leave to make an amendment after the expiration of the limitation period under r 376 of the UCPR (grounds 3 and 5.1).

3. Whether the learned primary judge erred in exercising the discretion to set aside the default judgment under r 290 of the UCPR because the proposed amendments did not disclose an arguable cause of action against the appellant (grounds 4 and 5.2).

Relevant rules of the UCPR

[7] Rule 69 of the UCPR relevantly provides:

> "**Including, substituting or removing party**
>
> (1) The court may at any stage of a proceeding order that—
> …
>
> (b) any of the following persons be included as a party—
> …
>
> (ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.
>
> (2) However, the court must not include or substitute a party after the end of a limitation period unless 1 of the following applies—
> …
>
> (f) for any other reason—
> …

(ii) relief sought in the proceeding before the end of the limitation period can not be granted;

unless the new party is included or substituted as a party."

[8] Rule 376 of the UCPR relevantly provides:

"**Amendment after limitation period**

(1) This rule applies in relation to an application, in a proceeding, for leave to make an amendment mentioned in this rule if a relevant period of limitation, current at the date the proceeding was started, has ended.

…

(4) The court may give leave to make an amendment to include a new cause of action only if—

(a) the court considers it appropriate; and

(b) 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 already been claimed in the proceeding by the party applying for leave to make the amendment."

The claim against Aussie Country

[9] The respondent's claim against Aussie Country concerned an incident alleged to have occurred at a rural property resort, known as "Gumnuts Farm Resort" located at Canungra, Queensland, offering temporary accommodation and various activities, including clay target shooting (the premises).

[10] The statement of claim alleged that, at all material times, Aussie Country was the owner, operator and occupier of the premises at Canungra (para 1(b)). It was also alleged that, on 30 January 2011, the respondent was a lawful entrant on the premises who had entered into a contract with Aussie Country to stay at the premises (paras 2 and 3).

[11] The statement of claim made the following allegations concerning an incident on 30 January 2011:

- the respondent and his then girlfriend were participating in target shooting on the premises (para 5);
- the respondent "was instructed by an employee of [Aussie Country] to place his hand on his girlfriend's shoulder so that she would not experience a 'kick back' from the gun" (para 6), which he did, relying on the instructions (para 7);
- when fired, the gun emitted a loud noise (para 8);
- the respondent was not provided with any protective hearing devices while engaging in that activity (para 9); and
- as a result of the incident, the respondent sustained "personal injury to his hearing, loss and other damage" (para10).

[12] The statement of claim alleged that it was an implied term of the contract with Aussie Country and/or the duty of Aussie Country to take all reasonable precautions for the

respondent's safety while on the premises; not to expose him to any risk of damage or injury of which it knew or ought to have known; to provide and maintain safe premises; and to take reasonable care that the premises were safe (para 4).

[13] It was alleged that the respondent's personal injuries, loss and other damage were caused by Aussie Country's negligence and/or breach of duty of care and/or breach of contract as follows:

(a) failing to take any adequate precautions for the respondent's safety while on the premises (para 11(a));

(b) exposing the respondent to a risk of damage or injury of which it knew or ought to have known (para 11(b));

(c) failing adequately to warn the respondent of the risk of injury associated with not wearing protective hearing devices (para 11(c)); and

(d) failing to provide the respondent with protective devices which a reasonable person would or ought to have known would protect him (para 11(d)).

The proposed amended statement of claim

[14] By the proposed amended statement of claim, it was newly alleged[3] against the appellant that:

(a) at all material times, the appellant was the owner of the premises, the only member and shareholder of Aussie Country and had a common director with Aussie Country (para 1(c));

(b) the appellant had, sometime after September 2008, entered into an agreement with Aussie Country to allow the latter to conduct a business on the premises, (para 2);

(c) as part of that business, Aussie Country provided accommodation and "recreational activities", including "the hazardous activity of rifle target shooting" (para 3);

(d) a contract was entered into between the respondent and Aussie Country whereby the respondent was "utilising activities provided by [both Aussie Country and the appellant] at the said premises" (para 6);

(e) on 30 January 2011 the respondent and his then girlfriend were "participating in the recreational activity of target shooting as provided by [Aussie Country] on the [appellant's] premises" (para 11).

