

CITATION: *Sealanes Albatross Pty Ltd v JACG Pty Ltd* [2003] NTMC 003

PARTIES: SEALANES ALBATROSS PTY LTD

V

JACG PTY LTD

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20203748 &

DELIVERED ON: 10th January 2003

DELIVERED AT: Darwin

HEARING DATE(s): 8th January 2003

JUDGMENT OF: Judicial Registrar Fong Lim

CATCHWORDS:

Practice and Procedure – joinder of parties – rule 12.02 and 12.05 Local Court Rules
– section 82 of Trade Practices Act – section 91 of the Consumer Affairs and Fair
Trading Act

Wardley Australia Limited v Western Australia [1992] 175 CLR 514

REPRESENTATION:

Counsel:

Plaintiff: Mr O’Loughlin

1st Defendant: Ms Porter

Solicitors:

Plaintiff: Halfpennys

1st Defendant: De Silva Hebron

Judgment category classification: A

Judgment ID number: [2003] NTMC 003

Number of paragraphs: 21

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20203748

[2003] NTMC 003

BETWEEN:

Sealanes Albatross Pty Ltd
Plaintiff

AND:

JACG Pty Ltd
1st Defendant

REASONS FOR DECISION

(Delivered 10 January 2003)

JUDICIAL REGISTRAR FONG LIM:

1. The Plaintiff has applied to join Xana Da Silva –Kamitsis (Kamitsis) as a Defendant in this proceedings. The draft amended Statement of Claim shows that the Plaintiff claims that it has suffered damage pursuant to a misrepresentation made by Ms Kamitsis and the Plaintiff relies upon section 42 of the Consumer and Fair Trading Act of the Northern Territory. The Plaintiff makes its application under rule 12.02 and 12.05 of the Local Court Rules.
2. The relevant rules read as follows:

“12.02 Joinder of parties

(1) Subject to rule 12.04, a party may join 2 or more persons as Plaintiffs or Defendants in a proceeding where, if separate proceedings were brought by or against each of them, a common question of law or fact would arise in all the proceedings.

(2) A party may join persons as Plaintiffs or Defendants whether or not –

(a) all rights to relief are in respect of or arise out of the same transaction or series of transactions; or

(b) each person is entitled to damages and the damages will need to be assessed individually.

.....

12.05 Removal, addition or substitution of party

At any stage of a proceeding, the Court may order that –

(a) a person who is not a proper or necessary party (whether or not the person was a party originally) cease to be a party;

(b) any of the following persons be added as a party:

(i) a person who ought to have been joined as a party;

(ii) a person whose presence before the Court is necessary to ensure that all questions in the proceeding are properly and completely determined;

(iii) a person in respect of whom there may exist a question arising out of, relating to or connected with a claim in the proceeding and it is just and convenient to determine the question between that person and a party as well as between the parties to the proceeding; or.....”

3. The Plaintiff argued that it was clear from the evidence in the affidavit of Mr Furness sworn the 26th November 2002 that the issues that arise between the Plaintiff and the intended second Defendant arise out of the same transactions which give rise to the action between the Plaintiff and the Defendant. It was further argued that it is trite to say that it is a policy issue for the courts to avoid multiplicity of proceedings, and achieve finality in litigation. On the evidence before the court today, the Plaintiff argues that without the joinder of the second Defendant there is a danger of multiplicity of proceedings and of no final resolution of issues.

4. The Defendant argues that the Plaintiff must first show that there is in fact a cause of action before it can argue that it should be allowed to join the intended Defendant and in this case it had not shown that there is a cause of action.

5. I agree that to join a party as a Defendant the Plaintiff must show that there is possibly a cause of action against that Defendant not that it is likely to succeed nor that there is a prima facie case.

6. **Cause of action**

The Defendant pointed out a defect in the amended statement of claim in that it only pleads misrepresentation pursuant to the section 42 of the Consumer Affairs and Fair Trading act (CAFTA) not damages as a result pursuant to section 91 of the CAFTA however that defect can be rectified by amended and if the Plaintiff is granted leave to join Kamitsis then that amendment will be made. Even if properly pleaded the Defendant argues that the cause of action does not arise unless actual loss has occurred and referred me to the High Court decision of Wardley Australia Ltd V Western Australia (1992) 109 ALR 247 .(“Wardley’s case”)

7. I accept that Wardley’s case stands for the proposition that a cause of action pursuant to section 82 of the Trade Practices Act (the equivalent section to section 91 of CAFTA) only arises when there is actual loss not contingent loss. The Defendant strongly argued that in this case there is no actual loss to the Plaintiff arising out of Kamitsis’ alleged misrepresentation. The Defendant disputes the existence of a contract between it and Plaintiff and therefore the loss to the Plaintiff is contingent on that contract being proved.

