

SUPREME COURT OF QUEENSLAND

CITATION: *Montgomery v Pickard & Ors* [2006] QSC 373

PARTIES: **WILLIAM FRASER MONTGOMERY**
(Plaintiff)
AND
KEN PICKARD
(First Defendant)
and
MTW NO 2 PTY LTD (ACN 070 017 391)
(Second Defendant)
and
MTW NO 1 PTY LTD (ACN 070 321 372)

FILE NO/S: S184/03

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Townsville

DELIVERED ON: 8 December 2006

DELIVERED AT: Townsville

HEARING DATE: 5 December 2006

JUDGES: Cullinane J

ORDER: **That William Fraser Montgomery and Sally Teoh Montgomery as trustees in the Montgomery Superannuation Fund and Nan-Frae Holdings Pty Ltd be added as parties to the action.**
The action by the trustees and Nan-Frae Holdings Pty Ltd be taken to have started when the amended statement of claim is filed.
The applicants pay the respondents' costs of and incidental to the application to be assessed.

CATCHWORDS: JOINDER OF PARTIES – Applicants claim to have made certain payments claimed in present action by existing plaintiff – Whether Rule 69 (2)(iii) applicable – Whether

evidence is prejudice to Defendants.

Rule 69 and Rule 376(3) *Uniform Civil Procedure Rules*
Althaus v Australia Meat Holdings Pty Limited [2006] QCA
 412, cited
Bridge Shipping Ltd v Grand Shipping SIE (1991) 173 CLR
 231, cited
Brisbane South Regional Health Authority v Taylor (1997)
 186 CLR 541, adopted.

COUNSEL: Mr Michael Jonsson for the Applicant

Mr Farrell for the Respondent

SOLICITORS: Boulton, Cleary and Kern for the Applicant

Brian Bartley & Associates for the Respondent

- [1] This is an application pursuant to both Rule 69 and Rule 376(3) of the *Uniform Civil Procedure Rules* to add two parties, namely Sally Teoh Montgomery as trustee of the Montgomery Superannuation Fund and Nan-Frae Holdings Pty Ltd as second and third plaintiffs respectively. It is also an application to add the existing plaintiff, William Fraser Montgomery as a second plaintiff in the capacity of trustee of the Montgomery Superannuation Fund with Sally Teoh Montgomery.
- [2] When the action was commenced it was commenced solely in the name of William Fraser Montgomery in his personal capacity.
- [3] The statement of claim as it was delivered alleges that the first defendant was the plaintiff's accountant as well as a director and shareholder of the second and third defendant and a unit holder in the unit trust of which the third defendant was the trustee.
- [4] It alleged that the first defendant made certain representations to and gave certain advice to the first plaintiff as a result of which monies were invested by the plaintiff in acquiring 700 units in the unit trust which monies have been lost.
- [5] It is also alleged that further representations were made by the first defendant (who it is alleged was at all material times acting on behalf of himself and the other defendants) as a result of which further monies were invested described as payments on behalf of the business which is described as Motor Traders Warranty Association whose assets were held by the unit trust.
- [6] A number of causes of action were pleaded including negligence, fraud, breach of fiduciary duty and breaches of the *Trade Practices Act*.
- [7] In their defence the defendants admit that the first defendant was the plaintiff's accountant but deny that he gave investment advice generally to the plaintiff and deny that he was engaged to give investment advice generally to the plaintiff but admits that he did from time to time give such advice. The defendant alleges that another person (one Rowley) was retained to give investment advice "in relation to the investment of the plaintiff's superannuation fund." The allegations upon which the causes of action are based are denied.

