SUPREME COURT OF QUEENSLAND

CITATION:	*Ashton & Anor v Dorante & Anor* [2011] QSC 390
PARTIES:	**GEOFFREY JOHN ASHTON and CYNTHIA ASHTON** (Plaintiffs) v **ANTONIO FRANCIS DORANTE** (Defendant) **STATE OF QUEENSLAND** (Second defendant
FILE NO/S:	496 of 2010
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	8 December 2011
DELIVERED AT:	Cairns
HEARING DATE:	16 November 2011
JUDGE:	Henry J
ORDER:	**1. The plaintiffs' application for summary judgment is dismissed.** **2. The plaintiffs' Amended Statement of Claim filed 21 September 2011 is struck out.** **3. The plaintiff will file and serve a Further Amended Statement of Claim by 4.00 pm on 27 January 2012.** **4. The defendants will have liberty to apply to strike out the whole proceeding in the event that the plaintiffs fail to file a Further Amended Statement of Claim or fail to comply with the rules of pleading in such Further Amended Statement of Claim as may be filed.** **5. I direct the Registrar to add the names of the female plaintiff and the second defendant to the Amended Claim filed 21 September 2011.** **6. The plaintiffs will pay the first defendant's and second defendant's costs of and incidental to the applications to be assessed on the standard basis, unless otherwise agreed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – Where the plaintiffs' apply for summary judgment against the defendants – Where the

plaintiffs cannot establish the defendants have 'no real prospect' of defending the claim – Where the defendants' apply for the plaintiffs' Amended Statement of Claim to be struck out as it discloses no reasonable cause of action and cannot be pleaded to – Where the Amended Statement of Claim is struck out as it discloses no reasonable cause of action and is unable to be pleaded to.

PROCEDURE – COURTS AND JUDGES – Where the plaintiffs raise a Constitutional issue and adjournment of proceeding is sought to allow notices to be served on various Attorneys-Generals pursuant to s 78B of the *Judiciary Act 1903* (Cth) – Whether adjournment ought be granted – Where plaintiffs allege s 23(2) of the *Supreme Court of Queensland Act 1991* (Qld) requires a Judge who has retired to continue to preside until the completion of the whole of a proceeding they presided over.

Uniform Civil Procedure Rules 1999 (Qld) – r 171 and 292.

Judiciary Act 1903 (Cth) – s 78B

Supreme Court of Queensland Act 1991 (Qld) – s 23(2)

COUNSEL: G J Ashton in person for the plaintiffs
D P Morzone for the defendants

SOLICITORS: Crown Law Office for the defendants

[1] By an application filed 21 September 2011[1] the plaintiffs make application for summary judgment. By an application filed 7 November 2011[2] the defendants apply for orders striking out the Amended Statement of Claim and removing the second defendant as a party.

[2] The applications of the parties and argument upon them give rise to five main issues for determination:

1. Does the proceeding involve a matter arising under the constitution or involving its interpretation such that it ought not proceed until notice has been given to the Attorneys-General of the Commonwealth and of the States pursuant to s 78B(1) of the *Judiciary Act 1903* (Cth) ("Constitutional point?")?
2. Does s 23(2) of the *Supreme Court of Queensland Act 1991* (Qld) have the consequence that the former Far Northern Judge, the Honourable S Jones AO QC, must continue to preside until the completion of the proceeding and render *ultra vires* the orders of any other judge presiding in connection with the proceeding ("Must the retired judge hear this matter?")?
3. Should there be an order for summary judgment in favour of the plaintiff ("Summary judgment?")?
4. Should there be an order striking out the plaintiffs' Further Amended Statement of Claim ("Strike out?")?

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1 Doc 33
2 Doc 39

5. Should the second plaintiff and/or the second defendant be removed as parties to the proceedings ("Removal of parties?")?

Background

[3] The first named plaintiff, Geoffrey Ashton, appears for the plaintiffs without legal representation. He apparently intends to continue to be self-represented[3].

[4] On 9 September 2011, Justice Jones dismissed applications by both the plaintiffs and defendants for summary judgment. His Honour observed the Amended Statement of Claim disregarded the *Uniform Civil Procedure Rules 1999* (Qld) ("the Rules") relating to pleadings and the function of pleadings by including details which were not material, allegations which were scandalous, statements which were argumentative, statements of opinion and allegations or conclusions of law. His Honour also considered the pleadings offended the Rules by setting out provisions of law and expressing opinions as to the proper construction of the law.

