SUPREME COURT OF QUEENSLAND

CITATION:	*Smiley v Watson & Anor* [2001] QCA 269
PARTIES:	**JACK IRVING SMILEY** (plaintiff/applicant) **v** **JOHN WATSON** (first defendant/first respondent) **LAURA WATSON** (second defendant/second respondent)
FILE NO/S:	Appeal No 4076 of 2001 DC No 68 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	20 July 2001
DELIVERED AT:	Brisbane
HEARING DATE:	29 June 2001
JUDGES:	Davies JA, McPherson JA, Williams JA Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**Application for leave to appeal dismissed with costs**
CATCHWORDS:	PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – OTHER MATTERS – whether leave to proceed was required – whether obtaining a document pursuant to a notice of third party discovery constitutes taking a step in the proceeding PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS – CIVIL JURISDICTION – JURISDICTION – SUBJECT MATTER – action for damages for personal injuries – where matter commenced in Magistrates Court – where transfer to District Court sought - whether the District Court had jurisdiction to hear and determine an application for leave to proceed – whether transfer from District Court constituted a step in proceedings *District Court Act* 1967 (Qld) s 79, s 118 *Uniform Civil Procedure Rules* r 389(2) *Burns v Korff* (1982) 8 QL 201, cited

Citicorp Australia Limited v Metropolitan Public Abattoir Board [1992] 1 Qd R 592, applied
Decandia v Parker OS 163 of 1979, judgment 4 May 1979, considered
I H Dempster Nominees Pty Ltd v Chemgoods Pty Ltd [1993] 2 Qd R 377, applied
Red Ru Pipeline Construction Company Pty Ltd v The State of Queensland [1990] 1 Qd R 389, cited
Thompson v Kirk [1995] 1 Qd R 463, cited
Yrttiaho v The Public Curator of Queensland (1971) 125 CLR 228, cited

COUNSEL: M Grant-Taylor SC for the applicant
F Dawson for the respondents

SOLICITORS: Boyce Garrick for the applicant
Butler McDermott & Egan for the respondents

[1] **DAVIES JA**: I agree with the reasons for judgment of Williams JA and with the orders he proposes.

[2] **McPHERSON JA**: I agree with the reasons of Williams JA. The application for leave to appeal should be dismissed with costs.

[3] **WILLIAMS JA:** This is an application for leave to appeal against a decision of a District Court judge refusing the applicant (plaintiff in the action) leave to proceed pursuant to r 389(2) of the *Uniform Civil Procedure Rules* 1999.

[4] Notwithstanding that the application was made to that court, counsel for the applicant now contends that the District Court had no jurisdiction to consider it. Further and alternatively, it is contended that the learned District Court judge erred in refusing to grant leave. Based on those two contentions it was submitted that this was an appropriate case for this Court to grant leave to appeal pursuant to s 118 of the *District Court Act* 1967.

[5] On 20 April 1995 the applicant was working as an electrical contractor on a construction site, being property owned by the respondents. On that date he fell into a trench and sustained some injury. He commenced an action in the Magistrates Court on 20 June 1997 claiming $40,000 damages for personal injuries. The respondents filed a defence in which they denied negligence and, in broad terms, alleged that the applicant was responsible for the condition of the trench. In 1997 discovery was completed and the applicant filed and served a statement of loss and damages.

[6] No step in the action was taken at all throughout 1998. On 22 January 1999 the respondents filed an amended entry of appearance and defence and that pleading was served on the applicant on 27 January 1999. After a change of solicitors for the applicant, notice of intention to proceed was given on 22 January 2001; but the solicitor for the respondents contended that the applicant needed leave to proceed pursuant to r 389(2). In consequence an application was filed in the District Court on 23 February 2001, returnable 26 March 2001 seeking the following orders:

"1. That proceedings filed in Plaint and Summons No 810/1997 in the Magistrates Court at Maroochydore, be transferred to the District Court at Maroochydore.
2. That the Plaintiff have leave to file and serve an Amended Claim and Statement of Claim in terms of the documents that is Exhibit "JS2" to the Affidavit of Jack Irving Smiley.
3. That the costs of this application be reserved.
4. Further or other relief."

Significantly the order for leave to file an amended claim involved the addition of a party, Dolstone Pty Ltd. It is also of significance that the amended claim was for $250,000 damages for personal injury; there was material which indicated that there had been some worsening in the applicant's condition.