- [8] The statement of claim in paragraph 5 refers to a meeting at which it is said the first defendant made certain representations to the plaintiff "that the plaintiff should invest money from his superannuation fund in the business."
- [9] The contract relied upon is alleged to have occurred initially in early 1997 and subsequently in 1998, 1999 extending into early 2000. The proceedings were instituted on 5th March 2003.
- [10] In their defence the defendants pleaded that some of the monies claimed were advanced not by the plaintiff personally but by the trustees of the superannuation trust.
- [11] In addition the defence goes on to deny that a further sum particularised in paragraph 17 of the Statement of Claim was paid by the plaintiff because (the Defendants) believe that the payment was made by Nan-Frae Holdings Pty Ltd."
- [12] The defence was filed on 1st May 2003.
- [13] By letter of 18th April 2003 the solicitors for the defendants wrote to the solicitors for the plaintiffs informing them that a draft defence had been prepared but was incomplete. It went on to state that the allegation in paragraphs 17 of the statement of claim was on the solicitor's understanding incorrect because investments were made by various entities related to the plaintiff rather than by the plaintiff himself. It invited the solicitors to review the allegations and amend the statement of claim at that point rather than incur a liability to pay the costs of an amended defence at a later stage.
- [14] The response of the solicitors for the plaintiff was to grant an extension of seven days to file a defence but the solicitors for the defendants were informed that no further extensions would be granted and in the event of a failure to file a defence by 29th April 2003 steps would be taken to enter default judgements without further notice.
- [15] In fact nothing was done in this regard until early 2005 when steps were taken to obtain advice from counsel on a range of issues including a possible joinder of the trustees and Nan-Frae Holdings Pty Ltd. Some other, but relatively few, steps were taken in the interim period.
- [16] The advice was not obtained until August, 2005 and as a result of the advice certain further particulars of the defence were sought and provided.
- [17] In September 2005 the solicitors for the plaintiff wrote to the solicitors for the defendants asking whether they would participate in a mediation and this was held in May 2006.
- [18] According to the solicitor having the conduct of the matter on behalf of the plaintiff and the applicants, he at this time sought advice as to whether there should be a joinder of other plaintiffs and the relevant documents were drafted.
- [19] This application was made on the 10th October 2006.
- [20] A draft amended statement of claim is exhibited to the affidavit of the solicitor for the applicants which was filed on 10th October 2006. Following some argument

when the matter came before the court the application was adjourned so that a further statement of claim could be prepared. This is exhibited to a further affidavit of the solicitor for the applicants filed on 29th November 2006.

- [21] The proposed amended statement of claim shows the applicants as plaintiffs and, in effect, brings the claims by the various plaintiffs into line with what the defendants alleged was the position in their defence filed in 2003, so far as those making payments and the purpose of the payment are concerned.
- [22] The respondents resist the application. It is submitted first of all that Rule 69 of the *Uniform Civil Procedure Rules* does not apply to the circumstances of this case and that Rule 376 does not assist the applicant. Ultimately, it is fair to say, the applicants were inclined to accept that Rule 69 was the relevant Rule rather than Rule 376 and I think this is correct. I do not think Rule 376 assists the Applicants.
- [23] Rule 69 (so far as is relevant) provides as follows:

[r 69] Including, substituting or removing party

69 (1) The Court may at any stage of a proceeding order that - ...

(b) any of the following persons be included as a party –

(i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding;

(ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.

(2) However, the court must not include or substitute a party after the end of a limitation period unless 1 of the following applies –

(a) the new party is a necessary party to the proceeding because –

(i) property is vested in the party at law or in equity and the plaintiff's or applicant's claimed entitlement to an equitable interest in the property may be defeated if the new party is not included; or

(ii) the proceeding is for the possession of land and the new party is in possession personally or by a tenant of all or part of the land; or

(iii) the proceeding was started in or against the name of the wrong person as a party, and, if a person is to be included or substituted as defendant or respondent, the person is given notice of the court's intention to make the order; or

(iv) the court considers it doubtful the proceeding was started in or against the name of the right person as a party, and, if a person is to be included or substituted as defendant or respondent, the person is given notice of the court's intention to make the order;

(b) the relevant cause of action is vested in the new party and the plaintiff or applicant jointly but not severally;

(c) the new party is the Attorney-General and the proceeding should have been brought as a relator proceeding in the Attorney-General's name;

- (d) the new party is a company in which the plaintiff or applicant is a shareholder and on whose behalf the plaintiff or applicant is suing to enforce a right vested in the company.
- (e) The new party is sued jointly with the defendant or respondent and is not also liable severally with the defendant or respondent and failure to include the new party make the claim unenforceable;
- (f) for any other reason –
 - (i) a claim made, or ground of defence raised, in the proceeding before the end of the limitation period can not be maintained; or
 - (ii) relief sought in the proceeding before the end of the limitation period can not be granted;
 unless the new party is included or substituted as a party.

