SUPREME COURT OF QUEENSLAND

CITATION:	*Argus Administration Pty Ltd & Ors v Caldwell & Anor* [2018] QSC 281
PARTIES:	**Argus Administration Pty Ltd – 614702528** (First Plaintiff) and **Argus Accounting Pty Ltd – 612896358** (Second Plaintiff) and **Argus Private Pty Ltd – 159585190** (Third Plaintiff) v **Ivan Caldwell** (First Defendant) and **Yvonne Grogan** (Second Defendant)
FILE NO/S:	SC No 317 of 2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	30 November 2018
DELIVERED AT:	Cairns
HEARING DATE:	7 September 2018
JUDGE:	Henry J
ORDERS:	**1. In respect of the plaintiffs' application for an injunction:** **(a) application dismissed;** **(b) the plaintiffs will pay the defendants' costs of the application to be assessed on the standard basis if not agreed.** **2. In respect of the defendants' application for summary judgment and strike-out:** **(a) judgment for the defendants as against the second and third plaintiffs;** **(b) paragraphs 24 to 27 inclusive of the amended statement of claim are struck out, excluding sub-paragraphs 24(a) and 24(b);**

(c) the costs of the application are reserved pending the determination of the summary judgment application as against the first plaintiff;

(d) if the first plaintiff seeks to continue its claim it will file and serve a further amended statement of claim by no later than 4 pm 19 January 2019, which further amended statement of claim is to resolve the pleading deficiencies identified in these reasons and reflect the removal of the second and third plaintiffs as plaintiffs;

(e) the defendants will give notice to the first plaintiff by no later than 4 pm 28 January 2019 as to whether it seeks to continue its application for summary judgment as against the first plaintiff;

(f) the matter is listed for review at 9.15 am 30 January 2019 at which time, if the application for summary judgment is to continue, directions will be made as to the future carriage of the application, and if it is not to continue, the parties will be heard as to the costs of the application.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – Where employment contracts contained confidentiality clauses – proper construction of confidentiality covenants in employment contract – whether confidentiality clauses were valid – whether former employees breached confidentiality clauses – whether the second and third plaintiffs' claims cannot succeed because the contracts allegedly breached were contracts to which they were not privy.

EMPLOYMENT – EMPLOYER AND EMPLOYEE – CONTRACT OF EMPLOYMENT – TRADE AND COMMERCE – OTHER REGULATION OF TRADE OR COMMERCE – RESTRAINTS OF TRADE – VALIDITY AND REASONABLENESS – proper construction of restraint of trade covenants in employment contract – whether restraints were valid and reasonable – whether former employees breached restraints – whether the second and third plaintiffs' claims cannot succeed because the restraints allegedly breached were in contracts to which they were not privy.

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – where the defendants made admissions to facts pleaded in the statement of claim – where the plaintiffs' amendments to the statement of claim vary the meaning of those facts – whether the defendants need leave to withdraw the admission per r 188 UCPR.

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the plaintiff claims breaches of restraint and confidentiality clauses – where the defendant makes an application for summary judgment pursuant to s 293 of the *Uniform Civil Procedure Rules 1999* (Qld) – whether the plaintiff has a real prospect of succeeding on all or part of the claim– whether there is a high degree of certainty that the claim would fail – where the application for summary judgment granted against the second and third plaintiffs – where the application for summary judgment against the first plaintiff is adjourned on the striking out of parts of the amended statement of claim.

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS INTERLOCUTORY INJUNCTIONS – PRIMA FACIE CASE – where the plaintiffs seek orders that pending determination of the case the defendants be restrained from working for or with or "making a solicited approach" to any client or former client of the plaintiffs – whether the defendants would be restrained from working for their present employer – where the balance of convenience favours the defendants being allowed to remain in their current employment.

