PARTIES:	Amcor Pty Ltd Trading as A.P.M. Containers and Victoria Valley Beef Pty Ltd and Donald Edgar Hoar
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Interlocutory Application
FILE NO.:	624 of 1990
DELIVERED:	27 January 1995
REASONS OF:	Master Coulehan

CATCHWORDS:

Practice & procedure - O.36 - application to amend name of a party - misnomer - expiry of limitation period - O.36.01(6) - whether amendment would be futile

Practice & procedure - O.36 - application to amend pleadings by withdrawal of admission - need for adequate explanation - whether injustice to other party - need to consider efficient administration of justice

Cases followed:

Rainbow Spray Irrigation Pty Ltd v Hoette (1963) NSWR 1140
Bridge Shipping Pty Ltd v Grand Shipping SA 103 ALR 607
Hollis v Burton (1892) 3 Ch. 227
Coopers Brewery Ltd v Panfida Foods Ltd (1992) 26 NSWLR 738

Cases referred to:

Commonwealth v Verwayen 170 CLR 394
North Australian Aboriginal Legal Aid Service v Liddle - an unreported decision of the Supreme Court of the Northern Territory of Australia dated 8 September 1994

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

No. 624 of 1990

BETWEEN:

AMCOR PTY LTD TRADING AS A.P.M. CONTAINERS

Plaintiff

AND:

VICTORIA VALLEY BEEF PTY LTD
First Defendant

AND:

DONALD EDGAR HOAR
Second Defendant

MASTER COULEHAN: REASONS
(Delivered 27 January 1995)

The Writ in this proceeding was issued on 29 October 1990 on behalf of "Amcor Pty Ltd trading as A.P.M. Containers" claiming the price for "packaging" delivered by the Plaintiff to the First Defendant between 18 June 1990 and 31 August 1990. It was further claimed that the Second Defendant had, by an agreement in writing dated 20 May 1983, agreed "to be responsible" for all debts incurred by the First Defendant to the Plaintiff.

Judgment was entered against the First Defendant, in default of appearance, on 27 November 1990. The Second Defendant filed his appearance on 19 December 1990.

On 14 May 1991, the Second Defendant filed his defence in which he admitted the agreement in writing dated 20 May 1983 and its effect, but denied that he was liable to the Plaintiff because, he said, the debt was incurred by "Relkwild Pty Ltd". It thus appeared that the issue was whether the debt was incurred by the First Defendant.

The Plaintiff filed its list of documents on 29 January 1992. Included was a document entitled "Commercial Credit Application and Guarantee" dated 20 May 1983. This was the agreement in writing referred to in the Plaintiff's statement of claim.

It appears that at the time the defence was filed the Second Defendant did not have a copy of this document. His solicitor made several attempts to obtain a copy from the Plaintiff's solicitors between 20 December 1991 and 27 July 1993.

On 5 September 1994 the Second Defendant's solicitor conducted a search of the Australian Security Commission's register which revealed that "Amcor Pty Ltd" had changed its name to "Stylana Pty Ltd" in 1984 and had been de-registered on 18 May 1993.

On 6 September 1994 she informed the Plaintiff's solicitor of the non-existence of the Plaintiff and also that the Plaintiff was not a party to the agreement dated 20 May 1983.

By letter dated 18 October 1994, the Plaintiff's solicitors were given notice that unless the Plaintiff withdrew the proceeding or applied to amend the Writ an application would be made to dismiss the proceeding. Notice was also given that if the Writ was amended the Second Defendant would apply to amend his defence. A copy of a proposed amended defence which effectively withdrew the admissions made as to the agreement dated 25 May 1983 was enclosed with the letter.

By summons filed on 12 December 1994 the Second Defendant applied to have this proceeding dismissed or, alternatively, for leave to file an amended defence. Subsequently, the Plaintiff applied to amend the name of the Plaintiff to "Amcor Ltd trading as A.P.M. Containers".

If the Plaintiff's application succeeds, the Second Defendant's application to dismiss the proceeding becomes untenable because it is based on the non-existence of the

Plaintiff named in the Writ.

