SUPREME COURT OF QUEENSLAND

CITATION:	*Stockley Furlong (a firm) v Hyde* [2022] QSC 285
PARTIES:	**STOCKLEY FURLONG (A FIRM)** (plaintiff) **v** **MARK THOMAS HYDE** (defendant)
FILE NO/S:	BS No 11837 of 2022
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	23 December 2022
DELIVERED AT:	Brisbane
HEARING DATE:	8 December 2022
JUDGE:	Burns J
ORDER:	**The order of the court is that:** **1. Leave is granted to the defendant pursuant to r 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) to plead the cause of action for an account.** **2. The costs of the application shall be the defendant's costs in the proceeding.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTIONS AND OF PARTIES – MATTERS RELATING TO LIMITATION PERIOD – where the defendant seeks leave pursuant to r 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) to plead a cause of action for account arising out of a dispute over the payment of legal fees between 2009 and 2016 – where the alleged indebtedness arose from an entire account into which all liabilities and payments were carried in order of date resulting in a single balance – whether this amounted to a running account – where the plaintiff contended that leave should be refused because the cause of action for an account was, in part, statute-barred by operation of s 10(2) of the *Limitation of Actions Act* 1974 (Qld) – where the plaintiff further contended that leave should be refused as the cause of action for an account did not arise out of the same facts or substantially the same facts already pleaded by the defendant – whether, in the case of a running account, the cause of action for an account accrued when the last payment on that account was made by the defendant or whether the cause or causes of

action accrued more than six years prior to the commencement of the proceeding – whether the cause of action for an account arises out of the same facts or substantially the same facts as those which have already been pleaded by the defendant

Civil Proceedings Act 2011 (Qld), s 16
Limitation of Actions Act 1974 (Qld), ss 10(2), 35(3)
Uniform Civil Procedure Rules 1999 (Qld), r 376

Draney v Barry [2002] 1 Qd R 145, cited
Jane v Bob Jane Corporation Pty Ltd & Anor [2013] VSC 406, cited
Menegazzo v Pricewaterhousecoopers (a firm) & Ors [2016] QSC 94, cited
Meriton Apartments Pty Ltd & Anor v Owners Strata Plan No 72381 (2015) 105 ACSR 1, followed
Paul v Westpac Banking Corporation [2017] 2 Qd R 96, cited
Re Footman Bower & Co Ltd [1961] Ch 443, followed
Santos Coffee Company Pty Ltd v Director Freight Express Pty Ltd [2010] NSWCA 14, cited
Thomas v State of Queensland [2001] QCA 336, cited
Wolfe v State of Queensland [2009] 1 Qd R 97, cited

COUNSEL: A J H Morris KC, with C M Thwaites, for the applicant defendant
J P Hastie for the respondent plaintiff

SOLICITORS: Gibbs Wright Litigation Lawyers for the applicant defendant
Woods Prince Lawyers for the respondent plaintiff

[1] The defendant seeks leave pursuant to r 376(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) to plead a cause of action for an account.

[2] There is a long and unflattering history of disputation between the parties.

[3] The plaintiff firm acted for the defendant in matrimonial proceedings before the Family Court of Australia. To that end, the parties entered into a written client agreement on 10 October 2005 and, after orders were made in the Family Court, a further written client agreement on 18 December 2009.

[4] On 12 October 2016, the plaintiff commenced this proceeding in the Magistrates Court at Brisbane in which it was (and still is) alleged that the defendant is indebted to them for unpaid fees under the first client agreement. The statement of claim runs to 30 pages, 28 of which are taken up with a schedule containing "details of the invoices rendered, the balance due and payable, the interest accrued and the payments received by the plaintiff" over an 11 year period from 17 October 2005 to 12 October 2016. Thus, it was quite apparent even at this early stage that the plaintiff alleged that the indebtedness arose from a running account over the period specified resulting in a fluctuating balance depending on the invoices rendered by the plaintiff and the payments made by the defendant.[1] Put another way, the alleged indebtedness arose

