

SUPREME COURT OF QUEENSLAND

CITATION: *Holdway v Acuri Lawyers* [2007] QSC 355

PARTIES: **MARGARET ELIZABETH HOLDWAY**
(plaintiff)
v
ACURI LAWYERS
(defendant)
MICHAEL EASTWOOD
(third party)

FILE NO: SC No 3255 of 2004

DIVISION: Civil

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court

DELIVERED ON: 22 November 2007

DELIVERED AT: Brisbane

HEARING DATE: 21 November 2007

JUDGE: Fryberg J

RULING: **Leave to lead evidence in chief from an expert witness orally, granted**

CATCHWORDS: Procedure – Supreme Court Procedure – Queensland – Evidence – Form of expert evidence allowed – Requirement of leave

Uniform Civil Procedures Rules 1999 r 427

COUNSEL: Plaintiff: M Cooke QC and D Morgan
Defendant: R Derrington SC

SOLICITORS: Plaintiff: Phillip Roberts Lawyers
Defendant: Sparke Helmore

SUPREME COURT OF QUEENSLAND
CIVIL JURISDICTION
FRYBERG J

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[2007] QSC 355

No 3255 of 2004

MARGARET ELIZABETH HOLDWAY
and

Plaintiff

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ARCURI LAWYERS
and

Defendant

MICHAEL EASTWOOD

Third Party

1895 of 2003

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MARGARET ELIZABETH HOLDWAY
and

Plaintiff

FRANCIS JOHN VIRGONA
BRISBANE

Respondent

..DATE 22/11/2007

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RULING

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HIS HONOUR: The plaintiff has sought leave pursuant to rule 427(iv)(c) to lead oral evidence-in-chief from an expert witness. The witness in question is a solicitor from whom it is proposed to lead evidence as to the proper conduct and reasonable conduct of a solicitor in the circumstances which faced the defendant in this case.

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Although no report has been obtained from the expert, the nature of his evidence is fairly obvious and the defendant has known for at least two days of the intention to seek leave to call the expert.

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The defendant does not point to any possible prejudice which would not be cured by an adjournment with a suitable order as to costs, and indeed I am unsure that there is much likelihood of the witness giving evidence of such a nature as even to require that, given the amount of knowledge which the defendant has had of the case throughout the proceedings.

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It follows that, in my judgment, if leave is necessary it should be given.

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I am not persuaded that leave is necessary or even that rule 427(iv)(c) applies to the case. Rule 427(iv) refers to the situation on its face where oral evidence is to be given or is proposed to be given by an expert who has furnished a report. If the structure of the rules were that it was intended that without leave, expert evidence may be given only by a report, one would have expected that to appear in rule 427(i), either

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by a wording such as, "An expert may give evidence in a proceeding only by a report", subject perhaps to a grant of leave otherwise.

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Subrule 1 is not worded in any such way, but is worded permissively and the structure of division 2 of part 5 is designed to deal with expert reports.

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If it be suggested that such a construction is an invitation to parties to try to ambush their opponents by leading expert evidence orally, the answer is, I think, that it would be foolish in the extreme for any litigant to adopt such an approach. The Court would have great difficulty in most cases in comprehending such expert evidence. The adoption of such a course unless unavoidable, and even if unavoidable in some cases, might well lead to an adjournment at the cost of the party who adopted the course and it might reasonably be expected that steps would be taken to ensure that the opposing party was not prejudiced.

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Practical experience teaches that almost invariably expert evidence is given by way of a report, simply because that is the way to make it most comprehensible to the Court. The task of advocates is to persuade the Court, a task which would not be performed were they to lead incomprehensible evidence.

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As presently advised, therefore, I would not think that leave is necessary.

However, I have not heard full argument on the point. It is

unnecessary to decide it in the present case since I am
content to grant leave and that is the course which I shall
follow.

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You have leave to adduce the evidence.

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