DISTRICT COURT OF QUEENSLAND

CITATION:	*Stacey v Perkins & Anor* [2015] QDC 100
PARTIES:	**PAUL DOUGLAS STACEY** (plaintiff) v **KERRY ANN PERKINS** (first defendant) and **WILLIAM STEWART PERKINS** (second defendant)
FILE NO:	D3592/14
DIVISION:	Civil
PROCEEDING:	Claim
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	8 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2015
JUDGE:	Dorney QC DCJ
ORDERS:	**1. The plaintiff have leave to amend his Claim and Statement of Claim as advised and file the same within 14 days of this order.** **2. All amendments are to take effect on and from 8 May 2015.** **3. The second defendant give disclosure to the plaintiff pursuant to his duty to do so pursuant to r 211 of the *UCPR*, within 7 days of this order.** **4. All parties have leave to file, and serve, written submissions on costs, if any, by 4pm on 15 May 2015.**
CATCHWORDS:	Amendment of Claim and Statement of Claim – new causes of action – possible expiry of limitation periods – date from which amendments to take effect – disclosure
COUNSEL:	M Williams for the Applicant/Plaintiff G Shaw (Solicitor) for the First Respondent/Defendant G Radcliffe for the Second Respondent/Defendant

SOLICITORS:	Carter Capner Law for the Applicant/Plaintiff
	Australian Law Group for the First Respondent/Defendant
	Russell Baxter Lawyers for the Second Respondent/Defendant
LEGISLATION CITED:	*Civil Proceedings Act* 2011, s 28
	Competition and Consumer Act 2010, Schedule 2: The Australian Consumer Law, s 236, s 243(b)
	Limitation of Actions Act 1974
	Trade Practices Act 1974 (Cth)
	Uniform Civil Procedure Rules 1999, r 5, r 171, r 214(2)(c), r 214(2)(e), r 223, r 375, r 376, r 376(4), r 377(1)(c), r 379, r 387(3)
CASES CITED:	*Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175
	Hartnett v Hynes [2009] QSC 225
	Mineral Resources Engineering Services Pty Ltd (as trustee for the Meakin Investment Trust) v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia [2015] QSC 62
	Monto Coal 2 Pty Ltd & Ors v Sanrus Pty Ltd (as trustee of the QC Trust) & Ors [2014] QCA 267
	Murdoch v Lake [2014] QCA 216
	Scarcella v Lettice (2000) 51 NSWLR 302
	Startune Pty Ltd v Ultra-Tune Systems (Aust) Pty Ltd [1991] 1 Qd R 192
	Wardley Australia v Western Australia (1992) 175 CLR 514
	Westpac Banking Corporation v Knight Property Investments No. 3 Pty Ltd & Anor (No 3) [2014] QSC 270
	Winnote Pty Ltd v Page (2006) 68 NSWLR 531

Introduction

[1] By application filed 27 April 2015 the plaintiff, as applicant, has sought, pursuant to r 377(1)(c) of the *Uniform Civil Procedure Rules* 1999 (*"UCPR"*), that he be granted leave to amend both the Claim and Statement of Claim filed on 16 September 2014. The application seeks disclosure orders as well.

[2] Upon initially considering the present Claim and Statement of Claim and having observed that no specific sum had been sought, in either, for the damages claimed, I sought that the plaintiff's Counsel take instructions because I was otherwise of the view that the action should be transferred to the Supreme Court under s 28 of the *Civil Proceedings Act* 2011: see *Startune Pty Ltd v Ultra-Tune Systems (Aust) Pty Ltd*,[1] at 197. On taking such instructions, it was indicated to the Court that the amount to be sought would not be above the monetary limit of the jurisdiction of this Court, with the plaintiff abandoning any excess, for which I gave leave to effect.

[3] Both the first defendant and the second defendant, as respondents, opposed the application for leave to further amend.

Background

[4] It is not in dispute that the plaintiff has been, at all material times, the General Manager of Shamir Australia Pty Ltd (formerly known as Smyth & Perkins Pty Ltd). It is also not in dispute that:

(a) the first defendant and the second defendant were shareholders in the company until such time as each sold her or his shares;

(b) by a Deed (Exhibit 1), dated as made 28 October 2008, entered into between the defendants and the plaintiff, the defendants agreed to pay a calculable "consideration" to the plaintiff in consideration of the plaintiff agreeing, in general terms, to continue to be employed by the company; and

(c) Clause 1 of the Deed contained "conditions precedent" to payment.

[5] It also was not in dispute that the defendants asserted that those conditions precedent were not met and asserted, positively, that no obligation remains on the defendants to pay any sum to the plaintiff despite agreements, eventually, being

[1] [1991] 1 Qd R 192.

entered into pursuant to which both defendants disposed of their respective shareholding referred in that Deed to the legal entity identified in that Deed.

