

SUPREME COURT OF QUEENSLAND

CITATION: *Wallace v Bendigo and Adelaide Bank Limited & Anor*
[2020] QCA 122

PARTIES: **CHARLIE WALLACE**
(applicant/appellant)
v
BENDIGO AND ADELAIDE BANK LIMITED
ACN 068 049 178
(first respondent)
WILLIAM MARTIN COLWELL
TIMOTHY JAMES MICHAEL
(second respondents)

FILE NO/S: Appeal No 10768 of 2019
SC No 8044 of 2017

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time/General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – Unreported, 28 June 2019
(Dalton J)

DELIVERED ON: 5 June 2020

DELIVERED AT: Brisbane

HEARING DATE: 18 May 2020

JUDGES: Fraser and Morrison and McMurdo JJA

ORDERS: **1. The time to appeal extended to 5 October 2019.**
2. Appeal dismissed.
3. Appellant to pay the respondents’ costs of the appeal.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TIME, EXTENSION AND ABRIDGMENT – where the applicant/appellant filed a claim and statement of claim but did not serve it on the respondents within one year – where the registrar ordered, pursuant to rule 24(2) of the *Uniform Civil Procedure Rules 1999* (Qld), that the claim be renewed – where the respondents successfully applied to set aside the order of the registrar – where the applicant/appellant made a deliberate decision not to effect service – whether the primary judge erred in finding that there was not “another good reason” to renew the claim

Uniform Civil Procedure Rules 1999 (Qld), r 24

High Top Pty Ltd v Kay Sheila Lawrence t/as ‘Kay Lawrence Accountancy’ [2010] QCA 270, applied

IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission [2007] 1 Qd R 148; [\[2006\] QCA 407](#), applied

COUNSEL: G D Skelton (*sol*) for the applicant/appellant
D Chesterman for the respondents

SOLICITORS: Allaw Queensland Lawyers for the applicant/appellant
Corrs Chambers Westgarth for the respondents

- [1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the orders proposed by his Honour.
- [2] **MORRISON JA:** I have read the reasons of McMurdo JA and agree with those reasons and the orders his Honour proposes.
- [3] **McMURDO JA:** The applicant, Mr Wallace, is a grazier. For many years, he has been in dispute with his former bank,¹ and the other respondents who were receivers and managers appointed by the bank over his grazing properties and cattle. They sold his assets at prices which were insufficient to discharge his debts to the bank.
- [4] On 7 August 2017, Mr Wallace commenced the present proceeding, by a claim and statement of claim. He alleged that the appointment of the receivers over some of his property, “on or about 8 August 2011”, was unlawful and prevented him from selling the cattle and repaying the bank, as he was obliged to do in November 2011. Consequently, he pleaded, he could not repay the bank, and the second and third respondents were appointed as receivers and managers of his two grazing properties and his other cattle. All of that property was sold, resulting in an overall loss, for which he claimed damages, in the sum of \$17,651,000, being the difference between the true value of the assets which were sold and the debt which he owed to the bank. He claimed that sum as damages for breach of contract by the bank and as damages pursuant to s 236 of schedule 2 of the *Competition and Consumer Act* 2010 (Cth) or alternatively s 12GF of the *Australian Securities and Investments Commission Act* 2001 (Cth). Under those Acts, he also claimed an order that he be released and discharged from any liability to the bank and he also sought a declaration that he was not indebted to any of the respondents in any respect.
- [5] Part of his pleaded case relied upon conversations which Mr Wallace had with a certain bank officer in 2011, but prior to 8 August. But it does not appear that any relevant limitation period had expired when the claim was filed on 7 August 2017. The date or dates when the various causes of action would have become statute barred are not clear. But it does appear that those dates would have been reached at least within a year of the proceeding being commenced. For reasons which will be discussed, the claim and statement of claim were not served within that year.
- [6] Rule 24(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that a claim remains in force for one year starting on the day it is filed. Rule 24(2) provides that the registrar, if satisfied that reasonable efforts have been made to serve the defendant or that there is another good reason to renew the claim, may renew the

¹ Being Rural Bank Limited. On 11 June 2019, the Chief Justice ordered that Bendigo and Adelaide Bank Limited be substituted as the first defendant, its assets and liabilities having been transferred to that entity under the *Financial Sector (Transfer and Restructure) Act* 1999 (Cth).

claim for further periods of not more than one year at a time. A claim may be renewed whether or not it is in force: r 24(3). For any limitation period, a claim that is renewed is taken to have started on the day the claim was originally filed: r 24(6).

