DISTRICT COURT OF QUEENSLAND

CITATION:	*Van Straalen v Gopalasamy & Anor* [2005] QDC 095
PARTIES:	**LAURINDA JANE VAN STRAALEN** Plaintiff **v** **JAGANMOHAN GOPALASAMY** Defendant And **ECON REALTY PTY LTD trading as RAINE & HORNE REAL ESTATE AGENTS** Third Party
FILE NO/S:	3205/01
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Queensland, Brisbane
DELIVERED ON:	3 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2005
JUDGE:	Alan Wilson, SC,DCJ
ORDER:	**1. Refuse leave to the defendant to apply to the Court to disallow amendments to the Plaintiff's Statement of Claim** **2. Dismiss the third party's application for the production of an Advice given by the Plaintiff's Counsel**
CATCHWORDS:	PROCEDURE – QUEENSLAND – PRACTICE UNDER THE RULES OF COURT – AMENDMENT – where Plaintiff has amended the Statement of Claim without the leave of the Court – whether leave necessary – PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – DISALLOWANCE OF AMENDMENT – where Defendant has not applied under *UCPR* r 379 for disallowance of an amendment of the Plaintiff's Statement of Claim – whether Defendant should have leave to apply where a long period of time has elapsed, and the application was not notified until the morning of trial.

PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION OF DOCUMENTS – where the third party seeks production of Counsel's Advice which is referred to in an exhibit to an Affidavit filed on behalf of the Plaintiff – whether the Plaintiff is entitled to withhold production of a document.

Uniform Civil Procedure Rules 1999

ACC v Australian Safeway Stores Pty Ltd (1998) 153 ALR 393
Ampolex v Perpetual Trustee Company (Canberra) Ltd (1996) 137 ALR 28
Astley v Austrust (1999) 197 CLR 1
Ayr Link v Paterson (No 2) (2003) NSW CA 251
Bayliss v Cassidy (No 2) (2000) 1 Qd R 464
BT Australasia Pty Ltd v State of New South Wales (No 7) (1998) 153 ALR 722
Burrows v CA Sciacca & Associates (1997) 1 Qd R 157
Draney v Barry (2002) 1 Qd R 145
Renowden v McMullan (1970) 123 CLR 585
Rigato Farms Pty Ltd v Ridolfi (2001) 2 Qd R 455
Sharples v O'Shea (1999) QSC 190
Standard Chartered Bank v Antico (1995) 36 NSWLR 87
Torcasio Developments Pty Ltd v County Park Developments Pty Ltd

COUNSEL: Mr C Newton for the Respondent/Plaintiff
Mr R Green for the Applicant/Defendant
Mr M Horvath for the Applicant Third Party

SOLICITORS: Carter Capner for the Plaintiff
Quinlan Miller & Treston for the Defendant
Minter Ellison for the Third Party

[1] The Defendant seeks leave to apply under *UCPR* r 379 for an order disallowing amendments to the Plaintiff's Statement of Claim made in February 2003. Leave is necessary because the rule requires that an application be brought within eight days after service of the amended document. The possibility of this application was first raised on the morning of the day the trial was to commence in this court, on 17 March 2003. The trial was adjourned and, as the transcript shows, it was directed that either party bring an application concerning the pleadings within seven days. It was submitted before me that Her Honour the trial judge actually granted leave to the Defendant to bring this application, but I do not think she ultimately went so far[1].

[1] Transcript, Ryrie DCJ, 17 March 2005 p 9 ll 11-32.

[2] The Third Party also seeks an order that the Plaintiff disclose an Advice her solicitors obtained from Counsel last year, referred to in an affidavit of the solicitor filed 1 April 2005.

[3] It is appropriate to set out a short history of the matter, with particular reference to the pleadings from which the current application springs. The Plaintiff alleges she rented premises from the defendant in November 1999 and, on 22 May 2001, fell over in the yard while hanging out clothing and suffered injuries in circumstances said to entitle her to damages. The time limit for that claim expired on 22 May 2004*: Limitation of Actions Act* 1974, s 11.

