IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROFESSIONAL LIABILITIES LIST

Not Restricted

S ECI 2021 00319

JOSEPHINE MARY GREENSILL — Plaintiff

v

PIPER ALDERMAN (A FIRM)
and others according to the schedule — Defendant

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	17 October 2022
DATE OF RULING:	18 October 2022 (Revised 21 October 2022)
CASE MAY BE CITED AS:	Greensill v Piper Alderman & Ors (Ruling)
MEDIUM NEUTRAL CITATION:	[2022] VSC 622

PRACTICE and PROCEDURE – Amendment of defence sought at the commencement of trial – Case managed proceeding where expedited trial accommodated – Delay – Forensic choice – Balancing of the interests of justice – Amendment refused.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J. Rush KC with Mr G. Kozminsky	Gordon Legal
For the Second Defendant	Mr T Wodak	Moray & Agnew Lawyers
For the Third Defendant	Ms R. Singleton	Colin Biggers & Paisley

HIS HONOUR:

1 This proceeding is fixed for trial commencing today. On 11 October 2022, the second defendant applied by summons for leave to file and serve an amended defence. Prior to doing so, it had unsuccessfully sought the plaintiff's consent.

2 However, the parties have confined the issue to paragraph 37(e) of the pleading. Otherwise the plaintiff does not oppose the amendments. Relevantly, the plaintiff alleged:

> Piper Alderman (through Stops) knew or a competent solicitor in the position of Piper Alderman (including Stops) would have known that:
>
> ...
>
> (d) if Josephine prosecuted that action, she would likely receive a substantial award of damages which would have been satisfied.
>
> PARTICULARS
>
> At the time, Shadbolt and Catterick had financial means.

3 In response, at paragraph 37 of the proposed amended defence, the second defendant accepted that a competent solicitor would advise as to the prospects that any award of damages, and any costs order, would be capable of being satisfied or substantially satisfied and then alleged by the contentious sub-paragraph 37(e):

> (e) says that as at, and from, mid-2015 any award of damages, and any costs order, the Plaintiff obtained against RS and SC would be incapable of being satisfied or substantially satisfied.
>
> PARTICULARS
>
> SC has not since July 2015:
>
> - owned any real property in Victoria; or
> - been a director or shareholder of any company registered in Australia.
>
> RS:
>
> - has not since July 2015 been a director or shareholder of any company registered in Australia;
> - has since July 2015 been the registered proprietor of a real property in Hoddles Creek, Victoria. That property is subject to a registered mortgage.

RS was indebted to the ANZ Bank in the following amounts:

- as at 30 June 2015 the amount of $509,084.90;
- as at 30 June 2020 the amount of $686,992.92.

4 The proposed paragraph 37(e) would raise, for the first time, whether the defendants in the plaintiff's proposed malicious prosecution action, Shadbolt and Catterick, had the financial capacity to satisfy a judgment.

5 This proceeding was commenced on 11 February 2021. The second defendant initially filed a defence on 16 September 2021. On 26 November 2021 the plaintiff sought an expedited trial, relying on an affidavit of Peter Gordon affirmed 19 November 2021. There were special reasons for that application that were clearly explained. On 17 December 2021, on the return of that application, Matthews AsJ gave case management directions to bring the proceeding to trial on the date that her Honour fixed. The plaintiff, by leave, filed an amended writ and statement of claim on 22 December 2021. Her Honour gave directions, among others, that:

(a) The proceeding be fixed for trial on 18 October 2022;

(b) The defendants file defences to the amended statement of claim by 11 February 2022;

(c) The defendants file and serve any expert reports by 16 May 2022;

(d) The defendants file and serve witness outlines by 13 June 2022; and

(e) The defendants identify what documents are to be included in a proposed court book by 30 August 2022.

6 The second defendant submitted that the relevant principles in respect of applications for amendment of pleadings had been recently restated by Connock J in *Business Service Brokers v Optus Mobile (No 3)*.[1] These principles, which are well established, were not in contest. I deal with this application by reference to those principles but do

---

1 [2022] VSC 283, [23]-[31].

not propose to set them out in full in these reasons.

7 As the earlier authorities have made clear, the primary question is: What did the interests of justice dictate? Of course, the authorities provide guidance about how those various interests are to be assessed in the circumstances of any particular case. On this application, the particular focus is on whether the 37(e) issue, which can conveniently be titled 'collectability', is an issue of real controversy that has been raised for determination in a way that is procedurally fair to both parties.