- [7] On the anniversary of the filing of the claim (7 August 2018), Mr Wallace, who by then was not legally represented, had a neighbour send an email to the registrar, seeking to renew the claim on the basis that there was “another good reason” to do so. The registrar replied to the neighbour that she was prepared to renew the claim for a period of 12 months, but first required the return of the service copies of the documents. On 30 October 2018, the registrar ordered that the claim be renewed for a period of 12 months.
- [8] In the usual way, that application was decided without hearing from the defendants, who were able to apply to set the order aside, as they did on 15 April 2019.² The matter came on for hearing before Dalton J on 28 June 2019, who, in an *ex tempore* judgment, set aside the order of the registrar.
- [9] On 3 October 2019, Mr Wallace filed an application to this Court to set aside her Honour’s order. By that stage he was out of time to appeal against the judgment, and this became an application for an extension of time in which to appeal, on which the court heard full argument on the merits of the appeal.
- [10] For the reasons that follow, I would extend the time to appeal, but dismiss the appeal.

Further facts

- [11] The preparation and filing of the claim and statement of claim was done by Mr Wallace’s then solicitors. They ceased to act for him in February 2018, and he then served on the respondents’ lawyers a notice that he was acting in person.
- [12] It appears that Mr Wallace’s solicitors were instructed not to serve the documents, at least immediately. A solicitor acting for the respondents became aware of this proceeding on about 17 August 2017, by conducting an electronic search of civil files on the Queensland Courts website. On about 24 August 2017, that solicitor obtained a copy of the claim and statement of claim from the Registry. He immediately emailed the solicitor acting for Mr Wallace, advising that he held instructions to accept service on behalf of the defendants. No response was received, and a further email was sent three days later, saying that the claim was already “attended with delay”, because the matters complained of in the proceeding had occurred, for the most part, in 2011 and early 2012. No reply to either email was received.
- [13] Mr Wallace does not say that his then lawyer was instructed to serve the proceeding.
- [14] In an affidavit filed on 26 September 2018, Mr Wallace described his health problems at relevant times. On 3 August 2017, he underwent heart surgery in Townsville. He also required bilateral knee replacements, and was waiting for some months, for an available date for this to occur at the Townsville General Hospital. He attended that hospital on 9 July 2018, for what he describes as a pre-admission day.

² Under r 16 of the UCPR.

On 20 July 2018, a cardiologist at the hospital provided him with a “full clearance on heart to now allow” him to undergo that surgery. He was admitted for the surgery on 7 August 2018. In his affidavit of September 2018, he said that he would make “all endeavours, after recovering fully from surgery, to continue the legal action, if required.”

- [15] In the same affidavit, Mr Wallace referred to his attempts to negotiate a settlement, in late 2017 and early 2018. He said that the bank had undertaken to a senate committee that it would meet with him, but that it had not done so. He said that meetings which an intermediary had tried to arrange had not taken place, due to the unavailability of the bank’s representatives “and/or” his own “health issues”.
- [16] That evidence would confirm an inference that Mr Wallace had decided not to have the documents served, at least at that stage, in the hope that he might avoid having to prosecute this case by negotiating a settlement. It may also be inferred that he became unrepresented when it was realised that this would not occur.
- [17] Mr Wallace does not claim that he believed that his then solicitors had served the documents. Nor does he claim that, at the time, he understood that it had become unnecessary to do so. He did serve upon the respondents’ solicitors a notice that he was acting in person. Plainly, he could have served the claim and statement of claim upon them at the same time.
- [18] This was not the first piece of litigation between Mr Wallace and the bank. In June 2012, he commenced a proceeding in the trial division against the bank, the receivers and the operator of an abattoir, seeking an injunction to restrain the slaughtering of cattle which the receivers had sent there. An interim injunction was granted, but then discharged after a contested hearing. On 7 June 2012, the bank and the receivers commenced a proceeding against, amongst others, Mr Wallace, seeking an injunction to restrain him from interfering with the mustering, loading and removal of cattle under the receivership. That injunction was granted and Mr Wallace was ordered to pay indemnity costs. On 31 August 2012, the bank commenced a proceeding in the trial division against Mr Wallace, in which it obtained a default judgment in January 2014. His application to set aside that judgment was dismissed with costs on 28 April 2014. In August 2014, Mr Wallace unsuccessfully applied for an injunction to restrain the receivers from selling his grazing properties. His appeal against that decision was dismissed by this Court on 21 November 2014.