[4] Her claim, filed 4 July 2001 contained a prayer for "... *damages for negligence, breach of contract and/or breach of statutory duty occasioning personal injury* ...". The accompanying Statement of Claim only referred to, and pleaded and particularised, claims for damages for negligence or breach of statutory duty (the latter referring to the *Workplace Health & Safety Act* 1995). An amended pleading filed on 18 February 2003 contained new assertions that the premises were of a residential kind and alleged the Plaintiff was a tenant, within the meaning of that term in the *Residential Tenancies Act* 1994, pursuant to a Tenancy Agreement signed 26 November 1999. Further amendments recited obligations under that Tenancy Agreement said to be imported from the Act and then pleaded breach of contract, with particulars; and, altered the alleged breaches of statutory duty so they referred to the landlord and tenant, and not workplace, legislation.

[5] Shortly before the amended pleading was delivered the Defendant had added the third party to the action alleging he had engaged it to manage the property on his behalf and claiming that, if the Plaintiff succeeded, he was entitled to indemnity from it. The defendant did not change its defence in the face of the Plaintiff's amended Statement of Claim.

[6] What stirs the Defendant and the Third Party is their contention that the amendments were effected to avoid any adverse consequences for the Plaintiff from changes wrought to the *Law Reform Act* 1995 by the *Law Reform Contributory Negligence) Amendment Act* 2001, introduced after *Astley v Austrust* (1999) 197 CLR 1; ie, amendments designed to ensure contributory negligence could be successfully raised up against a plaintiff who had sued in contract, whether or not that plaintiff had or could also have sued in tort. It is said the changes to the pleading are a plain attempt to avoid the consequences of the amending legislation which came into effect on 7 August 2001, ie a little over a month after these proceedings were commenced.

[7] A preliminary question arises: whether the amending legislation applies, in any event. On its face, the amending Act clearly announces an intention to have retrospective effect:

> **'21 Amendments about contributory negligence to have retrospective effect**
>
> **'(1)** The provisions of part 3, divisions 1 and 3 apply to a wrong that happened before the commencement as if the provisions, in their form as amended by the amending Act, had been in force when the wrong happened.
>
> **'(2)** However, the provisions, as in force before the commencement, continue to apply to a wrong if any of the following apply—
>
> …

(b) a proceeding about the wrong—

(i) was started before the commencement; and

(ii) final relief has not been granted by the court before the commencement;

[8] "Wrong" is defined earlier in the amending Act:

4 Amendment of s 5 (Definitions for pt 3)

…

(2) Section 5 -

insert-

"wrong" means an act or omission that –

(a) gives rise to a liability in tort for which a defence of contributory negligence is available at common law; or

(b) amounts to a breach of a contractual duty of care that is concurrent and coextensive with a duty of care in tort.

[9] On any view the action brought by the Plaintiff was "… *a proceeding about the wrong*", commenced before the amendment took effect. The "*act or omission"* referred to in the definition means either tortious acts, or acts in breach of a contractual duty of care. The former were raised in both the Plaintiff's original claim, and Statement of Claim (although she did not plead a contract or particularise any breaches). The intention of the amending Act appears to be to ensure that claims in contract could be met, and damages reduced, by a plea of contribution but the definition, in offering alternatives, also suggests the legislature was prepared to include in the class of actions which might avoid the effects of the amendments those which had commenced beforehand albeit that the plaintiff might only have pleaded in tort. That is a plain construction, open and suggested by the wording of the amending Act. It follows that having commenced her action before it came into effect the Plaintiff would always avoid its consequences.

[10] Even if that construction is wrong, this is not a case in which the Defendant can establish an entitlement to the relief he now seeks. The first consideration is whether it was, in fact, necessary for the plaintiff to seek and obtain leave before amending her pleading.

[11] Submissions were directed towards Ch 10 Pt 3 of the *UCPR*, rr 375-387. The Defendant and the Third Party contended, in particular, that the Plaintiff's amendments required the leave of the court at the time (and her failure to obtain that leave was a powerful reason to disallow them now, notwithstanding the long delay). Rules 375 and 376 were relied upon:

[r 375] Power to amend

375 (1) At any stage of a proceeding, the court may allow or direct a party to amend a claim, anything written on a claim, a pleading, an application or any other document in a proceeding in the way and on the conditions the court considers appropriate.