[15] The proposed pleading made new allegations as to the appellant's duty of care to the respondent, as follows:

(a) "Because of the hazardous activity associated with the use of rifles on the premises, the [appellant] owed all persons who either entered or were nearby the premises, a duty of care to ensure that they were not harmed by the hazardous activity arising out of [Aussie Country's] business" (para 4);

(b) the appellant owed the respondent an obligation:

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[3] At the hearing before the primary judge, the respondent indicated he did not seek to pursue a claim made in the proposed pleading that the appellant had breached a statutory obligation under the *Workplace Health and Safety Act* 1995 (Qld).

(i) "to ensure that [Aussie Country] would take all reasonable precautions to ensure that [the respondent] was not harmed by the hazardous activity of [Aussie Country], while on, or nearby the said premises" (para 9(i)); and

(ii) "to provide and maintain safe premises and to take reasonable care that the premises were safe" (para 9(ii)).

[16] It was also alleged in the proposed pleading that the respondent's personal injuries were caused by the appellant's negligence, breach of duty of care or breach of contract. In that respect, it was alleged that the appellant owed "a non-delegable duty" because it "undertook the care, supervision and control" of Aussie Country and of the property (paras 18(a)(i) and (ii)).

[17] Particulars of the care, supervision and control the appellant exercised over Aussie Country were pleaded as follows:

(a) the appellant was the owner of the land upon which Aussie Country conducted its business (para 19(a));

(b) Mr James Oliver Webster was a director of both Aussie Country and the appellant (para 19(b));

(c) "At all material times, [Aussie Country] and as a result James Oliver Webster being a director of [Aussie Country and the appellant], had knowledge and was aware of the type and nature of hazardous activities that [Aussie Country] was conducting through its business and the associated magnitude of risk that such activities carried" (para 19(c)).

[18] The new allegations of breach alleged (in para 20) against the appellant were that it breached the duty it owed to the respondent by:

- failing to take any adequate precaution or any reasonable care for the safety of the respondent, taking into account the significant magnitude of the hazardous activities and the risk associated with the respondent firing a loaded gun;
- exposing the respondent to a risk of damage or injury which a reasonable person would have known or ought to have known;
- failing to adequately warn the respondent of the risk of injury associated with not wearing protective hearing devices;
- failing to provide the respondent with protective devices which a reasonable person would have known or ought to have known would protect the respondent;
- failing to require Aussie Country to undertake any or any reasonable risk assessment of the business activities undertaken by Aussie Country;
- failing to ensure that Aussie Country took adequate precautions for the safety of the respondent whilst he was on the said premises;
- failing to ensure that Aussie Country did not expose the respondent to a risk of damage or injury of which a reasonable person would have known or ought to have known;
- failing to adequately ensure that Aussie Country warned the respondent of the risk of injury without wearing protective hearing devices;
- failing to ensure that Aussie Country provided the respondent with protective devices which a reasonable person would have known or ought to have known

would protect the respondent when engaged in or associated with the hazardous activity; and

- failing to require Aussie Country to take out any or adequate public liability insurance.

Findings of the learned primary judge

[19] In his ex tempore reasons, the learned primary judge stated that Aussie Country was deregistered soon after the default judgment was obtained, "thereby … depriving the [respondent] of any realistic likelihood of recovering anything by way of damages … to be assessed." His Honour noted that the respondent sought to set aside that judgment under r 290 "so that he may add another company as a second defendant" which he alleged was in fact the owner of the land upon which the incident occurred.

[20] His Honour held that, if the respondent had an arguable cause of action against the appellant, it would be appropriate under r 290 to set aside the default judgment. His Honour first considered whether the discretions under r 69(1), r 69(2) and r 376(4) should be exercised before returning to the discretion to set aside the default judgment under r 290.

[21] His Honour found that:

(a) In the circumstances of the present case, it was desirable, just and convenient to add the appellant as a second defendant for the purposes of r 69(1)(b)(ii).

(b) The respondent had demonstrated that r 69(2)(f) was met. (It appears from the order made that his Honour was so satisfied on the basis that the relief claimed in the proceeding before the end of the limitation period could not be granted unless the appellant was added as a second defendant, thus enlivening r 69(2)(f)(ii).)

(c) It was appropriate to add the new cause of action sought to be pleaded in the proposed amended statement of claim and that new cause of action arose out of substantially the same facts as the existing pleading for the purposes of r 376(4).

(d) The respondent's proposed amended statement of claim showed "some basis for a successful claim being made" and there was an "arguable case to be made against" the appellant such that the default judgment should be set aside under r 290.

Did the exercise of the discretions under r 69 and r 376 miscarry?