1 As to which, see *Re Footman Bower & Co Ltd* [1961] Ch 443, 450; *Meriton Apartments Pty Ltd & Anor v Owners Strata Plan No 72381* (2015) 105 ACSR 1, [204]-[205].

from an entire account into which all liabilities and payments were carried in order of date resulting in a single balance.[2]

[5] On 18 January 2021, the proceeding was transferred by consent to the District Court of Queensland and, on 7 February 2022, the plaintiff filed an amended statement of claim relying on the second client agreement for invoices issued after 18 December 2009. Gone was the schedule from the plaintiff's first pleading but in its place were two equally lengthy annexures containing even more "detail" about the composition from time to time of the running balance. On 19 September 2022 the proceeding was transferred, again by consent, to this court.

[6] In response to this proceeding, the defendant filed a defence and counterclaim in the Magistrates Court on 16 November 2016 and, since then, several revised versions of that pleading have been filed, with the last being his fifth further amended defence and counterclaim filed in this court on 2 November 2022. In his first pleading, the defendant alleged that the plaintiff improperly charged interest on interest and that, rather than being indebted to the plaintiff, they had been overpaid. His stance in those respects has remained unchanged throughout, although further claims have since been advanced under cover of the counterclaim including an allegation of overcharging.

[7] In addition to the defendant's counterclaim for sums said to be owing under both agreements, some time ago the defendant pleaded by way of further or alternative relief an entitlement to an account of the fees paid by him in excess of proper fees incurred under the two client agreements. On 14 November 2022, the plaintiff's solicitors wrote to the defendant's solicitors to complain, relevantly, that the defendant had not sought or obtained leave to include the claims for an account. The next day, the defendant's solicitors responded in terms asserting that the action for an account arose out of facts that were already included in the defendant's first pleading in November 2016 but, out of an abundance of caution, the subject application would be made.

[8] The application for leave was opposed by the plaintiff for essentially two reasons: first, because fees under the first client agreement were paid more than six years before the commencement of the proceeding, the plaintiff maintained that any claim for an account with respect to those fees will be statute-barred; and, second, the plaintiff argued that the claims for an account did not arise out of the same or substantially the same facts as a cause of action for which relief has already been claimed by the defendant in the proceeding. For reasons that follow, neither contention can be accepted.

[9] The limitation period in Queensland for an action for an account is six years,[3] and that is the case whether the action is at law or equity.[4] Here, various payments were made under the first client agreement between 17 October 2005 and 12 October 2010, that is to say, more than six years prior to the commencement of this proceeding. Relying on this feature, the plaintiff argued that the limitation period in respect of those payments had already ended when the proceeding was commenced and, for that reason, there was no power to grant leave to add a cause of action for account so far as those payments are concerned.

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2 *Santos Coffee Company Pty Ltd v Direct Freight Express Pty Ltd* [2010] NSWCA 14, [41].

3 *Limitation of Actions Act* 1974 (Qld), s 10(2).

4 *Menegazzo v Pricewaterhousecoopers (a firm) & Ors* [2016] QSC 94, [105]-[109].

[10] It is true that the power conferred by UCPR r 376 for the court to grant leave to make an amendment where the relevant period of limitation has ended may only be exercised where that period was "current at the date the proceeding was started",[5] but the plaintiff's argument in this regard depends on acceptance of the proposition that each time the plaintiff received a payment from the defendant a new cause of action accrued in respect of that payment.[6] However, where a running account is concerned, that is not correct because any payments that are made are taken to have been made on account of the balance generally and not on account of any particular invoice contributing to that balance.