(2) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started.

(3) If there is misnomer of a party, the court must allow or direct the amendments necessary to correct the misnomer.

(4) This rule is subject to rule 376.

[r 376] Amendment after limitation period

376 (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.

(2) The court may give leave to make an amendment correcting the name of a party, even if the effect of the amendment is to substitute a new party, only if—

(a) the court considers it appropriate; and

(b) the court is satisfied that the mistake sought to be corrected—

(i) was a genuine mistake; and

(ii) was not misleading or likely to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(3) The court may give leave to make an amendment changing the capacity in which a party sues, whether as plaintiff or counter-claiming defendant, only if—

(a) the court considers it appropriate; and

(b) the changed capacity in which the party would then sue is one in which, at the date the proceeding was started by the party, the party might have sued.

(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 Defendant also purported, initially, to rely upon r 377 but ultimately conceded it applied only to an originating process, which is defined in r 8 in a way which makes it clear pleadings are not included within it: something which r 377(2) also says, directly. The Plaintiff's amended Statement of Claim referred, on its face, to this rule but that was plainly mistaken and cannot dictate the outcome of this application.)

[12] I do not think r 375(1) compels a party to apply for leave for any amendment to a pleading. That contention, advanced by the Defendant and Third Party, ignores rr 378 and 379, which provide:

[r 378] Amendment before request for trial date

378 Before the filing of the request for trial date, a party may, as often as necessary, make an amendment for which leave from the court is not required under these rules.

[r 379] Disallowance of amendment

379 (1) If a party makes an amendment without leave before the filing of the request for trial date, another party may, within 8 days after service on the party of the amendment, apply to the court to disallow all or part of the amendment.

(2) On the application, the court may make an order it considers appropriate.

[13] Rule 378 seems plain; as Chesterman J said in *Bates v Queensland Newspapers P/L* (2001) QSC 083 at para [6]:

> … UCPR 378 provides that, before the filing of the request for a trial date, a party may, as often as necessary, make an amendment for which leave is not required.

[14] Rule 376 applies to amendments sought to be made after a limitation period has expired, but that was not the case here. (It would be relevant, of course, if leave had been necessary at the time and should, then, be sought by the Plaintiff now, because the limitation period has since expired.)

[15] It was also suggested the amended pleading introduced a new cause of action because, by omitting any reference to a breach of the contract or the *Residential Tenancies Act* in the original Statement of Claim the Plaintiff might be deemed to have abandoned the claim in contract[2], but I was not referred to any rule or authority which prohibits amendments to a pleading which introduce a new cause of action within the limitation period or require leave from the court for an amendment of that kind. Rule 50(1)(a) requires that a breach of contract be specifically pleaded, and r 169 deems pleadings to have closed 14 days after the defence but neither was suggested as a bar to amendment. Rule 387 relevantly provides:

> **[r 387] When amendment takes effect**
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> **387** (1) If a document is being amended under this part, the amendment takes effect on and from the date of the document being amended.
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> (2) However, an amendment including or substituting a cause of action arising after the proceeding started takes effect on and from the date of the order giving leave.
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> (3) Despite subrule (2), if an amendment mentioned in subrule (2) is made, then, for a limitation period, the proceeding as amended is taken to have started when the original proceeding started, unless the court orders otherwise.

[16] This not a case in which the claim in contract arose after the proceeding started: r 387(2)[3]. I was not referred to s 81 of the Supreme Court 1991 but again, because the amendment was effected within the limitation period, it would not apply. In any event, there is no equivalent provision in the *District Court Act* 1967. Further, as *Draney v Barry* (2002) 1 Qd R 145 shows, the section does no more than supplement the discretion arising under r 376 which, again, does not apply here.