Agar v Hyde (2000) 201 CLR 552, cited.
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, cited.
Digital Products Group v Opferkuch [2008] NSWSC 575, cited.
IF Asia Pacific Pty Ltd v Galbally [2003] VSC 192, cited.
LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCA 105, cited.
Lindner v Murdock's Garage (1950) 83 CLR 628.
Mason's Case (1930) AC, 742, cited.
Mitchel v Reynolds (1711) PWms 181, 24 ER 347, cited.
Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] AC 535, cited.
Ormonoid Roofing & Asphaults v Bitumenoids Ltd [1931] 31 SR (NSW) 347, cited.

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107, cited.
Weldon & Co v Harbinson [2000] NSWSC 272, cited.

Uniform Civil Procedure Rules 1999 (Qld) r292, r293, r377, r378.

COUNSEL: Michael Jonsson QC for the First and Second Defendants

SOLICITORS: First, Second and Third Plaintiffs represented by Director C Grindal
Miller Bou-Samra Lawyers for the First and Second Defendants

[1] The plaintiff companies each claim "damages for breach of contract and future economic loss" from the defendants. The pleaded foundation for liability is the defendants' alleged breach, as former employees, of a restraint of trade clause and a confidentiality clause in their respective contracts of employment.

[2] The defendants seek summary judgment. The plaintiffs seek an injunction.

The litigation so far

[3] A previous application by the plaintiffs for summary judgment was dismissed on 8 August 2018, with it then being explained to the director representing them, Mr Grindal, that there were foundational deficiencies with their pleadings, potentially including the identity of the proper plaintiff.[1]

[4] An application[2] filed by the plaintiffs the day after the dismissal of their summary judgment application sought the court's leave to amend their claim and statement of claim. However, on 15 August 2018, well before the listed hearing date of that application, they filed an amended claim and amended statement of claim. This was not the subject of complaint by the defendants and made the application otiose. In any event leave would only have been required for the amending of the claim,[3] which amendment was only cosmetic.

[5] There are now two substantive applications for determination. One, by the defendants, seeks summary judgment for the entirety of the claims by the second and third plaintiff and summary judgment for or the striking out of part of the first plaintiff's pleaded claim. Another, by the plaintiffs, seeks orders restraining the defendants from soliciting

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1 Mr Grindal's affidavit filed 9 August 2018, file doc 11, incorrectly asserts the filing of an amended claim and statement of claim was ordered. The order was simply a dismissal of the summary judgment application with costs, although it was explained that was a result of the deficient pleading of the case. It was inevitable the statement of claim would need to be amended for the plaintiffs to advance their case.

2 File doc 10.

3 Rules 377, 378 *Uniform Civil Procedure Rules 1999* (Qld).

or working for or with any client or former client of the plaintiffs. It is convenient to deal with the applications in that sequence.

[6] As will become apparent, there remain fundamental problems with the pleading of the plaintiffs' case.

Defendants' application for summary judgment v second and third plaintiffs

[7] The test for summary judgment in r 293 of the *Uniform Civil Procedure Rules 1999* (Qld) ("*UCPR*"), consistently with r 292's mirror provision for a plaintiff's application, is:

> "**293. Summary judgment for defendant**
>
> …
>
> (2) If the Court is satisfied –
>
> (a) the plaintiff has no real prospect of succeeding on all or the part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the Court considers appropriate."

[8] The philosophy underpinning r 293 is that a plaintiff ought not be denied the opportunity to place his or her case before the court[4] unless the defendant satisfies the court that the plaintiff does not have a real as opposed to fanciful prospect of succeeding on all or part of the claim.[5] The requirement of satisfaction is to be applied in conjunction with the requirement that the court be satisfied there is no need for a trial, thus requiring there exists a high degree of certainty the claim would fail were it allowed to continue in the ordinary way.[6]

[9] Rule 293 is readily satisfied in the summary judgment application as against the second and third plaintiffs. That component of the application relies upon the foundational deficiency that the second and third plaintiffs were not parties to the contracts of employment which the defendants are alleged to have breached. The deficiency was identified at the time of their unsuccessful application for summary judgment. They have not overcome it.