8. It must be remembered that Wardley’s case was a consideration of the obligation of the Plaintiff in relation to an indemnity granted between the parties. Their honours set the parameters of the issue they were considering in the very first line of their judgement at page 519 as follows:

“The principal question in this appeal concerns the time at which a cause of action under section 82 of the Trade Practices Act 1974 (Cth) (the Act) accrues if, as a result of misleading or deceptive conduct a party enters into an indemnity which is subsequently called upon (*emphasis is mine*)”

9. This present case does not involve an indemnity obligation and therefore the discussion about contingent damage and loss in Wardley’s case has less significance when applied to the present fact situation.

10. Counsel for the Defendant made much of their Honours adoption of the comment of Gaudron J in *Hawkins v Clayton* (1988) 164 CLR that

“for the actual loss is sustained only when recoupment becomes impossible”

Her Honour in that case was considering the accrual of a cause of action in the antecedent right to recoup monies advanced and was attempting to clarify that until the Plaintiff could not actually recoup the monies it is then the actual loss is sustained.

11. In the present case the Plaintiff has suffered actual loss, it has supplied goods and has not been paid it is a liquidated debt. There is no contingency to fulfill before the Plaintiff has suffered actual loss. The issue is whether that loss is due to the alleged misrepresentation made by Kamitsis and whether there is a contract between the Plaintiff and the Defendant. To expect the Plaintiff to have to had proved its case against the Defendant before it can sue for loss arising out of the alleged misrepresentation would be ludicrous. In fact, the loss caused to the Plaintiff could still be established even if no contract is found between the Plaintiff and the Defendant and there still could be an issue outstanding between the Plaintiff and Kamitsis as to the alleged misrepresentation and its causal effect of the loss incurred by the Plaintiff (by supplying goods to another party because of the Kamitsis’ alleged misrepresentation). I therefore find

that the Plaintiff may have a cause of action against Kamitsis and do not dismiss the Plaintiff's application on that basis.

12. Pursuant to rules 12.02 and 12.05 a person may be joined as Defendant if:

“if separate proceedings were brought by or against each of them, a common question of law or fact would arise in all the proceedings. ”

(ii) a person whose presence before the Court is necessary to ensure that all questions in the proceeding are properly and completely determined;

(iii) a person in respect of whom there may exist a question arising out of, relating to or connected with a claim in the proceeding and it is just and convenient to determine the question between that person and a party as well as between the parties to the proceeding;

13. The rules also provide that a party should not be joined if the joinder would cause embarrassment or delay to the proceedings, cause prejudice to a party, or be otherwise inconvenient (see rule 12.04). The Defendant argued that the joinder of Kamitsis would be an embarrassment to the proceedings because there would immediately be an application by Kamitsis to strike out the statement of claim as showing no cause of action. I have already dealt with that argument and have not accepted it in this instance as there is no cause of action. It is my view that if the Defendant were to take that course of action it would fail (provided the Plaintiff includes a claim for remedy pursuant to section 91 in its amended Statement of claim).

14. There were no submissions or evidence regarding delay or prejudice and it is clear that the joinder of Kamitsis would not cause significant delay in the proceedings nor would there be great prejudice to the Defendant. It is equally clear that Kamitsis had some connection with the Defendant even if not a director and is aware of the application to join as stated by Counsel for the Defendant.