[11] In *Re Footman Bower & Co Ltd*,[7] Buckley J explained why:

> "When, as in the present case, there is an account running between the parties which to the knowledge of both parties is of that kind and kept in that way, then, if the debtor makes a payment 'generally on account' it appears to me that he must be taken to be making it on account generally of whatever is owing on the balance of the account. A payment 'on account' imports an acknowledgment of a liability for a larger sum (see *Friend v Young* per Stirling J). When a payment is merely stated to be 'on account' without the liability on account of which it is made being specified, one must first inquire what liabilities on the part of the payer to the recipient exist. If, on inquiry, it is found that the only liability is in respect of a balance due on current account, the natural conclusion to reach is, in my judgment, that the payment is made on account of that balance generally, not on account of any particular items contributing to that balance. Where, as may well have been the case as regards payments by the company to the applicant, a payment would, in accordance with the rule in *Clayton's Case*, be taken to discharge, say, three items on the debit side of the account entirely, and a fourth in part, it appears to me that it would be an abuse of language to describe the payment as made 'on account' of those particular items. It would be still more fanciful, if at the date of payment the oldest outstanding debits were statute-barred. If (which has not yet, so far as I know, been decided) the inference that the debtor intended to appropriate the payment to non-statute-barred items to the exclusion of statute-barred items, is applicable in the case of a current account (the point left open by Lord Cranworth, L.C., in *Nash v Hodgson*) an analysis of the account would be required before the particular item or items on account of which the debtor is to be supposed to have made the payment could be identified. If, on the other hand, that inference would not arise, it would follow that the debtor would be supposed to have made the payment on account of statute-barred items. Either position would, in my opinion, be very artificial. The much more acceptable view seems to me to be that by making a payment generally on account the debtor makes it on account of the whole of his indebtedness, that is to say, on account of

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[5] The same position obtains in the case of the power to amend conferred by s 16(2)(c) of the *Civil Proceedings Act* 2011 (Qld).

[6] The plaintiff relied in this regard on what was said by Sifris J in *Jane v Bob Jane Corporation Pty Ltd & Anor* [2013] VSC 406, [78].

[7] *Re Footman Bower & Co Ltd* [1961] Ch 443.

> the balance outstanding and due at the date of payment."[8] [References omitted]

[12] It follows that the cause of action for an account in this case accrued on the date of the last payment made by the defendant, and that is alleged by the plaintiff to have occurred on 29 March 2016.[9] As such, the relevant limitation period for the whole of the claims for an account was current at the time when this proceeding was commenced later that year. That disposes of the plaintiff's first contention.

[13] As to the second contention, the court is empowered by UCPR r 376(4) to grant leave to a party to make an amendment to include a new cause of action if the court considers it appropriate *and* 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. It will be an appropriate case for leave if the necessary additional facts to support the new cause of action "arise out of substantially the same story as that which would have to be told to support the original cause of action",[10] with the reference to "story" being a reference to the matters which the party must prove.[11]

[14] The relief which the defendant now wishes to add – claims for an account – should come as no surprise to the plaintiff; it is the textbook remedy for the defendant's essential complaints about the charging of interest on interest and overpayment. Indeed, to succeed at trial, the plaintiff will need to prove the overall alleged indebtedness – the running balance – by reference to the amounts invoiced and the amounts paid and, as such, the claims for an account do not merely arise from substantially the same facts that have already been pleaded by the defendant, they arise from substantially the same facts which the plaintiff must prove.

[15] This is otherwise an appropriate case for leave; there can be no suggestion that the plaintiff is prejudiced by the addition of claims for an account. The costs of the application, opposed as it was, will be the defendant's costs in the proceeding.

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8 Ibid, 451-452. And see *Meriton Apartments Pty Ltd & Anor v Owners Strata Plan No 72381* (2015) 105 ACSR 1, [204]-[205].

9 This conclusion is consistent with the feature that the making of that payment constituted an acknowledgement within the meaning of s 35(3) of the *Limitations of Actions Act* 1974 (Qld).

10 *Draney v Barry* [2002] 1 Qd R 145, 164 [57].

11 *Thomas v State of Queensland* [2001] QCA 336, [19]. And see *Paul v Westpac Banking Corporation* [2017] 2 Qd R 96, 103 [15]; see, for example, *Wolfe v State of Queensland* [2009] 1 Qd R 97, [11], [16].