8 Those authorities clearly acknowledge that, absent extraordinary circumstances, leave to amend will be granted. I have concluded that the circumstances of and surrounding this application are remarkable, and extend beyond the ordinary limits that define when the court will grant the applicant an exception from compliance with usual case management. That is, the circumstances are for the following reasons, exceptional and in my view the interests of justice dictate that the amendment must be refused.

9 The proposed amended defence responds to the following allegations. By paragraphs 33-41 of the amended statement of claim, the plaintiff alleges the retainer and its terms of Stops and Piper Alderman (paragraphs 33-35). Paragraphs 36 and 37 allege the matters that Stops and Piper Alderman knew or ought to have known for the purposes of advising the plaintiff as required by the alleged retainer. Paragraph 38, alleges the content of the duty of care and the conduct in breach is alleged in paragraph 39. The plaintiff's counterfactual is alleged in paragraph 40 leading to the allegation that the plaintiff suffered loss and damage in paragraph 41.

10 The claim against the second defendant follows a similar template and in paragraph 44 draws on the allegations earlier set out in paragraph 37 when alleging that the plaintiff suffered loss and damage by reason of the conduct of the second defendant.

11 I turn first to the nature and importance to the issues in controversy of the amendment that is sought. The second defendant denies the plaintiff's allegation that she suffered loss and damage by reason of the second defendant's negligence and, by the

amendment, adds a cross-reference to paragraph 37 which raises, amongst other issues, the collectability issue. I pause to observe that the denial puts in issue the plaintiff's loss and she must prove it. The issue that the second defendant seeks to introduce is an issue that would reduce the loss by requiring a greater discount to the assessment of the value of the chance, namely, whether the chance to recover damages was valueless as uncollectable. The placement of this allegation in a paragraph responding to a causation allegation cannot change that consequence. The fact of the financial capacity of Shadbolt and Catterick at the relevant time is distinguished as a different issue to what a competent solicitor ought to have known, or given advice about, concerning the collectability of a judgment.

12 It is well established that the value of the lost chance is dependent not only upon the chance of the plaintiff succeeding in the action that became statute barred against Shadbolt and Catterick but also on whether, if successful, the defendants could have satisfied the judgment. It is uncontroversial that the plaintiff bears the onus of establishing that the lost opportunity had value. If the plaintiff succeeds on that issue, the court must assess the value of the lost opportunity.

13 The plaintiff has not alleged in terms that an award of damages would be satisfied. By paragraph 40, she claims that had she been properly advised she would have claimed substantial damages. However, the second defendant pointed to an allegation made in the context of causation which was the allegation that a competent solicitor would have known that if the plaintiff prosecuted the action she would likely receive a substantial award of damages which would have been satisfied. This allegation goes to what a competent solicitor ought to have known at the time such that in the counterfactual of competent advice there was a valuable chance that was lost. It is not an allegation of the fact that Shadbolt and Catterick could actually satisfy a judgment. The particulars provided state no more than 'At the time, Shadbolt and Catterick had financial means', which confirms that that allegation is about what is likely to have been advised to or understood by the plaintiff as being a necessary condition for her decision in the counterfactual to prosecute the malicious prosecution claims.

14 The second defendant submitted that the question of whether Shadbolt and Catterick were capable of satisfying or substantially satisfying an award of damages and costs is plainly one that must be answered in order to determine the plaintiff's claim. To the extent that this observation applies to the assessment of the value of the lost chance, I agree. While the plaintiff bears the onus of persuading the court of the value of the lost chance, the defendants will bear an evidentiary onus in relation to any particular facts upon which they intend to rely to demonstrate that the chance was worthless. In this sense, the defendant may need to satisfy an evidentiary onus in order to put relevant facts in issue.

15 The process of assessing damages for loss of an opportunity was described in *Masters Home Improvement Pty Ltd v North East Solution Pty Ltd*[2] as a three step process. The court asked first whether there was a commercial opportunity of some value. If there was a chance, the next question is; was that opportunity lost. The third step is to consider the value of that lost opportunity having regard to the prospects of success if the opportunity had been pursued.

16 I accept the plaintiff's submission that what a competent solicitor would have known about the collectability of any judgment is relevant to causation, subject to the distinction referred to earlier. The plaintiff can invite the court to consider material that would have been available to the solicitor at the time that may have lead the solicitor to consider that Shadbolt and Catterick would likely satisfy, at least to an acceptable extent, a judgment as they had financial means. This issue cannot be informed by reference to material that would not have been available to the competent solicitor. On the other hand, the issue in respect of loss of whether Shadbolt and Catterick in fact had the financial means to satisfy a judgment is a different question to be determined by reference to a different factual matrix.