[22] As the primary judge recognised, there could be no inclusion of the appellant as a party under r 69, nor any amendment under r 367 without the default judgment being set aside under r 290, so as to revive the claim brought by the respondent. It is convenient however to first address the discretions under r 69 and r 367. Unless those discretions could be exercised in favour of the respondent, there could be no utility in setting aside the default judgment under r 290.

Was there error in the exercise of the discretion under r 69(1)(b) and r 69(2)(f)?

[23] A proposed party may be joined as a party pursuant to r 69(1)(b)(ii) where it would be "desirable, just and convenient" to enable the Court to adjudicate effectually and completely on all matters in dispute connected with the proceeding. However, when a party is sought to be joined after the expiration of the applicable limitation period, the Court must not do so unless one of the circumstances identified in r 69(2) is satisfied, relevantly here r 69(2)(f)(ii).

[24] The appellant argued that the primary judge erred in finding the requirements of r 69(1)(b)(ii) had been satisfied. The proceeding against Aussie Country concerned the respondent's claim for damages for personal injury arising out of an activity conducted by Aussie Country and was distinct from the complaint made against the appellant. There was no impediment to the Court adjudicating on all the issues raised in the proceeding against Aussie Country, which it did by the default judgment. The complaint the subject of the proceeding did not concern the appellant and the appellant was not affected by the default judgment.[4]

[25] The respondent's submission was that the proceeding against Aussie Country included an allegation that it was the owner of the premises. That claim proceeded on the mistaken basis that the owner and operator of the resort were the same entity. It was not disputed that the appellant was, in fact, the owner at the material time. There were thus two separate entities relevantly associated with the premises; the owner of the land on which the resort business was conducted (being the appellant) and the operator of the business (being Aussie Country). In so far as the claim alleged a duty owed by the owner and a breach thereof, it might be said that the joinder of the appellant was desirable, just and convenient to enable the Court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.

[26] However, the difficulty with the respondent's submission (and with the approach of the primary judge) was that, although there was a plea that Aussie Country was the owner and that the duty of care it owed included a duty in relation to providing safe premises, the gravamen of the alleged breach concerned the failure to provide a protective hearing device while assisting another person in target shooting. It is not apparent how that concerned a breach of a duty owed by Aussie Country as owner of the premises, as opposed to the negligent operation of the business conducted on the premises.

[27] But, even if it could be argued that the presence of the appellant was required under r 69(1)(b)(ii), the proposition that r 69(2)(f)(ii) was able to be satisfied must be rejected. It cannot be accepted, as the primary judge appeared to find, that Aussie Country's deregistration precluded the pleaded relief sought against that entity from being granted. The obvious course open to the respondent was to apply for the reinstatement of the company under the *Corporations Act* 2001 (Cth), which the respondent did not do. It did not follow from Aussie Country's deregistration that the relief sought against it could not be granted. Indeed, the relief sought by the respondent, namely "damages for personal injuries, other loss and damage", was able to be granted by virtue of the respondent obtaining default judgment for such damages to be assessed. The primary judge erred in failing to so find. The exercise of the discretion under r 69(2)(f)(ii) miscarried accordingly.

[28] In its written submissions, the respondent also sought to argue that the claim was not able to be *maintained* against the deregistered Aussie Country alone (even if that company were to be reinstated) as it was not the owner of the premises. That submission is misconceived. It seeks to raise the circumstance specified in r 69(2)(f)(i), which refers to the position where "a claim made in the proceeding brought before the end of the limitation period cannot be maintained". As was accepted by senior counsel for the respondent, that was not the basis on which the respondent satisfied the primary judge that r 69(2)(f) was made out. The respondent did not cross-appeal to argue that his Honour erred in that regard.

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4 See *Macquarie Bank Ltd v Lin* [2002] 2 Qd R 188 at 192-193 at [14]-[15].

Did the new cause of action sought to be pleaded arise out of substantially the same facts for the purpose of r 376 UCPR?

