SUPREME COURT OF QUEENSLAND

CITATION:	*Cacchia v Rungert & Ors* [2002] QCA 207
PARTIES:	**STEVEN SEAN CACCHIA** (plaintiff/respondent) **v** **WILLIAM CARL RUNGERT and SUNCORP GENERAL INSURANCE** ACN 075 695 966 (first defendants) **COUNCIL OF THE SHIRE OF JOHNSTONE** (second defendant) **STATE OF QUEENSLAND** (third defendant /appellant)
FILE NO/S:	Appeal No 11532 of 2001 SC No 17 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from Interlocutory Decision
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	21 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2002
JUDGES:	McMurdo P, Williams JA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDERS:	**1. Appeal allowed;** **2. Set aside the order made adding the appellant as a party and instead dismiss the application;** **3. Respondent to pay the costs of the application;** **4. Costs of the appeal to be assessed.**
CATCHWORDS:	LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – PERSONAL INJURY CASES – where respondent made an application to join the appellant after the expiry of the limitation period pursuant to r 69(2)(g) of the *Uniform Civil Procedure Rules* 1999 – whether learned primary judge erred in granting the application – whether the absence of explanation by the respondent for failing to identify the third defendant's control of the road prior to the institution of proceedings is a matter to be considered - whether learned primary judge erred in

finding that the division of responsibility between the second defendant and the appellant was a matter of importance to the respondent in circumstances where the respondent must first prove a case of negligence against the second defendant for negligent performance of road works before it can succeed against the third defendant

Transport Infrastructure Act 1994 (Qld), s 23, s 27

Bates & Ors v Queensland Newspapers Pty Ltd & Anor [2001]QSC 083, applied
Brisbane South Regional Health Authority v Taylor (1997) 186 CLR 541, considered
Jerome v Hill [2001] 1 QdR 496, applied

COUNSEL: M E Eliades for the appellant
J T Bradshaw for the respondent

SOLICITORS: C W Lohe, Crown Solicitor for the appellant
Vince Martin & Co for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Cullinane J and with the orders he proposes.

[2] **WILLIAMS JA:** I agree with the reasons for judgment of Cullinane J and with the orders proposed.

[3] **CULLINANE J:** This is an appeal against an order made on 3 December 2001 adding the Appellant to the action.

[4] As the order, the subject of the appeal, is a discretionary one the Appellant is faced with the difficulties attendant upon any challenge to such an order.

[5] The Respondent was injured on the 11th November 1995. His cause of action is said to arise out of the negligent driving of the First Defendant and the negligent performance of road works in the vicinity of the accident site by the Second Defendant. The specific complaint made is of loose gravel being left at the roadway following the carrying out of such road works. The Second Defendant is the local authority for the area.

[6] The proceedings were instituted on 5th June 1997.

[7] Neither of these Defendants took any part in the application on the appeal.

[8] In its defence delivered on 7th December 1997 the Second Defendant made the following admission:

> *"The Second Defendant admits that at all material times it was responsible for the maintenance of the Mena Creek to Japoonvale Road Innisfail and admits that shortly prior to 11 November 1995 it had caused work to be carried out on the road's surface but does not admit that any such work was*

carried out on that section of the road where the accident, the subject of this action, occurred".

[9] In so far as there is a denial that work was carried out at the area where the accident occurred it is of course an essential part of the Respondent's case against the Second Defendant that it establish that such works were carried out.

[10] The Second Defendant has since sought to withdraw the admission. Judgment on it's application to do so is presently reserved. However for reasons which I will refer to a little later it does not seem to me that the issues which arise on this appeal are affected by either possible outcome of that application.

[11] It seems that after the trial had been set down for hearing, the Second Defendant became aware, in the course of its preparation, that it had carried out the work pursuant to a contract with the Appellant. Prior to this it had either not adverted or overlooked this fact. On 9th July the Second Defendant obtained leave to issue a third party notice to the Appellant. The trial was adjourned. Subsequently the Respondent applied to add the Appellant as a Defendant and the order appealed from was made, we were told on the 7th September 2001. It seems that the issue of quantum has been resolved.