[10] In pleadings not present in the initial Statement of Claim, the Amended Statement of Claim refers to a group of companies, consisting of the three plaintiffs and two other companies, as "the Argus Group" or "Argus".[7] It describes them collectively as operating "a financial services business providing accounting, taxation, finance, financial planning, superannuation, personal insurance and related services". The

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4 *Agar v Hyde* (2000) 201 CLR 552, 575-576.
5 *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, [17].
6 *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105, [26]-[30].
7 Amended Statement of Claim court doc 15 [H]

pleadings and the filed evidence do not allege the collective business of those companies is a separate legal entity capable of suing or being sued. The so-called Argus or Argus Group is merely a name, it is not an individual legal entity.

[11] It is trite that each of the plaintiff companies is a separate legal entity. It is also trite that under the doctrine of privity of contract it is ordinarily only the parties to a contract who may benefit from its stipulations.[8]

[12] The amended statement of claim pleads the defendants each signed a contract of employment but is conveniently silent as to which plaintiff or plaintiffs were parties to the all-important contracts with the defendants. Ignoring that telling gap the amended statement of claim pleads – in a pleading not present in its initial statement of claim – that, "All employees of Argus are employed by the entire Argus Group and not the First Plaintiff solely".[9] Bearing in mind that the terms "Argus" and the "Argus Group" are at best merely names used in the amended statement of claim to refer to a number of companies, and not to a single legal entity, this pleading in effect asserts the defendants were employed by each of the plaintiff companies and two other companies.

[13] It is necessary to pause and dispense with a diversion arising from certain admissions made by the defendants now relied upon in argument by the plaintiffs. The admissions were in the initial defence prior to its amendment consequent on the amendment of the statement of claim. In that defence the defendants admitted the pleaded allegations of the plaintiffs in the initial statement of claim that the defendants had been employed during the era in question "with the Argus Private Group ("Argus")".[10] That adoption of the short title "Argus" did nothing to explain what if any legal entity or entities the words "the Argus Private Group" referred to. Standing alone as they did, the words "the Argus Private Group" was not the name of a legal entity. It was a meaningless name. That the defendants initial defence admitted to them having been employed with a non-entity was a valueless admission.

[14] It was rendered even more valueless by the amended statement of claim's retention of the above use of the short title "Argus" and the introduction of a different use for the same short title, namely a reference to the five companies mentioned above. The amended statement of claim thus rendered ambiguous or varied, and for the first time properly described, entities which had allegedly employed the defendants. In the result the defendants' amended defence contained denials of employment with "Argus" and admitted only to employment with the first plaintiff. It was entitled to so plead without the leave required per r 188 *UCPR* to withdraw the earlier admission. That is because a defendant's admission of a fact pleaded by a plaintiff cannot logically continue to be an admission of a fact subsequently rendered ambiguous or varied by an amended pleading of the plaintiff.

[15] The plaintiffs' argument that the defendants should be held to their earlier admission is in any event not to the point. People can of course engage in employed work for more than one employer. For the sake of argument, let it be assumed the defendants were

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8 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 113-115.
9 Amended Statement of Claim court doc 15, eg compare [F] – [K].
10 Statement of Claim court doc 1 [8].

employed by the first plaintiff and by the second plaintiff and by the third plaintiff. Further, let the absence of pleading of material facts in support of those conclusions be ignored. The unbridgeable gap remaining in the second and third plaintiffs' cases is that the contracts of employment now sued upon were not contracts of employment with them.

[16] The filed evidence reveals that the defendants' contracts of employment upon which this case relies were with the first plaintiff only. The letters of engagement from Mr Grindal actually described the first plaintiff as "the employer" and included an employee acceptance form which on its terms described the accepted offer of employment as an offer of employment from the first plaintiff.[11]

[17] The plaintiffs' claim is premised entirely upon alleged breaches of the contracts of employment which were between the defendants and the first plaintiff. The terms of those contracts did not contain clauses purporting to protect other companies in business with the first plaintiff.[12] None of the filed evidence suggests the second or third plaintiffs were parties to the contracts. Nor does the filed evidence support some alternate, not pleaded, pathway by which the second and third plaintiffs became parties to the contracts or were owed the contractual obligations of the defendants in some exception to the doctrine of privity of contract.