[24] Secondly, it was argued that the evidence shows either the existence of actual prejudice as a result of the delays or the very real risk of it.

[25] The applicants primarily rely upon Rule 69(2)(iii).

[26] The applicants called in aid a judgment of Muir J in *Interline Hydrocarbon Inc v Brenzil Pty Ltd* [2006] QSC 184. The respondent contends that this judgment should not be followed.

[27] His Honour considered the scope of operation of Rule 69(2)(iii). He referred to the judgment in *Bridge Shipping Ltd v Grand Shipping SIE* (1991) 173 CLR 231 and in particular the judgment of McHugh JA in that matter and concluded that the Rule is not limited to cases of misnomer. At paragraph 21 he said:

"It follows that the sub-rule may operate in circumstances in which there was and remains a good cause of action against the initial defendant, who is to remain a defendant in the proceeding. Given the features of subr (iv) which I have identified, the limits of its operation are difficult to define but it appears to me that the allegations made and proposed to be made in this proceeding are capable of coming within it."

[28] This reasoning applies also to the case of sub-rule (iii) which the claimants and I with respect, adopt it.

[29] It may also be the case that Rule 62(f) applies but it is not necessary to express a concluded view about this.

[30] The position then so far as a proposed claim by the trustees is concerned is that no additional issue in the pleadings is now raised by the addition of the trustees. However, whereas the defendants had pleaded that certain payments were made by the trustees by way of defence, the trustees now wish to be added as plaintiffs to make such a claim.

[31] The position in relation to the claim by the applicant, Nan-Frae Holdings Pty Ltd is a little less clear. The amended draft pleading alleges payments made by that company by way of loan to the second defendant and payments made by it (in the alternative to the first plaintiff) of monies in exchange for a 25% shareholding in Leeturn 146 Pty Ltd as part of a rearrangement involving certain matters pleaded in paragraph 17(c) and (e) of the draft pleading.

- [32] The first defendant was a director of Nan-Frae Holdings Pty Ltd but says that he resigned as a director in December 2001 and signed the necessary documentation but that it appears not to have been registered.
- [33] In an affidavit by the applicant's solicitor it is alleged that the first defendant in his capacity as a director was made fully aware of the company and the fact that it held funds which was used by the plaintiff, William Fraser Montgomery for private investment. The first defendant in an affidavit denies this and says that his only familiarity with the records of the company was for the purpose of completing the company's financial and taxation returns.
- [34] The first defendant deposes that he cannot now recall specifically the events surrounding his appointment as a director and the acquisition by him of one share in the company (which he held non-beneficially) because of the passage of more than thirteen years since he acquired the share. His recollection is that he was asked by the plaintiff, William Fraser Montgomery, to act as director and to hold a share in the company to ensure that the company had at all times two directors.
- [35] He sets out in the affidavit his recollection of the events leading to the acquisition of shares in Leeturn 146 Pty Ltd by William Fraser Montgomery and himself and other parties but says he cannot understand how it is that, as the records show, William Fraser Montgomery personally acquired shares rather than Nan-Frae Holdings Pty Ltd. The first defendant says he has been unable to locate any documents to verify how and why the proposal changed.
- [36] The affidavit of the first defendant went on to allege a number of matters in relation to the issue of prejudice:

4. *In or about December 2005 I was asked by my solicitor to make enquiries to locate any documentation I may have in relation to the MTW Unit Trust. I reviewed a number of boxes of material I held in my office and was unable to locate any documentation not previously disclosed by me in relation to the Unit Trust. I recall providing some Unit Trust documentation to the plaintiff or one of his advisors a number of years ago but was unable to locate any documents to verify this either. I continued with my enquiries to locate the documents as and when I had an opportunity to and also searched the records I had stored in my archive facilities in Townsville without success. I have also tried to locate and contact Mr David Claussen, the former accountant for the MTW businesses to enquire as to whether Mr Claussen may have any other documents or information as to their whereabouts. Unfortunately, I have been unable to locate Mr Claussen despite my enquiries.*
5. *In light of the difficulties I have had to locate any further documents relevant to the claim(s), I can only assume that the records were either destroyed after seven years in accordance with my usual business practice, retained by Mr Claussen or handed the plaintiff at some time.*