[12] In its statement of claim in the third party proceedings the Second Defendant alleges that the roadway concerned was a State road the control of which was vested in the State of Queensland and it (the Second Defendant) performed work on the road at the request of the State of Queensland. These matters were admitted by the Appellant although there appears to be some issue as to whether the obligations undertaken by the Second Defendant meant that the Second Defendant could be described as being responsible for the maintenance of the road. I think, for reasons which will appear later, that this too, is not a relevant consideration on this appeal.

[13] The limitation period in the Respondent's action expired on the 11th November 1998. Thus at the time the third party order was made the Second Defendant was within time to take such proceedings but at the time the Appellant was joined as a Defendant the Respondent's cause of action was statute barred.

[14] Rule 69 confers by sub-rule 1 a power to add parties to actions. Rule 69 (2) goes on to provide so far as is relevant:

"(2) However, the court must not include or substitute a party after the end of the limitation period unless one of the following applies:

---- (g) for another reason the court considers it just to include or substitute the party after the end of the limitation period".

[15] In applying this rule the court is not limited by the requirement that the circumstances be "special" or "peculiar" as was the case under the repealed Rules. Rule 69 (2)(g) has been considered in *Jerome v Hill* [2001] 1 QdR 496 and *Bates & Ors v Queensland Newspapers Pty Ltd & Anor* [2001] QSC 083 both judgments of single Judges of the Court.

[16] In the latter case Chesterman J said at paragraph 20:

"The rule confers a wider general discretion on the court but it can only be exercised where the reason which makes the destruction of the defence just, can be clearly identified and is seen to be sufficient. An explanation for the failure to join the party within time will always be relevant although lack of explanation is not a pre-condition to the power".

[17] The reasons which His Honour thought justified the making of the order in this case appear in paragraphs 16, 17 and 18 of the judgment:

"*(16) The division of responsibility between the second defendant and the State of Queensland is clearly a matter about which the plaintiff ought to be concerned in the pursuit of his claim. Had the existence of these arrangements been brought to the notice of the plaintiff's legal advisers when disclosure was properly sought and its deficiency complained of, then the plaintiff could have, without leave, commenced proceedings against the State of Queensland. It was this failure to disclose, in a timely way, the existence of arrangements between the local authority and the Main Roads Department which has put the plaintiff in the position of having to make this application. Once the inadequacy of the disclosure was made known, the plaintiff acted in a timely way to seek the joinder of the State of Queensland as a defendant. Thus, there is a proper explanation as to why the proposed new defendant was not joined prior to the expiration of the period of limitations.*

(17) As to whether it is just to join the State of Queensland now, regard must be had to the fact that it is already a third party to the action and consequently the issue between it and the second defendant will have to be litigated in any event. That litigation will most likely take place at the same time as the hearing of the plaintiff's claim against the second defendant. Questions of prejudice by delay, availability of witnesses and impaired recall of witnesses are impacts which confront the presentation of the State of Queensland's case against the second defendant and have no greater impact in terms of meeting the case against the plaintiff.

(18) The State of Queensland, like the second defendant, are statutory bodies with obligations to prepare documents associated with public expenditure and to maintain records of works which they have undertaken. It is the recourse to the records which will most likely determine the conduct of either authority in respect of the works which the plaintiff alleges caused the loss of control of his vehicle."

[18] Some factual matters are clear on the material before the court. The road at all material times was a State controlled road and the works were carried out by the Second Defendant under a contract with the Appellant presumably pursuant to s. 27 of the *Transport Infrastructure Act* 1994 as amended. Pursuant to s.23 of that Act there must be a declaration of every such road published in the Government Gazette in a way which enables the road to be identified.