[5] His Honour observed the actual cause of action relied on by the plaintiffs remained obscure. He struck out the plaintiffs' Amended Notice of Claim and Statement of Claim but gave the plaintiffs leave to file a Second Amended Notice of Claim and Statement of Claim within 28 days.

[6] Subsequently, on 25 September 2011, Mr Ashton filed in the same proceeding, an Amended Claim and Amended Statement of Claim[4]. Those materials only named Mr Ashton as plaintiff and Mr Dorante as defendant and made no reference to the second plaintiff or the second defendant in the documents' titles. On the same date, Mr Ashton filed an application in the proceeding. The application named both plaintiffs and both defendants.

[7] On 21 October 2011, I made a number of orders in respect of that application and adjourned that part of it which was another application for summary judgment[5] to 16 November 2011 in order to allow the time permitted under the Rules for the defendants to exercise their right to file a Further Amended Defence. They did so on 7 November and on the same date filed an application seeking orders striking out the plaintiffs' Further Amended Statement of Claim and removing the second defendant as a party to the proceeding.

[8] That application and Mr Ashton's application for summary judgment came on for hearing before me on 16 November 2011. At the outset of the hearing, Mr Ashton raised two issues going to whether I would proceed to hear the applications. They are issues 1 and 2, considered below. In the circumstances I proceeded to hear argument in respect of those issues as well as the substantive issues relating to the applications and reserved my decisions.

Issue 1: Constitutional point?

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3 In the course of hearing the applications in this matter Mr Ashton expressed disinterest when I raised the idea of the Registry making inquiries of QPILCH with a view to ascertaining whether some pro bono legal advice might be provided at least for the purpose of assisting him in pleading his case properly.

4 Doc 32. These documents were actually a "Further Amended Claim" and "Further Amended Statement of Claim" but no point is taken about that inaccuracy.

5 Per para 13 of the application.

[9] In part 2 of Mr Ashton's written outline of submissions handed up at the outset of argument, he purported to identify a number of matters he contended arose under the Constitution or involved its interpretation, with a view to invoking the requirement of s 78B of the *Judiciary Act 1903* (Cth) that this Court not proceed further until satisfied the requisite notices have been given to the Attorneys-General of the Commonwealth and of the States.

[10] The matters Mr Ashton submits are involved in the proceeding which are said to arise under the Constitution or involve its interpretation are:

1. whether the *Transport Operations (Marine Safety) Act 1994* (Qld) and *Fisheries Act 1994* (Qld) are invalid under s 51(x) of the Constitution by reason of those Acts legislating in and regulating a Commonwealth Fishery namely the Great Barrier Reef Marine Park;
2. whether fines collected by the Queensland Fisheries and Boating Patrol for breaches of the Queensland *Transport Operations (Marine Safety) Act 1994* (Qld) and *Queensland Fisheries Act 1994* (Qld) represent duties under s 90 of the Constitution;
3. whether the fees and charges imposed on fishers by the *Transport Act (Qld)* and the *Fisheries Act 1994* (Qld) are duties of excise under s 90 of the Constitution;
4. whether the Executive Officers under the *Transport Operations (Marine Safety) Act 1994* (Qld) and the *Fisheries Act 1994* (Qld) as prescribed officers per s 38J(7) of the *Great Barrier Reef Marine Park Act 1975* (Cth) have a duel role compromising directions given under the two State Acts to the extent that directions are invalid under the Constitution;
5. whether the direction placed on the vessel "Baarrook" by Mr Dorante violates Mr Ashton's right to work, i.e. to fish in Commonwealth waters, contrary to his right under the United Nations Convention of the Law of the Sea Article 62 para 3;
6. whether the direction placed on the vessel "Baarrook" by Mr Dorante violates the plaintiff's right to work contrary to Article 6 of the Convention on Economic, Social and Cultural Rights.

[11] Having raised these points in his written and oral submissions, Mr Ashton contended that the Court was duty bound to adjourn until s 78B notices of the cause had been given.