6. *I am concerned that if given leave to join the trustees and Nanfrae as plaintiffs to the claim I will be unable to defend the claims in any meaningful way due to my inability to recall specific details of conversations I had with the plaintiff (in his capacity as trustee and generally) and the plaintiff's advisor(s) due to the passage of almost ten years since the events occurred and my inability to refresh my memory of these events by reference to documents created at the time.*

7. *In relation to the proposed joinder of the trustees as plaintiffs to the proceeding, I recall having a number of discussions with Mr Rowley in the time leading up to the acquisition of units in the Unit Trust by the Superannuation Fund particularly in relation to the rationale for the acquisition of units in the Unit Trust by the Fund. I believe I would have recorded each conversation in writing in accordance with my usual business practice. In the absence of my documents, including my notes of conversations with the plaintiff (as trustee) and Mr Rowley in particular, I am concerned as to how I am to defend the claims now proposed given the amount of time which has passed since the events occurred.*

8. *In particular I say that I have been unable to locate:*
 - (a) *Copies of correspondence passing between me and other persons involved in the business with Mr Rowley;*
 - (b) *Copies of diary notes and other records recording numerous discussions I had with the trustees of the Superannuation Fund, Mr Rowley and other investors in the Unit Trust;*
 - (c) *Correspondence and other documents which I sent to and received from the trustees and Mr Rowley prior to the trustees' acquisition of units in the Unit Trust, including the business financial and accounting records.*

9. *I note the affidavit of Mr Smith exhibits (at MJS1) a letter I sent to the plaintiff enclosing a letter to Mr Rowley which sets out details of the proposed acquisition of units in the Unit Trust. This is an example of the type of correspondence which would have passed between me, Mr Rowley and the plaintiff in relation to the Superannuation Fund's acquisition of units in the Unit Trust."*

[37] This evidence is not all together satisfactory, although it was unchallenged. Paragraph 5 seems to proceed upon the basis that there are some records which were not previously disclosed by him in relation to the unit trust or provided to the plaintiff. The basis for such an assumption does not appear.

[38] A Mr Claussen referred to in paragraph 4 has been contacted but says he has very little recollection of the relevant matters.

[39] It is difficult to accept that any relevant records would have been destroyed after seven years with the action on foot in which the first defendant had raised the

defence that he did not advise the then plaintiff about his or the superannuation fund's investments but that this was done by Mr Rowley. However he does depose in paragraph 8 to an inability to locate specific documents relating to dealings between himself and Rowley and himself and trustees of the superannuation fund and other correspondence and documents.

[40] He deposes to a belief that in accordance with his practice he would have kept notes of conversations and that he cannot now find these.

[41] These documents are of course all relevant to the issue which had been raised by the defence as to the relationship between the first defendant and the present and proposed plaintiffs. There is no evidence as to what steps were taken to obtain this documentation after the action was commenced and how much of such documentation was available. There has obviously been extensive disclosure and many documents have been inspected.

[42] So far as the claim by the trustees are concerned it does not seem that the addition of the applicants as plaintiffs would itself create any difficulties for the respondents. As I have said, all of these issues were live issues in the pleading as they stood after the delivery of the defence.

[43] One suspects that the difficulties as to documentation are not now substantially greater than they would have been at the time when the action was commenced.

[44] However some eight or nine years has passed since the relevant events. This passage of time necessarily impacts upon the capacity to obtain a fair trial. In addition the matter cannot simply be approached by comparing the position at that time and now.

[45] In *Brisbane South Regional Health Authority v Taylor* (1997) 186 CLR 541 McHugh J at 552 set out the rationales for the enactment of limitation periods:

"First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even 'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period."