17 In argument, the question became; who bore the evidentiary onus in respect of matters going to collectability. The second defendant submitted that s 52 of the *Wrongs Act*,

---

2 (2017) 372 ALR 440, [411].

1985 provided the answer because the issue went to causation.

18 In my view, the second defendant's proposed amendment is directed to the question of loss and no further. On that issue, although the plaintiff bears the ultimate legal burden and must, into the face of the second defendant's denial, prove her loss, the second defendant bears an evidentiary onus in respect of any particular circumstances that it seeks to introduce as limiting or denying the plaintiff's assessment.

19 The allegation in paragraph 37(e) is of this kind. If the second defendant wishes to contend that the chance lost was in fact worthless, irrespective of any advice that a competent solicitor might have given to the plaintiff, because Shadbolt and Catterick did not have the financial means to satisfy the judgment by reference to particular circumstances and supporting evidence, it bears an evidential onus to raise that allegation. That is not to say that the legal onus to prove loss shifts. It does not. While the plaintiff must prove her loss, the rules of procedural fairness that underpin pleadings and the conduct of trials require that such circumstances be pleaded and particularised by the party raising the issue. This conclusion finds some support in the cases.

20 In *Perri v Zaitman,*[3] the plaintiff alleged that solicitors had failed to prosecute an action for assault by two persons both of whom were subsequently sentenced to substantial terms of imprisonment. The plaintiff's claims became statute barred. Murray J ruled that the jury would be directed that the plaintiffs have the onus of proving their loss and that their loss is the value of their rights of action against their assailants taking into account, when estimating that value, the probable ability of their assailants to satisfy the judgments or any part thereof.

21 In *Redman v Instant Nominees Pty Ltd,*[4] Instant lost at trial an action to recover a commission and its appeal was dismissed for want of prosecution through the conduct of its solicitors. Instant later succeeded against its solicitors, recovering 70% of the fair value of its claim. On appeal, the Full Court held that the question of the

---

3 [1984] VR 314.
4 [1987] WAR 277.

ability of the original defendant (Brunswick) to satisfy a judgment had not been raised in the pleadings and the solicitors, if they wish to raise the issue of insolvency, had the evidentiary burden.

22 In the leading judgment, Brinsden J stated:[5]

> It is no doubt true that Instant had the legal burden of proof to prove its damage and if there had been a scintilla of evidence to suggest that Brunswick may not have been capable of meeting the judgment then clearly Instant would have run the risk of failing to establish its damage if it failed to call evidence so Brunswick could meet the judgment. The matter was not specifically put in issue in the pleadings... [n]o evidence as I have already mentioned was led by either party as to solvency nor did counsel for the solicitors raise the issue before Burt CJ. It is now only on appeal that the matter is first raised. It would seem to me in a case such as this the evidentiary burden lay on the solicitors if they wished to raise the issue of solvency though the overall burden of proof of damage rested upon Instant.

23 In *Wilkinson v Daley*,[6] Wilkinson's cause of action for damages for assault by security guards at a night club became statute barred through the negligence of her solicitors. Her claim for common law damages was dismissed because she had not proved the identity of the putative defendants or proved that judgments against them would have been satisfied. The Court of Appeal noted that the primary judge had followed the authoritative dictum in *Nikolaou v Papasavas, Phillips & Co*[7] that when assessing damages in an action against solicitors who had permitted a claim to become statute barred, there is a need to take account of the prospects of any judgment given in favour of the plaintiff being satisfied. The court noted the decisions in *Perri* and in *Redman,* observing that in the latter case, the Full Court was influenced by the manner in which the case had been conducted, which warranted the conclusion that the plaintiff was not called upon to lead evidence as to the solvency of the defendants.

24 I agree with the plaintiff's submission that this appeal was decided on the basis that the appellant had failed to establish the identity of the defendants against whom action would have been taken. Plainly, in that circumstance, the question of where the

---

5 *Redman v Instant Nominees Pty Ltd* [1987] WAR 277, 294.
6 [2004] NSWCA 331.
7 (1989) 166 CLR 394, 404.

evidentiary onus lies to demonstrate the insolvency of the defendants cannot arise.

25 The plaintiff submitted that the trend of these decisions was clearly right and found support in general considerations of policy and in American authorities, but it is not presently necessary to rule on these submissions.

