DISTRICT COURT OF QUEENSLAND

CITATION:	*Ockendon & Anor v Ryan & Ors* [2018] QDC 94
PARTIES:	**WILLIAM JAMES OCKENDON; MARY JENNIFER OCKENDON** (plaintiffs/respondents) **v** **BARRY PATRICK RYAN** (first defendant/not a party to the application) **and** **LEONARD JOHN MCKEERING** (second defendant/first applicant) **and** **GREGORY RONALD DOWN** (third defendant/second applicant)
FILE NO/S:	3959/17
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2018
JUDGE:	Devereaux SC DCJ
ORDER:	**1. Application for orders one, two and three dismissed.**
CATCHWORDS:	APPLICATION TO STRIKE OUT – whether no cause of action – whether any real prospects of success and need for trial. TORTS – NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – PROFESSIONAL PERSONS — where plaintiffs alleged failure to give appropriate legal advice constituted negligence – whether legal advice caused loss of opportunity.

LEGISLATION:	*Uniform Civil Procedure Rules 1999* (Qld) rules 171, 293, 367, 371.
COUNSEL:	R P S Jackson QC for the applicants
	D W Marks QC and B A Hall for the respondents
SOLICITORS:	McInnes Wilson Lawyers for the applicants
	Robinson Locke Litigation Lawyers for the respondents

[1] The defendants in this proceeding are a barrister and two solicitors. The plaintiffs claim they were given negligent advice with respect to a building dispute; that had they been given the correct advice they could have properly terminated the building contract and made a successful claim under the Queensland Building and Construction Commission ("QBCC") Home Warranty Insurance Scheme; because they were given negligent advice the contract was not "properly terminated" and they lost that opportunity.

[2] This application, brought by the second and third defendants – the solicitors – sought orders for judgment against the plaintiffs; alternatively, that the then current amended statement of claim filed 19 March 2018 (the eighth) be struck out. After the application was filed, the plaintiffs filed the ninth amended statement of claim on 22 May 2018. At the hearing, the applicants sought, and I granted, an amendment to the application so that it addresses the ninth amended statement of claim. The orders sought are:

1. That the eighth amended statement of claim be struck out as against the second and third defendants pursuant to rule 171(1)(a) or rule 371(2) of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR");
2. Pursuant to rule 293 of the UCPR, that the second and third defendants be given judgment against the plaintiffs on the plaintiffs' claim;
3. Alternatively to paragraph two, that the statement of claim filed 22 May 2018 be struck out as against the second and third defendants pursuant to rule 171(1)(a) or rule 371(2) of the UCPR;
4. Alternatively to paragraph two, that pursuant to rule 367 of the UCPR, the plaintiffs must not file any further statement of claim as against the second and third defendants without first obtaining the leave of the court;
5. That the plaintiffs pay the second and third defendants' costs of the application and proceedings on an indemnity basis.

[3] In short, the applicants submit the case against them is fatally flawed because the plaintiffs do not and could not allege that the essentially negligent act (sending an ineffective letter of termination) caused the loss the subject of the complaint.

The plaintiffs' pleaded case.

[4] The following is an outline of the pleaded allegations.

- The plaintiffs owned a property at Clayfield. On about 5 April 2014 they entered into a contract with a builder, Kamda Constructions Pty Ltd ("Kamda") to renovate the property. Practical completion was required by 14 November 2014. As at 14 November 2014, Kamda was in substantial breach of the contract due to numerous particularised defects in the work, and failure to reach practical completion by that date.
- Clause 20.3 of the building contract provided that the owner may not terminate the contract if "in substantial breach of this contract." Clause 22.3 provided similarly for the contractor.
- From about early December 2014, the plaintiffs prevented Kamda from gaining access to the property and directed Kamda not to rectify certain works until there was an inspection by an independent engineer. An engineer recommended urgent completion of backfill works to certain walls. Kamda wrote to the plaintiffs on 23 December 2014 seeking instructions to proceed with the backfill works and access to the property for that purpose.
- As at 9 January 2015, the plaintiffs remained in breach of certain clauses of the building contract by failing to provide Kamda with access to the property to carry out the works and by obstructing, interfering with or hindering the carrying out of the works. Kamda issued a notice of intention to terminate, requiring the plaintiffs to rectify their breach.
- The plaintiffs' refusal to allow Kamda access to the property was unreasonable, as particularised in paragraph 16A of the ninth amended statement of claim.
- On 23 January 2015, Kamda's solicitors sent a letter purporting to terminate the building contract as a result of the plaintiffs' failure to comply with the notice of intention to terminate.