[19] The Appellant raises a number of grounds of appeal. One of these concerns His Honour's finding that there was an explanation for the Respondent's failure to join the Appellant prior to the expiration of the limitation period.

[20] The Appellant contends that if anything in the Second Defendant's conduct justified the Respondent's failure to include the Appellant as a party to the proceeding, (something which the Appellant does not accept) this could only be the case from either the time of the delivery of its defence of 7th December 1997 by the Second Defendant or the subsequent discovery in which no documentation relating to the arrangements between the Appellant and the Second Defendant was disclosed.

[21] There is nothing which would suggest that the status of the road as a State road could not have been established by appropriate inquiry prior to the institution of proceedings in June 1997. No explanation of the failure to sue the Appellant was advanced.

[22] I think that the Appellant is correct in this submission. The absence of any explanation for the failure to identify the status of the road prior to the institution of proceedings is in my view a significant matter when considering the application to add the Appellant outside of the limitation period.

[23] The second matter raised by the Appellant concerns His Honour's finding that the division of responsibility between the Second Defendant and the Appellant was a matter of importance to the Respondent. The Appellant challenges this finding.

[24] The Respondent's cause of action against the Second Defendant is based upon the negligent performance of road works resulting in gravel lying upon the roadway thereby it is said creating a hazard which was causally related to the injuries sustained by the Respondent. It is immaterial for the purposes of the Plaintiff's cause of action against the Second Defendant in what capacity the Second Defendant performed this work.

[25] In the draft statement of claim which was before His Honour on the hearing of this application it is clear that the action against the Appellant is based upon the Second Defendant's negligence in the performance of such works and the failure of the Appellant to adequately supervise those works or to instruct the Second Defendant to remove the gravel from the road. That is, in order to succeed against the Appellant it will be necessary for the Respondent to prove the case which it alleges against the Second Defendant in the proceedings as they stood prior to the joinder of the Appellant.

[26] In these circumstances it is difficult to see what advantage the Respondent obtains by the order which was made. In the affidavit of Mr Martin in support of the application it was said that the Respondent sought the order in order "to protect the Plaintiff's interests in light of the new material and the Second Defendant's retraction of the admission".

[27] All that the Respondent has achieved by the making of the order is that there is an additional Defendant from whom it might recover. As the Second Defendant is a local authority it could hardly be contended that there was any concern about the capacity of that Defendant to satisfy a judgment.

[28] The case is not one in which there is uncertainty as to who was the responsible party so that the joinder of an additional Defendant is justified to avoid any risk that

the wrong party may have initially been chosen as a Defendant and the Plaintiff might, as a consequence, fail.

[29] Whilst the advantage to the Respondent in the making of the order is at best dubious the disadvantage to the Appellant is plain. It has been deprived of its protection from a statute barred action. The importance of statutes of limitation and the protection afforded by them to persons as they go about the conduct of their business was emphasised by McHugh J in *Brisbane South Regional Health Authority v Taylor* (1997) 186 CLR 541 at pages 552 to 554.

[30] I think that this factor also is a matter which bore significantly upon the discretion which had to be exercised in the present case.

[31] In my respectful view, His Honour's failure to advert to either of these two matters means that the discretion falls to be exercised afresh.

[32] As the reasons relied upon for the making of the order were on the one hand an explanation for failing to join the Appellant prior to the expiration of the limitation period, namely the Second Defendant's inadequate disclosure and on the other hand, if I understand His Honour correctly, the necessity or desirability of joining the Appellant as a party because of what is described as the division of responsibility between the Appellant and the Second Defendant and as I do not think that either of these grounds are made out, the application to add the Appellant should, in my view, be dismissed.

[33] In these circumstances it is unnecessary to consider the further grounds advanced which concern His Honour's findings on the issue of prejudice, the Appellant having advanced a claim of actual prejudice.

[34] I would allow the appeal, set aside the order made adding the Appellant as a party and instead dismiss the application. I would order the Respondent to pay the costs of the application and the costs of the appeal to be assessed.