The document dated 20 May 1983 names "Fibre Containers Ltd", the First Defendant and the Second Defendant as parties. The Second Defendant says that this was the company cardboard cartons were purchased from in 1983 and 1984. He says that in 1989 and 1990 cardboard cartons were purchased from Amcor Ltd.

It is not clear how Amcor Pty Ltd came to be named as Plaintiff in the Writ. The evidence suggests that the entity which should have been named was Amcor Ltd. It appears that there was a typographical error.

There was no argument as to when the cause of action against the Second Defendant arose. It appears to be agreed that the limitation period has expired.

O.36.01 provides that the Court may, at any stage, order that a document in a proceeding be amended for the purpose of correcting a defect or error.

It was argued on behalf of the Second Defendant that if the amendment is allowed, it should be on terms that the Second Defendant be granted leave to amend its defence because otherwise he will lose the benefit of the provisions of the Limitations Act.

This is a case of misnomer or misdescription and does not involve the substitution of a new party (see Rainbow Spray Irrigation Pty Ltd v Hoette (1963) NSWR 1440). The question of the Limitation Act does not arise (see Bridge Shipping Pty Ltd v Grand Shipping SA 103 ALR 607, 611). If it did, it could not be said that the Second Defendant has been prejudiced in the conduct of his defence in a way that could not be fairly met by an adjournment, an award of costs or otherwise (O.36.01(6)).

It was also argued that the amendment should be refused because it is futile. I doubt that an amendment designed to reflect the truth of the relationship between the parties may be described as futile. It is relevant to the Plaintiff's claim against the First Defendant and also any claim by the Second Defendant for costs. Furthermore, it may be open to the Plaintiff to raise other issues, such as estoppel.

It is now necessary to consider the Second Defendant's application to amend his defence.

O.36 provides for the amendment of pleadings. A pleading may be amended at any stage of a proceeding if this may be done without causing injustice to another party (Clough and Rogers v Frog (1974) 48 ALJR 481).

Where leave to withdraw an admission is sought, the Court will usually require an adequate explanation for the making of the admission (Hollis v Burton (1892) 3 Ch. 227, Coopers Brewery Ltd v Panfida Foods Ltd (1992) 26 NSWLR 738).

The explanation given by the Second Defendant for the admissions made in the defence was in the form of hearsay, to which no objection was made.

He says that cardboard cartons were purchased between 1983 and 1990 from a business which operated under different names at different times. All his documents had been lost in a flood on 19 February 1991 but he remembered signing a document containing a guarantee and instructed his solicitors to admit the existence of the agreement.

The Second Defendant's admissions were made without his solicitor having access to the agreement to which neither Amcor Pty Ltd nor Amcor Ltd was a party. Notwithstanding the lack of care in making the admission, it would be clearly unjust to refuse leave to allow the admission to be withdrawn if no injustice would thereby be caused to the Plaintiff.

On the question of prejudice the Plaintiff referred to the decision of the High Court in Commonwealth v Verwayen 170 CLR 394 and argued that the application to withdraw the admissions came late in the proceeding and has caused detriment which cannot be measured only in terms of monetary compensation.

Reference was also made to the effect of the withdrawal of the admissions on the efficient administration of justice (see Coopers Brewery Ltd v Panfida Foods Ltd supra and North Australia Aboriginal Legal Aid Service v Liddle, an unreported decision of the NT Court of Appeal dated 8 September 1994).

The Second Defendant has not explained the delay between obtaining a copy of the agreement on 27 July 1993 and bringing the application to amend. However, the Plaintiff did not pursue its claim with any vigour in this period, or at any stage in the proceeding.

There is no evidence which suggests that the Plaintiff has suffered any detriment which may not be adequately compensated by an order for costs and the circumstances are not such that detriment may be inferred.

The delay caused by the amendments are not of sufficient significance to justify refusal. Different considerations may apply if the proceeding had been set down for trial.

Justice requires that the Second Defendant be given leave to amend his defence. O.63.11(7) makes provision for costs in these circumstances.

I order as follows:

1. The name of the Plaintiff be amended to "Amcor Ltd trading as APM Containers".

2. The Second Defendant have leave to file and serve an amended defence in the terms of the amended defence annexed to the affidavit of Janine Ougham sworn on 17 November 1994.