[6] The draft amended Claim and Statement Claim now allege, in the alternative to the presently pleaded cause of action (being damages for breach of contract), damages for "common law misrepresentation", damages for misleading or deceptive conduct pursuant to s 236 of the *Competition and Consumer Act* 2010, Schedule 2 [the *Australian Consumer Law* ("*ACL*")] and orders pursuant to s 243(b) of the *ACL* to vary that Deed and to pay damages.

[7] Again, it is not in dispute that the further causes of action are based, at least in part, upon initial acts that are alleged to have occurred, at the latest, around April 2008.

Relevant amendment rules

[8] Despite both defendants raising the issue of the expiry of limitation periods (pursuant to the *Limitation of Actions Act* 1974 and the applicable consumer legislation), the plaintiff did not seek to amend his application so as to rely upon r 376(4) of the *UCPR* also.

[9] Undoubtedly that course was taken because the plaintiff himself, in his written Outline (at paragraph 7), contended that the leave was to "incorporate new claims" against the first and second defendants, in circumstances where those new causes of action could not sensibly be said to arise out of the same facts, or substantially the same facts, as the existing cause of action for breach of contract.

[10] Addressing, in an incidental way, the issue of determining a limitation period expiry date in an interlocutory hearing, Philip McMurdo J noted in *Mineral Resources Engineering Services Pty Ltd (as trustee for the Meakin Investment Trust) v Commonwealth Bank of Australia; Hay v Commonwealth Bank of Australia*[2] that a practical difficulty in some cases arises because it cannot be fairly determined whether a relevant period of limitation has expired: [18]. While that conclusion was reached during a general consideration of r 376, it highlights the question here about whether it is open on the existing evidence to decide, on such an interlocutory application as the present one, whether new causes of action, if allowed, would be outside the limitation periods: see the cognate discussion in *Westpac Banking*

[2] [2015] QSC 62.

Corporation v Knight Property Investments No. 3 Pty Ltd & Anor (No 3),[3] at [8] – [9].

[11] As observed by Peter Lyons J in *Murdoch v Lake*,[4] what is critical is identifying when measurable damage first occurs: at [46], relying upon *Wardley Australia v Western Australia*,[5] at 537–8 and *Scarcella v Lettice*,[6] at [31]–[32]. As Peter Lyons J went on then to note, relying upon *Winnote Pty Ltd v Page*[7] (at [64]), in determining whether a cause of action has accrued concerning the expiry of a period of limitation, the question is answered by reference to the substance of the matter and not simply on the basis of allegations in a pleading: also at [46].

[12] The applicant/plaintiff has asserted that his measurable loss – at least arguably – occurred, at the earliest, when "each of the defendants respectively sold their shares in the corporation and then refused to make good the(ir) promise". Those dates are, arguably, still within any 6 year period of limitation. Given the cautionary message in *Wardley* (by Mason CJ, Dawson, Gaudron and McHugh JJ) that limitation questions should *not* be decided in interlocutory proceedings "except in the clearest of cases" (at 533), I decline to enter in to such a consideration at this time.

[13] Nevertheless, as I indicated during the oral submissions, particularly in circumstances where r 376 is not relied on, it may be appropriate to make an order pursuant to r 387(3) – to the extent that it operates – that the Court should "otherwise" order, so that the defendants will still have the avenue of pleading any limitation period that might be arguably applicable. I intend to follow that course. To the extent that it does not, r 387(2) has effect.

Principles relevant to discretion

[14] The parties have raised the potential effect of *Aon Risk Services Australia Limited v Australian National University*.[8] Recently, in *Monto Coal 2 Pty Ltd & Ors v Sanrus Pty Ltd (as trustee of the QC Trust) & Ors*,[9] the Court of Appeal held that the principles in *Aon*, because of the operation of r 5 of the *UCPR*, must be accepted to

[3] [2014] QSC 270.
[4] [2014] QCA 216.
[5] (1992) 175 CLR 514.
[6] (2000) 51 NSWLR 302.
[7] (2006) 68 NSWLR 531.
[8] (2009) 239 CLR 175.
[9] [2014] QCA 267.

be of general application and, in particular, do apply to amendments – particularly relevant to that case – prior to the filing of a request for a trial date or the allocation of a trial date by the supervising judge: at [73]. As Flanagan J, speaking for the Court, noted, Applegarth J in *Hartnett v Hynes*[10] (at [27]) outlined 12 principles applicable with respect to amendments for which leave is required: at [74]. Nevertheless, as he went on to remark, the 12 principles identified "are, of course, only a guide in the sense that the application of those principles will vary from case to case… (and) (e)ach case will depend on its own circumstances.": at [74].