[46] His Honour went on to reject the test which the Court of Appeal had applied in that case of comparing the prejudice at the end of the limitation period with the prejudice at the date at which the application (in that case) to extend the limitation period, had been made. He said at pages 554 and 555:

"But this analysis, with respect, treats the limitation period as little more than a point of reference. It suggests that all that is ordinarily relevant is the marginal prejudice created by the delay. It downplays, if it does not overlook, the second, third and fourth rationales of limitation periods to which I have referred. It treats the parties, subject to the question of prejudice, as if they were on an equal footing. The analysis gives no

weight to the fact that the defendant's potential liability expired at the end of that period and that to extend the period may result in the imposition of a new legal liability on the defendant. Indeed, it seems to indicate that a limitation period is a provisional rather than a rigid limit.

If the action had been brought within time, it would have been irrelevant that, by reason of the delay in commencing the action, Dr Chang might have had little independent recollection of his conversation with the Applicant and that the defendant might have had difficulty in fairly defending itself. But once the potential liability of the defendant had ended, its capacity to obtain a fair trial, if an extension of time were granted, was relevant and important. To subject a defendant once again to a potential liability that has expired may often be a lesser evil than to deprive the plaintiff of the right to reinstate the lost action. This will often be the case where the plaintiff is without fault and no actual prejudice to the defendant is readily apparent. But the justice of a plaintiff's claim is seldom likely to be strong enough to warrant a court reinstating a right of action against a defendant who, by reason of delay in commencing the action, is unable to fairly defend itself or is otherwise prejudiced in fact and who is not guilty of fraud, deception or concealment in respect of the existence of the action."

- [47] Although the application here was of a different kind I think the same considerations must apply here.
- [48] The position in relation to the claim by the applicant Nan-Frae Holdings Pty Ltd is a little different. Whilst it is true the defendants in their defence raised as a basis for a denial of the allegation that monies had been paid by the existing plaintiff to acquire an interest in Leeturn Pty Ltd the first defendant says that he has no clear recollection of the events surrounding these transactions. As will be seen from the proposed pleading the claim concerns a transaction involving a claim in the alternative so far as the acquisition of shares is concerned to a claim against the existing plaintiff and in addition a claim in respect of monies advanced by Nan-Frae Holdings Pty Ltd by way of loan to the second defendant. The first defendant says that he has had no involvement with the company since 2001 and says that there are matters which appear in the records which are at odds with his recollection and he does not now recall how that discrepancy arose.
- [49] So far as this claim is concerned, the case is one in which the delay in raising it, is said to itself give rise to possible prejudice in addition to the general prejudice which is said to affect the defendant's capacity to have a fair trial on the issues already raised concerning the relationship between the first defendant and the present and proposed plaintiffs.
- [50] Whilst an explanation for delay in making the application is not essential it is a relevant and important consideration. Here there is no explanation at all for the delay between the period when the solicitors for the defendants invited the solicitors for the applicants to consider the question of the appropriate parties and the making of this application. Certain other steps were taken in the latter part of this period but they do not provide an explanation as to why no steps were taken to put the question of parties in order.

- [51] Whilst as I have said the evidences on the subject of prejudice is not entirely satisfactory that evidence does raise, at least in relation to some important aspects of the matter as already discussed, serious issues of possible prejudice including prejudice in relation to specific documents which cannot be denied or underestimated.
- [52] In these circumstances I am not persuaded that the applicants have made out a case for the grant of the relief sought.
- [53] One of the claims included in the draft statement of claim is a claim based upon a breach of fiduciary duty. It is accepted that this claim faces no difficulty with any limitation period and that the applicants are entitled to pursue it. The respondent contended that consistent with what was said in *Althaus v Australia Meat Holdings Pty Limited* [2006] QCA 412 the appropriate course to take would be, if the Application otherwise failed, to make a special order under Rule 74(5) that the proceedings on behalf of the trustees and Nan-Frae Holdings Pty Ltd be taken to have started when the amended statement of claim was filed, thus permitting the defendants to plead the Statute in relation to the new claims (apart from the claim based upon breach of statutory duties). This seems an appropriate course to take.
- [54] The formal orders of the court are that:
- (a) William Fraser Montgomery and Sally Teoh Montgomery as trustees in the Montgomery Superannuation Fund and Nan-Frae Holdings Pty Ltd be added as parties to the action.
 - (b) The action by the trustees and Nan-Frae Holdings Pty Ltd be taken to have started when the amended statement of claim is filed.
 - (c) The applicants pay the respondents' costs of and incidental to the application to be assessed.