[12] I invited Mr Ashton to identify where in the pleadings or affidavit material filed he had identified a matter arising under the Constitution or involving its interpretation. He did not do so but contended the Court need not have regard to the materials before it in order to consider whether there is any substance to such an assertion. He submitted it was enough that he simply asserted these matters as part of his submissions and once he had done so that automatically invoked the operation of s 78B. However mere assertion is not enough as was explained by Toohey J in *Re Finlayson; Ex Parte Finlayson*[6]:

> *"In terms of s 78B, a cause does not "involve" a matter arising under the Constitution or involving its interpretation merely because someone asserts that it does. That is not to say that the strength or weakness of the*

6 (1998) 72 ALJR 73 at 74

> *proposition is critical. But it must be established that the challenge does involve a matter arising under the Constitution."* (my emphasis)

That statement was repeated and endorsed by the High Court in *Glennan v Commissioner of Taxation*[7].

[13] There might from time to time be instances where, during argument in the substantive issues in a proceeding, it is belatedly realised that the proceeding involves a matter arising under the Constitution or involving its interpretation. However, such a conclusion will, even if only in hindsight, derive from the substantive issues being litigated, which issues ought be apparent from the pleadings. I respectfully agree with the observation of Burchett J in *Amrit Lal Narain v Parnell*[8], in respect of s 78B, *"that what the section contemplates is a constitutional question which is a live issue in the proceedings".*

[14] In circumstances where Mr Ashton's pleadings do not identify a matter that can sensibly be said to arise under the Constitution or involve its interpretation, Mr Ashton has not provided any foundation for his assertion that the proceeding does involve a matter arising under the Constitution or involving its interpretation. Putting it differently, the matters raised in argument by Mr Ashton as arising under the Constitution or involving its interpretation are not live issues in the proceeding.

[15] I therefore reject Mr Ashton's submission that s 78B is enlivened and will proceed to determine the remaining issues presently before me.

Issue 2: Must the retired judge continue to hear this matter?

[16] Section 23 of the *Supreme Court of Queensland Act* provides:-

> *"(1) A judge must retire on reaching 70 years of age.*
> *(2) Despite subsection (1), a judge who, before retiring, whether or not because of subsection (1), starts the hearing of a proceeding remains a judge for the purpose of finishing the proceeding."*

[17] Mr Ashton contends that subsection (2) of s 23 has the consequence that because Justice Jones, as he then was, presided over the earlier applications in this proceeding, he must therefore remain the judge in the proceeding until it is finished. It is not readily apparent why Mr Ashton seeks such an outcome given he informed me in the course of his submissions on 21 October 2011:

> *"I ruled out Judge Jones on – on the ground of perceived bias and then bias. … And I wrote to the Attorney-General to have him dismissed. … And that's why he wasn't – his term wasn't renewed."*[9]

Those comments, the accuracy of which I rejected at the time[10], are at odds with Mr Ashton's implicit attempt through the present argument to insist on the return of the now retired Far Northern Judge.

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7 (2003) 198 ALR 250 at 253

8 (1989) 9 FCR 479 at 489, cited with agreement in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd and Others* (1999) 167 ALR 303 at 308

9 T1-18 LL39-50 (21.10.11)

10 Justice Jones retired effective on his 70th birthday, as the law required him to.

[18] Subsection (2) of s 23 is obviously directed at the situation where a judge's retirement date is reached during the hearing of an application or trial or after the act of hearing but pending the delivery of judgment. In order to avoid the application or trial ending without a result and having to be heard afresh the section allows the retiring judge to finish the task at hand. Mr Ashton's argument is that the words *"starts the hearing of the proceeding"* ought be interpreted broadly so that a judge who has heard an application in the proceeding and finished the application and given judgment must remain as the judge who hears any further aspect of the proceeding, presumably whether it is another application or the trial proper.

[19] Were Mr Ashton's interpretation correct it would have the effect that the first judge in time, whether nearing retirement age or not, to hear any form of proceeding in a matter must remain the judge hearing all other proceedings which arise in the matter, whether they be further applications or the trial proper. In respect of retired Judges it is unclear how, on that interpretation, they could be compelled to return to work. If Mr Ashton's interpretation were correct and the Honourable Mr S Jones AO QC declined to come back from retirement to continue to hear applications and the trial in Mr Ashton's case then Mr Ashton's case would fail because it could not be heard.