[18] The plaintiffs submit the contracts were entered into by the second and third plaintiffs "by conduct and express consent agreement".[13] The foundation for that submission was not exposed and the submission was not elaborated on. There is no evidence of a relevant "express consent agreement". As to the submission about entering into the contracts "by conduct", it appears at best to be premised on the alleged facts that, as it turns out, the defendants were also employed by and knew that they were also employed by the second and third plaintiffs and that they passed probation with all three plaintiffs.

[19] That is to say nothing of the contractual terms of the defendants' employment with the second and third plaintiffs. It is common enough for people to engage in employment without a written contract. That they may enter into employment with a number of employers, who are engaged together in business, does not mean the terms of their written contract with one such employer will be the same as the terms of their unwritten contracts with the other employers. That is most obviously so in respect of highly specific contractual terms, such as confidentiality and restraint of trade clauses, which are unlikely to arise by implication.

[20] It may be that the defendants' alleged employment with the second and third plaintiffs gave rise to a fiduciary relationship between them but, as Mason J observed in *Hospital Products Ltd v United States Surgical Corporation*,[14] a fiduciary relationship cannot be superimposed upon a contract in such a way as to alter the operation which that contract was intended to have according to its true construction.[15] The written contract between

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[11] Affidavit of Christopher Grindal file doc 3 ex CG 27, 28.
[12] Such clauses may in any event be of dubious validity – see *IF Asia Pacific Pty Ltd v Galbally* [2003] VSC 192 [195-199].
[13] Plaintiffs' written submissions p 7.
[14] (1984) 156 CLR 41.
[15] Ibid 97.

the defendants and the first plaintiff on its terms operated only as between them. Such fiduciary relationship as may have existed as between the defendants and the second and third plaintiffs cannot be superimposed upon that written contract in such a way as to include the second and third plaintiffs as parties to it.

[21] The second and third plaintiffs' claims are hopeless because the contracts allegedly breached were contracts to which they were not privy. Their amended claim and statement of claim and their filed evidence has ignored the problem. The inevitable conclusion is that the second and third plaintiffs have no prospect of succeeding on their ill-founded claims and a trial of those claims is unnecessary. The defendants' application for summary judgment against the second and third defendants must therefore succeed.

[22] Costs should follow the event but a prospective order is complicated by the fact that some other components of the filed application will linger for subsequent determination after the further amendment of the statement of claim, required for reasons given below. Until the application is entirely determined the prudent course is to reserve costs in respect of those components of the application which are determined.

[23] Because it will necessary for there to be a further amended statement of claim, those further amendments should reflect the removal by this summary judgment of the second and third plaintiffs as plaintiffs and should resolve the pleading deficiencies of short cut titles of entities and non-entities by specifically naming a company or companies, as the case may be, when referring to a company or companies.

Application for partial summary judgment/strike out v first plaintiff

[24] The part of the amended statement of claim targeted by the application for summary judgment or strike out against the first plaintiff is paragraphs 24 to 27 inclusive, excluding paragraphs 24(a) and 25(a). Paragraphs 24 and 25 relate to confidentiality and paragraphs 26 and 27 relate to restraint of trade.

Confidentiality

[25] Paragraph 24 and 25 are in identical terms, relating respectively to the first and second defendants' alleged breach of the confidentiality clause of their employment contracts with the first plaintiff. The confidentiality clause in each contract was as follows:

> "**10. Confidentiality**
>
> 10.1. By accepting this letter of offer, you acknowledge and agree that you will not, during the course of your employment or thereafter, except with the consent of the employer, as required by law or in the performance of your duties, use or disclose any confidential information relating to the business of the employer, including but not limited to client lists, trade secrets, client details and pricing structures."