[17] Even absent these further adverse conclusions reached by reference to the *UCPR*, the Defendant faces significant hurdles in establishing grounds for leave to apply now (or resisting a grant of leave to the Plaintiff to make the amendments, if that is necessary). No attempt was ever made to strike out the prayer in contract even though the first pleading did not pursue it; no particulars of the amended pleading were sought; contributory negligence was pleaded in the defence which was not, however, amended after the further pleading was received; and, the defendant signed a request for trial dates with all that implies[4] and then, after more than two years had passed belatedly raised the matter for the first time on the morning of the first day of trial.

[18] There is, additionally, obvious evidence of prejudice (which is relevant, again, even if leave should have been sought at the time of the amendments). The Plaintiff would, now, potentially be denied the opportunity to pursue a claim raised within the limitation period; and, compelled to cross-apply to amend the pleadings after expiry and attempt to overcome the challenges present by r 376. If that failed she

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[2] *Renowden v McMullan* (1970) 123 CLR 585 at 609; *Sharples v O'Shea* (1999) QSC 190 at para [7]; *Ayr Link v Paterson* (No 2) (2003) NSW CA 251, at para [121].

[3] and see Cairns *Australian Civil Procedure* (6th Ed at p 229).

[4] rule 469(5).

might apply for leave to join the Third Party as a defendant with, again, the hurdles that presents although it might be said that, in the circumstances arising here, *Draney v Barry* (supra) would be ample authority that leave might be appropriate.

[19] These factors are to be balanced against the prejudice which the Defendant and Third Party assert falls upon them if, contrary to the findings already made, the amending legislation catches this claim and the rules require that the Plaintiff should have obtained leave before amending her pleading. The prejudice is, in short, the possible loss of a chance to reduce the Plaintiff's damages in contract for contributory negligence, if she otherwise succeeds in the action.

[20] The discretion arising under r 375(1) is plainly wide as to both its nature, and extent; and, also, its timing. Here, giving the Defendant the benefit of every finding he requires, an application for leave would fall to be considered with reference primarily to the fact the amendments were notified within the relevant limitation period, but defeat the purpose of the amending legislation. The predecessor to r 379, RSC Order.32 r 5 permitted the court to disallow the amendment "... *if satisfied that the justice of the case requires it*"; now, the discretion is expressed in r 379(2) in terms that the court may make such an order as it considers "… *appropriate*".

[21] The discretion is not, I think, any narrower than that which previously applied under the RSC. In *Burrows v CA Sciacca & Associates* (1997) 1 Qd R 157 White J dealt with circumstances not dissimilar to those arising here. The plaintiff had sued for damages in negligence, which was the only relief sought in the writ, but his first statement of claim also asserted a cause based on breach of contract, as did a later pleading, and in both cases the relevant limitation period had expired. No application had been made to amend the writ endorsement, or the pleadings, and the defendants applied under the predecessor to r 379. As her Honour found (at p 162) it was, in truth, unclear whether the limitation periods had actually expired at all but her Honour was persuaded to refuse disallowance because the amendments to the pleading raising the contract arose out of substantially the same facts as the cause of action in negligence. The same conclusion arises here.

[22] In any event there remains the factor of delay which, here, is on any view of high importance. The defendant allowed the amended pleading to reflect the nature of the plaintiff's case for over two years, and did not seek disallowance until the morning of trial. These factors properly attract consideration of the principles enshrined in the *UCPR*, considered and discussed in *Rigato Farms Pty Ltd v Ridolfi* (2001) 2 Qd R 455 which shows that questions of prejudice may dictate that a party loses its right to a hearing of all issues on the merits. That is a compelling basis upon which to refuse leave to the Defendant to bring an application now. For the sake of completeness it is also appropriate to record that, for the reasons given earlier, even if leave had been granted and the defendant was permitted to oppose the amendments now, I am not persuaded they should be disallowed.