[20] Mr Ashton's interpretation is misconceived. Subsection (2) is an enabling provision, empowering a judge to finish a hearing once he or she has started it even if he or she retires in the meantime. It does not mandate that the same judge must continue to hear any further applications in the proceeding or, for that matter, the trial of the proceeding. Where subsection (2) refers to *"finishing the proceeding"* it is, on its ordinary meaning, referring only to the proceeding that the judge has started hearing. Schedule 2 of the *Supreme Court of Queensland Act* confirms that ordinary meaning:

> ***"proceeding** means a proceeding in a court (whether or not between parties), and includes—*
> *(a) an incidental proceeding in the course of, or in connection with, a proceeding; and*
> *(b) an appeal or stated case."* (my emphasis)

[21] The reference in that definition to an *"incidental proceeding"* means that in the present context the application heard and finished by Justice Jones was a *"proceeding"*. In the light of that definition and, for that matter, the context in which the word *"proceeding"* is used in s 23(2), the word *"proceeding"* in s 23(2) means it is not a reference to the totality of all proceedings that may occur in the life of a matter.

[22] I reject Mr Ashton's argument in respect of s 23(2).

Issue 3: Summary judgment?

[23] In the course of argument it appeared there was some uncertainty on Mr Ashton's part as to whether he wished to proceed with the summary judgment application. That followed my explanation to him that where a case involves a significant contest of credibility, as he eventually conceded this case does, it almost invariably means a trial will be necessary. Ultimately, he maintained his application.

[24] It is common ground that this case involves not only contests about the proper interpretation to be given to statutory provisions but also a significant contest of credibility in respect of the events at the heart of the litigation. Such contests of credibility need to be resolved by a trial and cannot be resolved in an application of this kind.

[25] For that reason alone Mr Ashton has not satisfied the requirement of rule 292[11] that the defendants have no real prospect of successfully defending the claim. However the application also suffers from the difficulty discussed below that the Further Amended Statement of Claim still fails to disclose any reasonable cause of action. That deficiency is in itself fatal to the application for summary judgement. In an application of this kind there must logically be prima facie evidence of an entitlement to judgment because in order to satisfy the requirement that the respondent has no real prospect of defending the case the applicant must first show there exists a case to be defended. It is impossible to assess whether the materials filed in this summary judgment application prove the applicant even has a case to be defended because the applicant is yet to properly identify through the pleadings what the case is.

[26] It follows the application for summary judgment must be dismissed.

Issue 4: Strike out?

[27] The defendant's apply for an order that the Amended Statement of Claim be struck out pursuant to Rule 171 which provides:

> *"171 Striking out pleadings*
>
> *(1) This rule applies if a pleading or part of a pleading—*
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> *(a) discloses no reasonable cause of action or defence; or*
>
> *(b) has a tendency to prejudice or delay the fair trial of the proceeding; or*
>
> *(c) is unnecessary or scandalous; or*
>
> *(d) is frivolous or vexatious; or*
>
> *(e) is otherwise an abuse of the process of the court.*
>
> *(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.*
>
> *(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading.*

[28] The defendants submit that the Amended Statement of Claim suffers from the same deficiencies as its predecessor, namely:

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[11] Explained in *Deputy Commissioner of Taxation v Salcedo* [2005] 2 QdR 232 and *Coldham-Fussell and Others v Commissioner of Taxation* (2011) 82 ACSR 439

(a) it does not identify any cause of action but is argumentative and sets out matters of opinion or statements of law, for example at paragraphs 7, 9, 10, 17, 18 and 28;
(b) it disregards the Rules, breaching rules 149, 150, 155, 157 and 158;
(c) it sets out provisions of law and expresses opinions of construction or conclusions of law, for example at paragraphs 6, 12, 13, 14, 16, 17, 18 and 28;
(d) the claim in the prayer for relief is inconsistent with the Amended Claim and is not adequately particularised in breach of Rules 150(1), 155 and 158 and is manifestly unreasonable, remote and excessive.

[29] I accept those criticisms are all well founded; save for the allegation that the amount claimed is excessive. It is simply impossible to meaningfully consider whether the amount claimed is excessive because of the absence of any pleaded foundation as to how it was arrived at or why either defendant is liable for it. This emphasises the most significant problem of all, the failure to disclose a reasonable cause of action.