[26] Paragraph 24 of the amended statement of claim relevantly pleads:

> "24. Pursuant to clause 10 and also titled Confidentiality … the first defendant was required to not use or disclose any confidential information relating to the business of Argus, including but not limited to client lists, trade secrets, client details and pricing structures.
>
> (a) The First Defendant has utilised the client list from Argus to commence working with Kickstart Accounting;
>
> (b) The First Defendant has made solicited approaches to current and former clients of Argus between November 2017 and July 2018;
>
> (c) The First Defendant has worked for and on the following clients of Argus:
>
> (i) Kickstart Accounting of Unit 2, 180 McManus Street, Whitfield, Qld 4870, a business controlled by Kirsten Colijn;
>
> (ii) … [the pleading names more persons and their addresses through to and including subparagraph (ix)]…; and
>
> (x) The above list is not exhaustive.
>
> (d) The First Defendant has made contact with the following current and former clients of Argus:
>
> (i) … [the pleading names further various persons and their addresses through to and including subparagraph (vii)]…; and
>
> (viii) The above list is not exhaustive."

Clause 25 pleads the same detail in respect of the second defendant.

[27] The first and second defendants' application makes no complaint as to the allegation in paragraphs 24(a) and 25(a), which is that the defendants used "the client list from Argus" to commence working with Kickstart Accounting. Presumably the defendants take the pleaded reference to a client list from Argus to be a client list from the first plaintiff, a matter of particularity which should nonetheless be properly pleaded. The naming of the first plaintiff's business as the business of Argus is also problematic. These are deficiencies which should be remedied on the further amendment of the statement of claim. The main complaint though is about the remaining allegations in sub-paragraphs (b), (c) and (d).

[28] Those allegations, while not expressly pleaded as breaches must, to be relevant in this breach of contract case, be relied upon as breaches of the confidentiality clause. Those allegations in sub-paragraphs (b), (c) and (d) as against each defendant are in short that they:

> (b) made solicited approaches to current and former clients of Argus;
>
> (c) worked for and on clients of Argus; and
>
> (d) made contact with current and former clients of Argus.

[29] It is not apparent what is meant by the allegation of working "on" clients of Argus. It is not a concept referred to in the confidentiality clause. Nor are acts of making "solicited

approaches" to current and former clients referred to in the confidentiality clause. Perhaps those words are intended to refer to attempts by the defendants to solicit work by approaching clients or former clients of the plaintiffs. Curiously, their natural meaning is that the approaches by the defendants were solicited, that is, that it was the clients or former clients who did the soliciting. It is difficult to see how responding to the soliciting of such clients could evidence a breach of a confidentiality clause, particularly one which does not even refer to "soliciting". Clearer, more particular, language is required to resolve these deficiencies and better align the pleaded allegations of breach with the terms of the clause said to be breached.

[30] A further hurdle is that the confidentiality clause does not, as the pleading deficiently assumes, prevent the use and disclosure of confidential information relating to the business of Argus. It prevents the use and disclosure of confidential information relating to the business of the first defendant.

[31] Let it be assumed, for the sake of argument, that the current and former clients in question are or were former clients of the first plaintiff's business, and not of Argus as is deficiently pleaded at present. There would then remain the fundamental problem that merely alleging the defendants approached, worked for or contacted those clients does not reveal how such acts are said to have involved the use or disclosure of confidential information.

[32] It may for example be that such approaches, work or contact was merely a result of these people being acquainted. It is a reality of business that employees may come to know clients of the employer and vice versa. The identity of people with whom one becomes acquainted in the course of employment is part of one's general stock of knowledge. It is not in the ordinary course confidential, whereas a business' compiled lists and records about an employer's client base likely will be.[16]

[33] The pleadings' failure to reveal how the defendants' acts are said to have involved the use or disclosure of confidential information is a fundamental deficiency, failing to comply with the rules of pleading. It breaches r 149 *UCPR* in that, if the acts did involve the use or disclosure of confidential information, then the ways in which they did so would be material facts which should have been pleaded and would take the defendants by surprise if not pleaded. It obviously has a tendency to prejudice or delay the fair trial of the proceeding, going as it does to one of the two foundational breaches relied upon to found the action.