[15] It is unnecessary, in this case, to canvas all 12 principles. What is relevant here are the following:

- there has been no undue delay, with the present application being filed some 5 months only after service on the plaintiff of the defences of the defendants;
- no trial date has even been requested;
- there is an explanation for the plaintiff's application to amend, since the proposed new causes of action have arisen out of the defences filed by the defendants to the present claim by the plaintiff for breach of contract;
- while there may well be limitation periods which have expired, it is at least arguable, given *Wardley*, that there are real issues in dispute about them that need proper adjudication by this Court;
- issues such as the application of the parol evidence rule, oral collateral agreements and *non est factum* – with the latter being, perhaps, particularly doubtful – are still arguable propositions (without the limitation defences having been decided against the plaintiff);
- apart from costs, there is no identified prejudice to other parties, to other litigants or to this Court (on a case management consideration); and
- while there was a lengthy delay in commencing the proceeding, the impelling feature here is the nature of the defences raised by the defendants and whether, in those circumstances, matters concerning the Deed and its surrounding factual matrix ought to be properly explored – which they ought to in this particular case where there is no suggestion, for instance, of loss of evidence.

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[10] [2009] QSC 225.

[16] Accordingly, the general discretionary features lead me to the tentative position that an amendment should be allowed, subject to the next matter to be addressed.

Inadequacy of draft amended pleadings

[17] I have already addressed the issue of unspecified damages. There is, in addition, the fact that no particulars have been given, even in the draft pleadings about the basis of any calculation of them, even though the excess over the District Court jurisdiction limit has now been abandoned. Even so, even though I will not give leave to amend in accordance with the draft (Exhibit "MB-1" to the affidavit of Michael Plaxton filed 27 April 2015) because of its manifest deficiencies, I think there is enough evidentiary substance in the foreshadowed Amended Claim and Amended Statement of Claim to permit the plaintiff to attempt to settle pleadings which will be compliant with the *UCPR*.

[18] An additional factor asserted against the draft is its reliance upon the *ACL*. As correctly pointed out by the defendants, the *ACL* took effect from 1 January 2011. That, at least on its face, raises substantial difficulties about total reliance upon that, although the previous legislation, the *Trade Practices Act* 1974 (Cth), may yet reveal itself as a proper basis for such "consumer" based claims.

[19] The last matter raised by the defendants is the lack of particularity in the proposed Amended Statement of Claim. This can clearly be addressed if it were still to be an issue once an amended pleading is filed, with the clear observation that any new pleading that is deficient may well be subject to an application pursuant to, for instance, r 171 of the *UCPR*.

Decision on amendment

[20] Given the above considerations, the plaintiff is granted leave pursuant to r 377(1)(c) of the *UCPR* to amend the Claim in this proceeding and, consequently, the Statement of Claim pursuant to r 375, as he is advised. It is to be further ordered that all such amendments are to take effect on and from the date of these orders. Because some resettling is necessary on the draft, I will allow 14 days for the amended pleadings to be filed.

Further disclosure

[21] Since r 214(2)(c) has the effect that the duty of disclosure timing is to be within 28 days after the amended pleading is delivered, at least with respect to additional documents, it is appropriate in such a circumstance that all disclosure of that nature be left subject to the regime of the *UCPR*. With respect to disclosure on the existing pleadings, r 214(2)(e) states that that was to be within 28 days after the close of pleadings. The first defendant attempted such disclosure initially by a list of documents delivered on 20 February 2015. The second defendant has not even made disclosure to this point.

[22] To the extent to which the plaintiff has sought further disclosure from the first defendant, the first defendant did offer to provide further disclosure by 4pm on 1 May 2015. That communication was made prior to the filing of the application on 27 April 2015. In those circumstances, I will not make an order that the first defendant make further disclosure – but only on the basis that the first defendant does, in fact, properly disclose as already offered. Any failure to do so can be the subject of later adjudication.

[23] With respect to the second defendant, I intend to make an order that disclosure be made within 7 days of the date of the orders made here.

Costs

[24] The plaintiff in this application has sought a singular indulgence to substantially amend his Claim and Statement of Claim in circumstances not only where is there an arguable case for the application of relevant limitation periods but also where the draft pleadings contain many deficiencies, particularly with respect to particularisation. In such circumstances and in light of my decision on disclosure, subject to hearing further argument on the matter (for which I will give leave), I indicate an intention to order that the plaintiff pay the first defendant's costs of the application. Because of the default provisions in the *UCPR*, it is unnecessary to state either the requirement for assessment or that they be on a standard basis.

[25] With respect to the second defendant, subject again to giving leave to file written submissions on costs, because of his failure to make disclosure I indicate an intention to make no order as to costs with respect to the application in so far as it

concerns the second defendant, because of his default as balanced against the indulgence granted.