The primary judgment

- [19] Mr Wallace saw fit to appoint Mr R N Culleton, a former senator for Western Australia but not a legal practitioner, to appear on his behalf before Dalton J. Her Honour declined to allow Mr Culleton to appear, and there was ultimately no challenge to that decision. After hearing from the defendants, her Honour gave a short *ex tempore* judgment which set aside the registrar’s renewal of the claim.
- [20] Her Honour said that the claim was filed “literally on the eve of the expiration of a six year limitation period”. That may be correct although, as I have said, it might be the position is not so clear.
- [21] Her Honour noted that importantly, the bank officer, who was said to have had critical conversations with Mr Wallace in 2011, was now deceased. He died in late 2012.

- [22] Dalton J said, correctly, that because the limitation period had now expired, if this proceeding was dismissed, the defendants would have “an accrued right to a limitation defence”, meaning that Mr Wallace would be out of time to start another proceeding.
- [23] Her Honour said, again correctly, that there was no material before the registrar which evidenced reasonable efforts to serve any of the defendants, and indeed there had been no attempt to do so. Service could have been very easily effected upon the defendants’ lawyers.
- [24] Her Honour then referred to the evidence of Mr Wallace’s health problems. She said that there was no “medical material” with the affidavit of Mr Wallace filed in September 2018, and there was no explanation by him as to how that prevented service of the documents. Similarly, she said, there was no explanation as to how the knee surgery prevented the service of the documents. Her Honour more generally observed that there was no explanation of why the documents could not have been served whilst Mr Wallace had legal representation, or why he could not have done so once he was acting on his own behalf.
- [25] Her Honour concluded her reasons as follows:

“In all those circumstances, I think the material before the Registrar really did not disclose that reasonable efforts had been made to serve the defendant, and there was really no proper explanation put before the Registrar as to why there had not been any attempt at service. In those circumstances, it must be very hard for any litigant to show that there is another good reason to renew the claim.

The only thing that might be said on behalf of the plaintiff is that the claim, although it is not settled by counsel, does seem to have been drawn by solicitors, and it cannot be said that on its face, the claim is entirely hopeless or otherwise lacking in merit, and that further, the defendants are, and have been for some time (within the original 12 month period) aware of the claim. In fact, the defendants have made an application to the court for an order to change their name on the court heading, so the defendants certainly are aware of the claim.

In all the circumstances, though, I cannot see that there was the basis for a rational – or, sorry, a rational and proper decision by the Registrar to renew the claim. That is, I cannot see that a good reason to renew the claim was shown by the plaintiff. In those circumstances, I am persuaded to set aside the order of the Registrar and make a consequential order that the claim in this proceeding – well, actually, that this proceeding be dismissed.”

The application for an extension of time

- [26] Mr Wallace says that he thought that he had filed the appeal within time. He understood that an appeal had to be filed within 28 days of the judgment, but did not post the document to the court until 25 July 2019. However, the document was not received by the registry, and stamped as filed, until 3 October 2019. Consequently, there is no clear explanation for the lateness of his appeal. However, I would grant

leave to appeal, because it is desirable that the proceeding in this case is decided upon the merits, or otherwise, of the appeal.