[23] The application by the Third Party is for production of Counsel's Advice dated 14 May 2004 referred to in para 5 of the affidavit of the Plaintiff's Solicitor Ian James Brown filed 1 April 2005. That affidavit was filed in response to the Defendant's application under r 379 and principally addresses the very late notice of it. The relevant paragraph touches some of the questions of prejudice discussed earlier:

> 5. Prior to the expiration of the limitation period in respect of the Plaintiff's claim I had specifically considered the issue of joining the Third Party as a Defendant to the claim. I sought advice from Counsel prior to the expiration of the limitation period and concurred with Counsel's advices of 14 May 2004 that the Plaintiff's claim against the Defendant pleaded in contract protected the Plaintiff's rights and that it was not necessary to join the Third Party as a defendant to the proceedings.

[24] As Counsel for the Plaintiff, Mr Newton, pointed out the Advice, ordinarily privileged, can only be sought to test the solicitor's credit and, relative to that motive, the Third Party did not ask for the solicitor to be available for cross-examination. The critical question addressed by the cases touching discovery of privileged documents concerns the nature, circumstances and context of the disclosure of the existence of the Advice. Counsel for the Third Party contended that the specific reference to the Advice waives the privilege but the cases to which I was referred do not, I think, go quite so far. In *Ampolex v Perpetual Trustee Company (Canberra) Ltd* (1996) 137 ALR 28 Kirby J observed, at 34, that a mere reference to the existence of legal advice would not amount to a waiver of its contents. In *ACC v Australian Safeway Stores Pty Ltd* (1998) 153 ALR 393 Goldberg J held that a reference to a brief without its contents or any summary of or information about those contents was insufficient to compel disclosure of their substance. In *BT Australasia Pty Ltd v State of New South Wales (No 7)* (1998) 153 ALR 722 Sackville J observed that the test of loss of privilege by disclosure was a quantitative test, which asked whether there had been sufficient disclosure to warrant loss of privilege.

[25] In *Bayliss v Cassidy (No 2)* (2000) 1 Qd R 464 the parties, and the Queensland Court of Appeal were prepared to accept the statement of Byrne J in *Torcasio Developments Pty Ltd v County Park Developments Pty Ltd*[5] that:

> … It is only where the client directly or indirectly puts in issue the substance of the privileged communication that the privilege is lost and then only in so far as it is necessary to do justice between the parties.

The important question, Davies JA said at 468,[6] was whether or not fairness dictated that an assertion about the content of confidential communications with a legal advisor should be taken as a waiver of any privilege attached to the communication.

[26] McPherson JA concurred and also said at 473:

> It occurs to me to say, however, that at least part of the reason for withdrawing the benefit of privilege in cases like this is to safeguard against the possibility of abuse or error by the person claiming it.

His Honour went on, at 474, to conclude that in the special circumstances arising in *Bayliss'* case it would not be fair to allow the defendants to use privilege as a shield. The special circumstances there were, however, that the defendants to an action for damages for false imprisonment revealed in answers to interrogatories their intention to rely on certain legal advice as a reasonable cause for their belief or suspicion, before the plaintiff's arrest, that he had committed a crime; thereby

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[5] Unreported, Supreme Court of Victoria, 9 September 1991.

[6] Reflecting what Hodgson J said in *Standard Chartered Bank v Antico* (1995) 36 NSWLR 87 at 94-95.

impliedly asserting that the contents of those advices supported the arrest, and imprisonment. Here, the solicitor's affidavit does no more than reveal the existence of advice which, he said, reflected agreement with conclusions he had himself reached which led, by inference, to advice to the plaintiff not to apply to join the third party as a defendant. The third party did not seek to challenge his own opinion. Otherwise, the disclosure is only relevant as showing the solicitor had thought about the matter to a degree sufficient, in his mind, to warrant seeking counsel's opinion – in the context of an assertion of prejudice said to be relevant to the defendant's present application and intended to show the matter had been considered. It might reasonably be said, however, that the prejudice would have arisen whether or not either of the legal advisers had turned his mind to it.

[27] These factors seem to me to fall short of meeting the quantitative test suggested by Sackville J in *BT Australasia Pty Ltd* (supra). Further, there is no compelling basis upon which it can be asserted that fairness dictates the opinion should be disclosed. This is a case in which the reference to counsel's advice is much closer to a bare mention of its existence. The application is refused.