15. **Common question of fact or law.**

It is accepted by the Plaintiff that the action against the Defendant in

contract is totally different to the action against Kamitsis for misrepresentation however the Plaintiff claims because the causes of action both arose out of the same transactions between the Plaintiff, the Defendant and the Kamitsis there are common questions of fact to be decided. The Plaintiff relied on the commentary in Williams on Supreme Court practice on the application of orders 9.02 and 9.06 which are the Supreme Court equivalents to 12.02 and 12.06 (even though the local court rules are a little wider in the application the principles are the same). In that commentary the learned author referred to a decision of the Chief Justice of the Supreme Court of Victoria in Glenwood Management Group Pty Ltd v Mayo 14 August 1990 in which Young CJ stated that 9.02 "... gives the court a wide discretion which is not to be cut down by restrictive interpretation . If for example only one of the criteria in paragraph (a) were satisfied that might be a case in which it was appropriate for the court in some circumstances to grant leave to join" .

16. It is my view that there are common issues of fact which are to be decided between the Plaintiff and the Defendant and Kamitsis. The most significant issue being the existence of the contract between the Plaintiff and the Defendant and the role Kamitsis had to play in that contract and any authority Kamitsis had to bind the Defendant.

17. **Properly and completely determined**

The Plaintiff argued without the presence of Kamitsis as Defendant all question between the parties would not be completely and properly determined. The pleadings filed define what questions are to be determined between the parties. The Defence filed shows that the only question to be determined between the parties is whether there is a contract between the Defendant and the Plaintiff. That question will be decided if the evidence supports the existence of a contractual relationship. It seems that Kamitsis played an integral part in the dealings between the Plaintiff and the Defendant and any finding made by the court on that relationship could not

be completely and properly determined without hearing evidence from Kamitsis. However that evidence could be obtained from Kamitsis as a witness, it is not necessary for Kamitsis to be a party for this issue to be determined. Of course any issues between Kamitsis and the Plaintiff would not be dealt with unless Kamitsis were joined but in my opinion Rule 12.05(b) (ii) refers only to the questions between the present parties.

18. **Just and convenient**

The Plaintiff relied heavily on this ground that it would be just and convenient to join Kamitsis because as the cause of action against Kamitsis arose out of the same transactions that created the cause of action against the Defendant the evidence about the dealings which gave rise to the causes of action would be from the same people. The Plaintiff argues it would not be just to insist that the Plaintiff totally prove its case against the Defendant before pursuing Kamitsis because it would mean the evidence would have to be given twice.

19. It is also under this head that I consider the issues of finality of litigation and multiplicity of proceedings. It would not be just and convenient for the court to have to determine the issue of the contract between the Plaintiff and the Defendant, how much is owing to the Plaintiff and what authority, if any, Kamitsis had to bind the Defendant (was there a misrepresentation) and indeed to hear evidence in relation to those issues twice. These are all issues I would expect the court to have to determine given the present pleadings. If the Plaintiff were required to sue the Defendant and Kamitsis in separate proceedings there is a danger of there being two different findings of fact by differently constituted courts (although I am of the view that if separate proceedings were issued that there would be a strong argument for both matters to be heard one after the other or together so that they could be disposed of efficiently by the court).

20. On balance I am of the view that the questions between the Plaintiff and the Defendant and the Plaintiff and Kamitsis are interrelated and should be determined together to avoid the multiplicity of proceedings.
21. My orders are as follows:
 - 21.1 The Plaintiff have leave to file and an Amended Statement of Claim joining Xana Da Silva Kamitsis in the form annexed to the affidavit of Jodie Truman of the 7th January 2003 with an additional pleading to refer to section 91 of the CAFTA within 7 days. The Plaintiff to serve the Amended Statement of Claim upon the Defendant JACG Pty Ltd within 7 days.
 - 21.2 The Plaintiff to serve a copy of this order upon the Defendant Xana Da Silva Kamitsis at the same time it serves the amended Statement of Claim. The Defendant Xana Da Silva Kamitsis file and serve a Defence to the Amended Statement of Claim within 21 days of service of that Amended Statement of Claim.
 - 21.3 The Defendant JACG Pty Ltd file and serve any Amended defence to the Amended Statement of Claim within 14 days of service of the Amended Statement of Claim upon it.
 - 21.4 The Plaintiff pay the Defendant's costs thrown away by the amendment.
 - 21.5 The costs of this application be costs in the cause fixed at 100% of the Supreme Court scale of costs for a contested interlocutory application.
 - 21.6 The matter is set down for a conciliation conference at 9:00 am on the 27th February 2003.

Dated this 10th day of January 2003

Tanya Fong Lim
JUDICIAL REGISTRAR