- On 5 February 2015, the plaintiffs attended at the offices of the second and third defendants' firm, McKeering Down Lawyers, and met the second defendant, an employed solicitor of the firm and a member of the senior bar, and the first defendant. At the meeting they retained the firm.
- The defendants did not advise the plaintiffs that they were in substantial breach of the building contract by not allowing Kamda access to the property to perform the backfill works; they did not advise the plaintiffs to remedy the breach, or that the refusal to allow Kamda access to the property would undermine a claim under the insurance policy and that QBCC would not be liable under the policy if the plaintiffs did not lawfully terminate the building contract.
- On 6 February 2015, McKeering Down sent a letter to Kamda's solicitors purporting to terminate the contract. Because the plaintiffs were in substantial breach at the time, the letter did not properly terminate the building contract within the meaning of clause 1.2 of the QBCC insurance policy.
- The plaintiffs lodged a claim under the insurance policy in February 2015. On 30 March 2015, the QBCC rejected the plaintiffs' claim on the grounds that the plaintiffs had not properly terminated the building contract.
- McKeering Down was in breach of the retainer and negligent in the way I have briefly outlined. Had the plaintiffs been given the appropriate advice to remedy their breaches and issued a notice of intention to terminate, Kamda would have been unable to comply within ten business days. The plaintiffs could have then lawfully terminated the contract and successfully claimed under the policy. As a consequence of the defendants' breach of contract and negligence, they lost the opportunity to claim under the insurance policy in respect of Kamda's non-completion and defective works, suffering damage in the sum of $200,000.00 (the cap under the insurance policy).

The application

[5] As is obvious, the plaintiffs' case involved their admission of default under the contract. Their complaint is that the defendants did not tell them they were in default and that they should correct their position by putting in place a proper termination process which, they assert, would have led to a successful insurance claim.

[6] The applicants' core submission is that the statement of claim does not disclose a cause of action because "the circumstances in which the right to claim on the QBCC policy were supposedly lost are not apparent on the face of" the statement of claim.[1] The argument continues that the plaintiffs' pleaded case is that the termination letter was of no effect and so the contract was not terminated (at all). Because the pleading does not allege that the effect of the termination letter was to repudiate the plaintiffs' obligations under the contract and that Kamda accepted the repudiation and so the contract was brought to an end in that way, it is not pleaded that the contract ended in a way which could not be described as being properly terminated by the plaintiffs.

[7] Senior counsel for the plaintiffs confirmed that the plaintiffs' case was that the contract was not only not "properly terminated" for the purposes of the insurance contract, but was not terminated at all. It was not part of the plaintiffs' case to prove, for example, that the contract had come to an end by mutual abandonment. The defendants' breach of contract and negligence as pleaded caused the plaintiffs' lost opportunity to claim under the insurance policy.

[8] Senior counsel for the plaintiffs submitted it was not necessary that the plaintiffs "forever lost"[2] the opportunity to claim under the insurance scheme, only that they lost an opportunity that had some value. I need not decide whether this is correct.

[9] Reference was made to *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited* [2017] QCA 254, but that was a very different case of lost opportunity and does not advance the plaintiffs' position. Here there is little doubt about the value of the loss; the only question is whether the plaintiffs have pleaded a case that the loss was caused by the defendants' poor advice.

Conclusions

[10] In my opinion, the ninth amended statement of claim presents against the second and third defendants a reasonably straightforward assertion of failure to provide appropriate advice in the circumstances known to all parties, advising a course designed to facilitate the plaintiffs' claim under the insurance policy but which,

[1] Outline of Argument on Behalf of the Second and Third Defendants, para 44.
[2] As submitted by the Applicants in the Outline of Argument on Behalf of the Second and Third Defendants para 26.

because the course did not lead to the plaintiffs properly terminating the contract, causally led to the claim being rejected. The statement of claim does not fail to allege factual material based on which the right to claim on the QBCC policy was lost.

[11] I do not accept that the applicants have shown a clear case of failure to prove that their conduct caused the loss said to have been caused.

[12] To succeed on the application for judgment, under rule 293 of the *UCPR*, the defendants must show the plaintiffs have no real prospect of succeeding on all or part of the claim and there is no need for a trial. As will be obvious from the above, I am not satisfied the applicants have discharged their burden.

[13] The application to strike out the pleading under rule 171 of the UCPR was urged on the basis that it did not disclose a reasonable cause of action as it failed to allege a necessary material fact. The applicants have not shown that the facts pleaded are incapable in law of giving rise to the relief sought.

[14] The application for orders 2 and 3 must be dismissed.

[15] The applicants submit that the eighth amended statement of claim should be struck out as having been effectively abandoned by the plaintiffs. The plaintiffs submit the document requires no attention and so no order should be made. I notice that the fourth amended statement of claim was struck out by Flanagan J on 10 October 2017. Since then, the fifth, sixth, seventh and eighth amended statements of claim have been filed in response to letters written pursuant to rule 444 of the UCPR by the defendants' solicitors about the previous filed statement of claim. All lie on the file, superseded by a later document. Because the ninth amended statement of claim is not to be struck out, it seems to me to be unnecessary to make any order about the eighth.

[16] The application for order 1 will be dismissed.

[17] I will hear the parties on whether order 4 should be made and costs.