The applicant's arguments on the appeal - consideration

- [27] It is submitted for Mr Wallace that, in effect, he did not need to have his claim renewed, because it had in fact been served. The argument is that it was served when the respondents' solicitor obtained a copy of the claim and statement of claim from the registry. That event is not irrelevant to the exercise of the discretion under r 24. But it cannot be accepted that this constituted service of the proceeding. That was not the result of an action by or on behalf of Mr Wallace. Until the defendants were served, the defendants were not required to respond to the proceeding.³ Nor did the defendants waive the requirement that the proceedings be served. By offering to accept service, their solicitor was making it clear that service was required.
- [28] Beyond that submission, the case which was ultimately advanced for Mr Wallace was that the failure to serve the documents was explained by his poor health and his need for surgery on two occasions. As that argument was developed, it was apparent that Mr Wallace was not saying that these problems made it too difficult for him to effect service. Rather, his case was that he was not minded to serve the proceedings, with the immediate consequence that he would then have to prosecute them, whilst he would be either waiting for, or recovering from, significant surgery. It appears that this is a case which was not clearly advanced to the primary judge.
- [29] It is clear that Mr Wallace did undergo significant surgery. It may be accepted that this would have made it very difficult for him, as an unrepresented litigant, to conduct the litigation during at least some of the 12 month period in which the documents had to be served. However, the evidence does not establish that this made it impossible for him to attend to the prosecution of this case for all of that period. He could have effected service, and then sought to persuade the respondents, or failing that persuade the court, that he should be relieved from immediately prosecuting the case until he had recovered.
- [30] Moreover, from his own evidence it appears that he refrained from having the documents served because he wished to pursue a settlement, without having to prosecute the case at all. Whilst settlement of litigation is to be encouraged, this did not provide a proper excuse for not effecting service.
- [31] The question for the primary judge was whether, in the absence of reasonable efforts having been made to effect service, there was another good reason to renew the claim.
- [32] Mr Wallace made a deliberate decision not to effect service. In *IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission*,⁴ Keane JA said that "a party who deliberately chooses to refrain from serving a claim will rarely be able to show good reason to warrant the renewal of the claim". His Honour continued:

"[54] No case was cited to this Court in which r 24(2) or its analogues has been held to authorise a renewal of a claim in favour of a party who deliberately chooses not to serve a claim

³ UCPR, r 23.

⁴ [2006] QCA 407; [2007] 1 Qd R 148 at [53].

where the facts of the case sufficient to enable the case to be pleaded are known to the plaintiff. Whatever the position may have been in that regard in the absence of a provision such as r 5(3) of the UCPR, the presence of r 5(3) means that the approach pursued by the plaintiffs in the present case should not be vindicated by the court.”⁵

- [33] This was not a case, for example, where a proceeding was commenced, but not duly served, because the plaintiff was still investigating the facts upon which the claim should proceed. Rather, it must be inferred that Mr Wallace decided that it was not in his interests to effect service, with the consequence of the immediate burden of prosecuting substantial and complex litigation against well-resourced defendants.
- [34] Of course there were other relevant considerations. One of them was the primary judge’s view that the claim, on its face, was not entirely without merit. On the other hand, the evidence before her Honour did not indicate that the claim was so strong that a serious injustice would result were it not allowed to proceed.⁶ Nevertheless, there was a possibility of a very substantial detriment to Mr Wallace from the failure of this proceeding. That was recognised by Dalton J, who held, correctly, that this was not the only consideration.
- [35] It was relevant that Mr Wallace left it until, at least, very late in any limitation period to commence the proceeding. It can be inferred that this is further evidence of a strategy to keep these claims alive whilst not having to prosecute them.
- [36] Her Honour did not mistake the facts or misapply any relevant principles. All that might be said is that her Honour did not consider whether Mr Wallace’s health problems were relevant, not because they prevented him from effecting service, but because they provided an explanation for his disinclination to immediately prosecute the case. As I have said, that appears to be an argument which was made for the first time in this Court. But, it is unpersuasive.
- [37] In my conclusion there was no error in the exercise of the discretion of the primary judge. In any event, my own view is that there was, in the terms of r 24, no good reason to renew the claim. As has been said in many cases, r 24 must be applied in the context of r 5, which requires parties to proceed expeditiously and to avoid undue delay. As White JA, with whom Chesterman JA agreed, said in *High Top Pty Ltd v Kay Sheila Lawrence* [2010] QCA 270 at [35]:

“[A]ny conduct of proceedings by a party which entails unexplained or inexcusable delay cannot expect to be vindicated by a court (or the registrar) exercising the discretion granted in r 24(2).”

Orders

- [38] I would order as follows:
1. The time to appeal extended to 5 October 2019.
 2. Appeal dismissed.

⁵ See also *McIntosh & Anor v Maitland & Ors* [2016] QSC 203 at [41].

⁶ cf *High Top Pty Ltd v Kay Sheila Lawrence t/as ‘Kay Lawrence Accountancy’* [2010] QCA 270 at [11] per McMurdo P.

3. Appellant to pay the respondents' costs of the appeal.