[29] In addition to the impediment to the joining of the appellant presented by r 69(2), there was a further insurmountable difficulty for the respondent in satisfying the requirement of r 376(4) in terms of the proposed amendment. That rule was considered in *Wolfe v State of Queensland*.[5] Keane JA (with whom the other members of the Court agreed) held[6] that an amendment "which sets up a different breach of duty" is not within the scope of r 376(4)(b). His Honour explained[7] that the determination of the question of whether an act or omission involved a breach of a duty of care depended upon the identification of the particular facts said to reveal a breach of the duty. His Honour referred to *Pianta v BHP Australia Coal Limited*,[8] where this Court adopted a similar approach as to the determination of whether a new cause of action was pleaded and whether it depended on facts which were not substantially the same, and to the following statement of the Court:[9]

> "The facts out of which each of the causes of action arose were those giving rise to the duty of care, those which constituted a breach of that duty and the fact of injury. The submission that the duties of care owed by the respondent to the applicant in each case were the same because the parties were the same and they were, in each case, in the relationship of employer and employee is correct only in a general sense. Relevantly the precise duties owed are correlative to the breaches of those duties and, as the applicant conceded, the facts constituting the breaches of duty in each case were quite different; neither the same nor substantially the same."

[30] The amendment to the pleading before the Court in *Wolfe* alleged negligence by the State in relation to work which should have been done in the maintenance of the sub-surface of a highway to prevent welts forming. That was held to raise a different breach of duty from that previously pleaded which concerned the maintenance of the surface of the highway to correct welts that had already formed. As Keane JA observed:[10]

> "On no fair reading of the allegations pleaded prior to the amendment could it be said that they were apt to alert the defendant that the case made against it comprehended a complaint of breach of duty in relation to the State's obligation to exercise reasonable care to maintain the highway other than as to the inadequacy of the State's efforts to maintain the surface of the highway."

[31] In advancing the argument that the owner of the premises would have been alerted to the case now sought to be made against it, the respondent relied on the allegations previously made in para 4 (as to a duty to take all reasonable precautions for the safety of the respondent while he was on the said premises and the duty not to expose him to any risk or damage or injury of which it knew or ought to have known and to take reasonable care that the premises were safe) and the allied breaches alleged in paras 11(a) and (b). That submission must be comprehensively rejected.

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5 [2009] 1 Qd R 97.

6 At [17].

7 [2008] QCA 113 at [13] referring to *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 479 [127] per Kirby J. See also *Yi v The Service Arena Pty Ltd* [2001] NSWCA 400 at [25] per Mason P.

8 [1996] 1 Qd R 65 at 68.

9 [1996] 1 Qd R 65 at 68.

10 [2009] 1 Qd R 97 at [11].

[32] The proposed pleading raised additional allegations of fact essential to establishing the duties and breaches newly alleged against the appellant as owner of the premises. The breaches alleged in para 20 of the proposed pleading were premised on the duty as pleaded in paras 18 and 19. Thus, the additional alleged factual basis for the non-delegable duty pleaded in para 18 was that the appellant "undertook the care, supervision and control of Aussie Country" and that it "undertook the care, supervision and control the land upon which the accident occurred" (para 18(a)(i)-(ii)). The "care, supervision and control" that the appellant was alleged to have exercised over Aussie Country arose from the introduction in para 19 of further allegations of fact. Those allegations of fact were not only that the appellant was the owner of the premises (para 19(a)), but also that the appellant and Aussie Country shared a common director (para 19(b)) and that the appellant thereby "had knowledge and was aware of the type and nature of hazardous activities that [Aussie Country] was conducting through its business and the associated magnitude of risk that such activities carried" (para 19(c)).

[33] The appellant's contention that the facts constituting the newly alleged duties and breaches were neither the same nor substantially the same as the facts constituting the previously alleged duties owed by and breaches committed by Aussie Country is clearly correct. The primary judge erred in finding otherwise and the discretion under r 376(4) miscarried accordingly.

Disposition

[34] Given the errors identified, it was not open to the primary judge to exercise the discretion to allow the appellant to be joined as a party under r 69 nor to grant leave under r 367(4) to make the proposed amendments.[11] In those circumstances, there could be no utility in setting aside the default judgment under r 290. The exercise of the discretion under that rule also miscarried.

[35] The appellant, having succeeded on its appeal, is entitled to the orders it seeks. The orders that should be made are:

1. The appeal be allowed.

2. The orders made by the learned primary judge on 8 August 2014 be set aside and in lieu thereof it is ordered that:

   (a) the further amended application filed 29 July 2014 be dismissed;

   (b) the respondent pay the appellant's costs of that application.

3. The respondent pay the appellant's costs of the appeal.

[36] **A LYONS J:** I agree with the reasons of Philippides JA and the orders she proposes.

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11 *House v The King* (1936) 55 CLR 499 at 505.