[7] Notwithstanding the wording of the formal application it was accepted by counsel on either side that there were three orders sought by the applicant on the hearing of the application:

(a) pursuant to s 79 of the *District Court Act* 1967, an order that the then Magistrates Court proceeding be transferred to the District Court;
(b) pursuant to r 389(2) of the UCPR, for leave to take a new step in the proceeding notwithstanding the lapse of two years from the time the last step was taken;
(c) pursuant to r 69 of the UCPR, for an order that Dolstone Pty Ltd be added as a third defendant in the proceedings.

The application with respect to Dolstone Pty Ltd was adjourned to a date to be fixed because that company had not been served.

[8] The learned District Court judge dealt first with the application for transfer of the proceedings. He held on the material that the applicant's "legitimate damages expectations exceed the present upper limit of the Magistrates Court monetary jurisdiction" and consequently he made an order that the matter be transferred to the District Court at Maroochydore. Thereafter he proceeded to consider the application for leave to proceed. The parties accepted, both in the District Court and on the hearing of this application, that r 389 applied notwithstanding that the proceeding had been commenced prior to the introduction of the UCPR: *Yrttiaho v The Public Curator of Queensland* (1971) 125 CLR 228. It follows that the relevant period for present purposes is two years.

[9] The primary submission of counsel for the applicant before the District Court judge was that leave was not necessary because a period of two years had not elapsed since the taking of the last step. It is clear that in determining what was the last step for purposes of the rule one has regard to the action as a whole; the last step need not have been taken by the applicant (*Thompson v Kirk* [1995] 1 Qd R 463 and *Red Ru Pipeline Construction Company Pty Ltd v The State of Queensland* [1990] 1 Qd R 389).

[10] Counsel for the applicant pointed to the fact that on four occasions in 1999 (18.2.99, 31.5.99, 27.7.99 and 26.8.99) the solicitor for the respondents had filed either a writ or notice of non-party disclosure; the first three were directed to Dr Blue. It can be inferred from a statement in the respondents' outline of argument that at least on one occasion (date unknown) Dr Blue responded by making some documents available for inspection. Counsel for the applicant contended, below

and here, that the filing of a writ or notice of non-party disclosure was the taking of a step in the action. The learned District Court judge held that it was not.

[11] A somewhat similar question was considered by McPherson SPJ (with whom Ryan and Dowsett JJ agreed) in *Citicorp Australia Limited v. Metropolitan Public Abattoir Board* [1992] 1 Qd R 592. There, consequent upon the discovery procedure, documents were produced for inspection by the plaintiff's solicitors. The documents were removed to the premises of the plaintiff's solicitors and retained there over a period of about three years during which it was claimed the process of inspection was continuing. There was no doubt, as confirmed by the judgment, that the production of the documents for inspection constituted a step in the proceeding. The question was whether the alleged ongoing inspection constituted the taking of a step. In that regard McPherson SPJ said at 594:

> "I am, however, unable to accept that acts done in the recesses of a solicitor's office partake of the character of a proceeding simply because they may, from the standpoint of the party for whom that solicitor is acting, be supposed to carry the action forward. That is particularly so where the act in question has, so far as the other party or the court is aware, no readily discernible impact on the progress of the action. Time and effort expended on preparing an affidavit of documents achieves nothing if the affidavit is never delivered. Taking instructions from the client or proofs from witnesses are necessary activities if the action is to be brought to trial. None of them can however fairly be described as a 'proceeding' in the cause as that expression is used in O 90 r 9".

[12] In the light of that and other authorities it is clear that the taking of a statement from a potential witness does not constitute the taking of a step in the proceeding. In my view the obtaining of a document pursuant to a writ or notice of non-party discovery falls into the same category. If the voluntary production of a document to the solicitor for a party by a potential witness in the course of a statement being taken does not constitute the taking of a step in the proceeding, it is difficult to see how and why the reliance by the party on a procedure to compel production of a document from an unwilling potential witness amounts to the taking of a step in the proceeding. In neither case has the actual proceeding between the parties been advanced. It is not a step necessarily required to be taken by the rules before the matter could be said to be ready for trial.

[13] It follows that the learned District Court judge was correct in concluding that the last step taken in the proceeding was the filing and serving by the respondents of their amended defence in January 1999. It followed that leave to proceed was required.