26 The issue of whether Shadbolt and Catterick could not have satisfied any judgement obtained in an action for malicious prosecution against them is capable of forming part of the real issues in controversy between the parties in this proceeding. As an affirmative allegation by a defendant in support of a denial of the plaintiff's claim, the defendant seeking to raise the issue bears an evidentiary onus. It is a matter that must be pleaded.[8] The legal onus to prove loss remains with the plaintiff. This is a factor that weighs in favour of permitting the amendment. That said, there is not, as I have noted, a right in a party to raise an issue, subject only to paying costs thrown away. Parties have choices, which they exercise. A party's forensic decisions are rarely openly explained to a court, but they are often sufficiently evident to be brought into the balancing exercise.

27 The question that remains is whether the circumstances of the second defendant's late application to amend are extraordinary such that the interests of justice dictate refusal of it. There are as number of reasons why it is in the interests of justice to refuse the application.

28 First, although I have determined that the collectability issue can form part of the real issues in controversy, it is not excluded completely from consideration as it remains necessary for the plaintiff to satisfy the burden of proving her loss. Accordingly, although the defendants will be constrained in their defence of denial of the plaintiff's allegations by the absence of a pleaded basis to advance affirmative allegations that the plaintiff's chance was worthless, the weight to be attributed to this consideration in the overall exercise of the court's discretion is not overwhelming.

29 Secondly, allowing the amendment would cause substantial delay in the proceeding

---

8 *Wheelahan v City of Casey (No 12)* [2013] VSC 316, [25(b)].

if the plaintiff were to seek the adjournment of the trial in order to properly meet the collectability issue. In this respect, I accept the evidence of Mr Clayton, the plaintiff's solicitor, as to the further preparation that would have been required to meet that allegation noting the extent of necessary further inquiries and the likely delay and cost. That course, that is an adjournment, would see a significant wastage of costs, there being five represented parties all waiting to start a trial with an estimate of 12 plus days.

30 It is only because the plaintiff will decline to seek an adjournment of the trial that there will not be a substantial delay or significant wasted costs if the amendment is permitted. However, the reasons why the plaintiff will not seek an adjournment of the trial are extraordinary. This proceeding has been on foot for nearly two years but events upon which the plaintiff's claim is founded commenced in March 2008. Since that time the plaintiff's interactions with the legal profession have raised issues that culminate in this proceeding. She was convicted in June 2010 of nine counts of indecent assault but was released upon the Court of Appeal entering a judgment of acquittal on all counts in November 2012 after she had served approximately two years in prison. From that time, she dealt with the defendants.

31 In my view, given the plaintiff's interaction with the legal profession and the legal system, she is entitled to proceed to the trial of her action without further delay. I accept that the inconvenience and cost of an adjournment of the trial would cause the plaintiff irreparable prejudice in the stress and anxiety that further delay would occasion. I am not persuaded that there are compelling reasons why the plaintiff should be prejudiced at trial through her insistence on avoiding further delay when the named defendants are legal practices and a legal practitioner in order to permit them to raise an issue that has been glaringly available to them since the writ was served. Further, by reason of the statutory requirements for professional indemnity insurance, it is almost certain that the proceedings are ultimately being defended by insurers who are experienced litigators. The dilatory attempt by the second defendant to plead this issue is quite unacceptable in this light, which more harshly illuminates

their failings when it is noted that the numerous opportunities afforded by the case management directions to consider or reconsider the issues for trial passed. Had the second defendant acted reasonably, there would have been an opportunity for the plaintiff to have prepared for this defence and to have avoided prejudice to her position.

32 Thirdly, and following on from the last point, the proceeding had been subject to judicial case management, affording the opportunity for the parties to seek case management directions from an Associate Judge on a number of occasions. There is no right or entitlement to a party to amend their pleadings whenever they think it appropriate to do so subject to paying costs thrown away. It is clear from the submissions put on the application that the defendants recognise the issue of collectability as relevant. Yet, no defendant sought to allege that Shadbolt and Catterick did not have the financial means to satisfy a judgment when the defences were first filed in September 2021 or at any time thereafter until this application came before the court on the day prior to the commencement of the trial. The third and fourth defendant are yet to introduce an amendment in like terms awaiting the outcome of this application. There was no suggestion, nor could there be, that the defendants did not have ample time to research and plead (with proper particulars) a defence of non-collectability of the counterfactual judgment. The court expects a compelling explanation from a party for a failure to properly frame the issues for trial in the absence of particular compelling circumstances.