[30] The Amended Claim states the plaintiff claims $1,500,00 *"for the loss of his Fishing Ship Baarrook and years of income from fishing".* The Amended Statement of Claim alleges in effect that the first defendant, Mr Dorante, a shipping inspector, unlawfully inspected Mr Ashton's vessel on 28 October 2008 and then, pleads:

> *"25. On the 28 October 2008 the Defendant gave a written direction "Ship cannot be operated safely" the Direction effectively tied The Plaintiff's fishing ship Baarrook to its mooring it has been there almost three years."*

There follows an allegation in effect that the direction, which is said in paragraph 17 to be invalid, meant Mr Ashton could not move the vessel and could not move it to complete repairs. A proper foundation for that allegation is not clearly identified. However much more problematically there does not follow any pleading of a loss suffered, let alone how the loss is said to be suffered, in consequence of the allegedly unlawful entry and or invalid direction. The pleading concludes, *"The plaintiff claims the following relief: payment for value of Baarrook $1,500,000.00".* There is simply no causative link pleaded between that *"relief"* and any of the matters pleaded.

[31] In short the Amended Statement of Claim discloses no reasonable cause of action.

[32] The overall position is not materially different from that prevailing at the time of Justice Jones' orders. The Amended Statement of Claim suffers the same fatal deficiencies as its predecessor. I have considered options other than striking out the claim, for example directions as to the provision of further and better particulars. However I have concluded that to do other than again strike out the pleading would be unfair to the defendants and only create further problems as the matter progresses.

[33] The defendants are entitled, notwithstanding the plaintiffs' inability to plead their case, to have the case properly pleaded. The plaintiffs' problem should not become the defendants' problem. The fundamental requirement that a cause of action be properly identified in the pleadings ought not be waived because a plaintiff does not appear able to plead it. If this problem at the threshold is ignored it will only result in more problems in properly litigating and hearing the matter.

[34] In the circumstances I will grant the defendants' application and strike out the plaintiffs' Amended Statement of Claim filed 21 September 2011. I will give leave for a further attempt to be made at properly pleading the case. I will allow a reasonable period for that to occur, making due allowance for the looming Christmas vacation period. I will also give the defendants liberty to apply to strike out the whole of the proceeding in the event that the plaintiffs fail to comply with the rules of pleading in such Further Amended Statement of Claim as they may file.

Issue 5: Removal of parties?

[35] The plaintiffs unilaterally changed the parties to the proceedings by removing the female plaintiff Cynthia Ashton and also the second defendant without the leave of the Court[12].

[36] The defendants urged me to formally remove the female plaintiff and the second defendant as parties to the proceeding.

[37] In view of the failure of the author of the Amended Statement of Claim to properly plead the case, there is considerable uncertainty as to whether a properly informed decision has been made by the plaintiffs as to whether or not they would seek the removal of the female plaintiff and the second defendant as parties to the proceeding. In the circumstances, and particularly bearing in mind that the filing of the Further Amended Statement of Claim may better enlighten the Court as to the need for the inclusion of the female plaintiff and the second defendant, I refrain from ordering their removal as parties to the proceeding at this stage.

[38] I will direct the Registrar to add the wrongly omitted names of the female plaintiff and the second defendant to the Amended Claim filed 21 September 2011.

Costs

[39] Costs should follow the event. While the defendants' have succeeded in virtually all respects, they were not successful in their application for an order removing the second defendant as a party. Nonetheless they were successful in the more significant aspect of their application.

[40] The defendants' urged me to order indemnity costs. There is a strong argument that I ought do so given the plaintiffs' repetition of the same fatal pleading problems as before. The matter is finally balanced in view of the partial above-discussed failure of the defendants' application. In the circumstances I will only award costs on the standard basis.

Orders:

[41] My orders will be:

1. The plaintiffs' application for summary judgment is dismissed.
2. The plaintiffs' Amended Statement of Claim filed 21 September 2011 is struck out.
3. The plaintiff will file and serve a Further Amended Statement of Claim by 4.00 pm on 27 January 2012.

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12 See Rule 69

4. The defendants will have liberty to apply to strike out the whole proceeding in the event that the plaintiffs fail to file a Further Amended Statement of Claim or fail to comply with the rules of pleading in such Further Amended Statement of Claim as may be filed.
5. I direct the Registrar to add the names of the female plaintiff and the second defendant to the Amended Claim filed 21 September 2011.
6. The plaintiffs will pay the first defendant's and second defendant's costs of and incidental to the defendants' application and the plaintiffs' application for summary judgment, to be assessed on the standard basis, unless otherwise agreed.