[14] At this point it is necessary to consider the submission by counsel for the applicant that the District Court lacked jurisdiction to deal with the matter; that is, if because of the delay of more than two years in taking a step in the Magistrates Court leave to proceed was required, the District Court had no jurisdiction to hear and determine the application for leave. On the argument of counsel for the applicant it would have been necessary to obtain leave to proceed from the Magistrates Court even before an application could be heard to have the proceeding transferred from the Magistrates Court to the District Court.

[15] The argument was based on an unreported decision of Douglas J: *Decandia v Parker* OS 163 of 1979, judgment 4 May 1979. That involved an application to transfer an action from the District Court to the Supreme Court. The transfer was opposed on the basis that no step had been taken in the proceeding for more than three years and the Rules of the District Court required that leave be obtained in such circumstances; the judgment records that the ground of opposition was that "the applicant has no locus standi in the District Court because the situation is … that the applicant has not complied with the requirement of Rule 377". It appears that most of the argument was centered on whether or not the informal supply of particulars by the plaintiff constituted the taking of a step in the proceeding. After referring in some detail to the correspondence relevant thereto, and to some decisions on the meaning of taking a step in the proceedings, Douglas J concluded that what had taken place was not a proceeding for purposes of the Rule. He then went on to say:

> "In the circumstances, it means that it is incumbent upon the applicant here to first apply to the District Court for leave to proceed under r 377".

[16] Two observations should be made on that decision. Firstly, it is not clear whether the question whether or not such a transfer constituted a step in the proceedings was argued. At most for the present applicant it can be said that it is arguably implicit in the statement quoted above that the transfer process constituted a step, but as the point was not specifically dealt with in the reasons the decision carries less weight than it otherwise would. Secondly, it is not clear whether or not counsel in that case asked the judge to exercise a jurisdiction to grant leave to proceed. Again it can be said that it is arguably implicit in the final order that the learned judge would have held he had no jurisdiction to do so, but as the point was not considered in depth in the reasons, one cannot say that the matter has been conclusively determined. On one reading of the reasons the real point argued was that the furnishing of informal particulars constituted the taking of the step, and in consequence leave was not required; if it was, then without alternatives being considered, the matter had to remain in the District Court. Master Lee QC in *Burns v Korff* (1982) 8 QL 201 at 209 also raised some doubts as to the point actually decided by Douglas J.

[17] Later, Ryan J in *I H Dempster Nominees Pty Ltd v Chemgoods Pty Ltd* [1993] 2 Qd R 377, held that a remitter from the Supreme Court to the District Court was not a step in a proceeding for purposes of the rule. At 378 his Honour said that it was "not a step which advances the course of the action in any way, it simply has the effect that the action proceeds thereafter in a District Court rather than in the Supreme Court". There is no reference in the reasons to *Decandia v Parker*.

[18] In my view there is force in the reasoning of Ryan J. The transfer of proceedings from one court to another does not move the matter "toward the judgment or relief sought in the action", a test commonly applied in such situations. If the transfer of a matter from one court to another does not constitute taking a step for purposes of the rule in question, neither party is prejudiced by the making of such an order. If leave to proceed in the action pursuant to rule 389(2) of the UCPR is required, all that the transfer means is that the application would be to the court to which the matter was transferred, rather than to the court from which it was transferred.

[19] Ultimately I have come to the conclusion that the transfer was not the taking of a step in the proceeding. It follows that the District Court judge was entitled to make the order transferring the matter up notwithstanding that leave had not been previously obtained. It also means that once that order was made it was for the District Court to determine whether or not leave should be granted to take a step in the proceeding.

[20] On the question of the exercise of the discretion whether or not to grant leave, the applicant relied heavily on the proposition that the inactivity and delay was the consequence of his former solicitors' inability to progress the litigation. The respondents placed material before the court relevant to prejudice. The female respondent had suffered injuries on 22 April 2000 and in consequence was unable to carry on the family business. That meant that in December 2000 the business had to be sold. The respondents had no insurance covering the applicant's claim. Some six years after the incident the applicant was still seeking to join an additional defendant and in consequence it could not be said that the matter was ready, or even nearly ready, for trial. The claim had jumped from $40,000 originally to $250,000.

[21] The learned District Court judge addressed all of those matters and came to the conclusion that it was not an appropriate case in which to grant leave to proceed. There is no obvious error of law in his reasoning in that regard.

[22] In all of the above circumstances I have come to the conclusion that the applicant has not demonstrated that this is an appropriate case in which to grant leave to appeal pursuant to s 118 of the *District Court Act* 1967.

[23] The application for leave to appeal should be dismissed with costs.