33 What is clear from these directions is that the second defendant had two occasions that specifically directed the second defendant's attention to consider what issues it would take by its defence according to a timetable determined by the court for the express purpose of a trial to commence on 18 October 2022 on an estimate of 12 days. As I have noted, it is of particular significance that these directions followed on an application by the plaintiff for an expedited hearing. It must follow that the importance of being ready for a trial on the appointed date was emphasised and the defendants were on notice of a special need to follow the case management directions,

which is not to suggest that observance of case management directions is a matter of choice. In addition, it must follow that the second's defendant's attention was, or ought to have been focussed on the issues that it wanted to run in the trial when it considered expert evidence, its lay witness evidence and the content of the court book.

34 Fourthly, I accept the plaintiff's submission that the second defendant's explanation for their delay in raising the point in the proceeding is unacceptable. It was said that the point first came to their attention through service of an expert report (one that is not to be relied on in the proceeding). Identifying this event as the starting point for the second defendant's consideration of the issue simply exposes, should it be accepted, the want of applied expertise in promptly identifying the issues for trial. I do not accept that between the second defendant, its legal team and its insurer there is any want of expertise capable of a timely identification of non-collectability as a defence, which was, as I have noted, in September 2021 when it filed its defence.

35 I am comforted in drawing this inference by the explanation actually proffered, which I reject. The 'expert' apparently opined that a reasonable practitioner would have informed the client that all legal proceedings involved financial risk and that it would have been reasonable to advise the plaintiff that Shadbolt and Catterick may not have had or later obtained the capacity to pay damages and recoverable legal costs. This 'opinion' is trite and I do not accept that the obvious issue of the collectability of any judgment was not contemplated by the second defendant, its insurer and its legal advisers until the expert's report was cited.

36 In suggesting that the issue of non-collectability was first considered after the Clayton affidavit of May 2020 was seen and that investigations were then made at the leisurely pace described in Mr Le Huray's affidavit in the context of the court's management of this proceeding as described is unacceptable. It cannot have escaped the second defendant and those advising or standing behind it that, had the defendants raised the issue of collectability in a timely fashion, further enquiries that would, or might, have been undertaken could be as extensive, significant, costly and time consuming as Mr Clayton described.

37 The second defendant in submissions avoided pressing the reasonableness of its explanation for its dilatoriness and contended that the need for those enquiries was necessarily raised in any event. The thrust of the submission was that the plaintiff would not suffer prejudice in the manner alleged by reason of the proposed amendment or, if she did, it was self-inflicted. In particular, the second defendant relied on an affidavit of Marcus Clayton affirmed 9 May 2022 that outlined information he had ascertained about the financial position of Shadbolt and Catterick.

38 Noting that some documents were included, at the plaintiff's request, in the court book, it is not to the point that the plaintiff has undertaken some enquiries. The fact that she has done so provides no justification for the second defendant's dilatory application to introduce the issue into the trial. I reject, in this context, the submission that the plaintiff ought to have prepared for trial to the extent identified by Mr Clayton in any event in relation to an issue that has not been pleaded.

39 Fifthly, the second defendant did not brief counsel until August 2022. There is no basis for criticism of counsel's attention to the matter, but what needed to be explained was the failure of the second defendant to plead the point in the period from September 2021 to August 2022 and that explanation required evaluation on the basis of acceptance that the denial of collectability was not a hidden, obscure, or difficult defence to research and plead. The plaintiff submitted that I might infer that the second defendant's failure to carefully analyse the issues in the proceeding, and to raise those issues in a timely manner, that a deliberate forensic decision was made for the purposes of managing expenditure on the claim. That inference is open particularly in a matter that has been subject to judicial case management following an application for an expedited trial for the reasons already discussed.

40 Sixthly, by reference to the prior considerations, I consider that permitting the amendment will, on balance, lessen public confidence in the administration of justice.

41 For these reasons, I consider that the interests of justice in this case dictate that the amendment be refused. I will order that the second defendant has leave to file and

serve an amended defence substantially in the form of the proposed amended defence in exhibit DGL-1 to the Affidavit of Daniel Grant Le Huray affirmed 11 October 2022, save that leave to include paragraph 37(e) is refused.

42 Subject to any further submission from counsel, I propose that the second defendant pay the costs of and incidental to the summons dated 11 October 2022.

CERTIFICATE

I certify that this and the 12 preceding pages are a true copy of the reasons for ruling of Justice John Dixon of the Supreme Court of Victoria delivered on 18 October 2022.

DATED this eighteenth day of October 2022.

.....
Associate