[34] It follows at the very least that the application to strike out per r 171 *UCPR* must succeed. The defendants press for summary judgment though, contending beyond the defect in pleading that there is no evidence the acts did in fact involve the use or disclosure of confidential information. Such "evidence" as has been filed on the issue appears to be inadequate. However, a difficulty with assessing the filed evidence is that evidence to be relied upon in trying to prove the use or disclosure of confidential information is likely circumstantial in nature. It is difficult to assess the prima facie

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[16] A distinction discussed in *Ormonoid Roofing & Asphaults v Bitumenoids Ltd* [1931] 31 SR (NSW) 347, 354-356 ; *Weldon & Co v Harbinson* [2000] NSWSC 272, [67-72]; *IF Asia Pacific Pty Ltd v Galbally* [2003] VSC 192 [218-226]; *Digital Products Group v Opferkuch* [2008] NSWSC 575, [17-19].

adequacy of circumstantial evidence in proving facts relied upon to sustain an inference that confidential information has been used or disclosed without knowing what the alleged use or disclosure is said to be.

[35] The safer course, before determining this component of the summary judgment application, is to adjourn it, strike out the offending pleadings, allow an opportunity for the first plaintiff to re-plead properly, if it can, and, if the summary judgment application is persisted in (whether in its current or amended form), to re-list it for supplementary argument on the fresh pleading and such evidence as has by then been filed.

Restraint of trade

[36] Paragraphs 26 and 27 of the amended statement of claim are in identical terms, relating respectively to the first and second defendants' alleged breach of the restraint of trade clause of their employment contracts with the first plaintiff. The restraint of trade clause in each contract was as follows:

> "**Restraint of trade**
>
> The employee must not undertake any accounting, taxation, clerical, financial services and other work for clients and former clients of the employer for a period of two years from the termination of the employee's employment agreement.
>
> The employee acknowledges that the restraint of trade is justified as it seeks to protect the goodwill of the employer.
>
> The employer acknowledges that during the two year restraint period, the employee may undertake other accounting, taxation, clerical, financial services and other work, providing that they do not undertake work for clients or former clients of the employer."

[37] Paragraph 26 of the amended statement of claim relevantly pleads:

> "26. Pursuant to clause titled Restraint of Trade … the First Defendant was required to refrain from working on or for a client or former client for a period of two years from cessation.
>
> (a) The restraint of trade clause operates to protect the goodwill of the Argus group;
>
> (b) The First Defendant restraint of trade period commences 2 December 2017 and expires 1 December 2019;
>
> (c) The First Defendant has worked for and on the clients of Argus nominated at paragraph 24(c); and
>
> (d) The First Defendant has breached the restraint clause by working for and on the clients, causing financial loss to the Argus group."

Clause 27 in identical terms relates to the second defendant.

[38] It is not apparent, again, what the words "and on" are supposed to mean in the pleaded phrase "working for and on the clients". There are other ways in which paragraphs 26 and 27 do not accurately reflect the terms of the contractual provision relied on. The contractual clause speaks of clients of the employer. According to the contract, the employer is the first plaintiff only. However, the pleaded paragraphs refer to clients of Argus and the causing of financial loss through the breach of the restraint of trade clause to the Argus group. As already explained, there is no pleaded or evidentiary foundation for the defendants owing the contractual obligations relied upon to any other companies in the so-called Argus group than the first plaintiff. Nor is there any pleaded or evidentiary foundation for liability for loss caused by a breach of those contractual obligations to any entity other than the first plaintiff. It follows that, once again, the defendants should at least be successful in striking out the offending pleadings.

[39] The defendants press for summary judgment in respect of paragraphs 26 and 27. Once again, proper assessment of this component of the summary judgment is frustrated by the unsatisfactory state of the amended statement of claim. It is true the defendants enjoy the considerable starting advantage of longstanding doctrine that restraint of trade clauses are prima facie void.[17] However, such a clause may be upheld if the party relying upon it demonstrates circumstances from which reasonableness can be inferred.

[40] As to unreasonableness, the restraint of trade clause here relates to clients and former clients and, moreover, involves a blanket ban upon working for such persons, apparently regardless of who seeks out whom. The clause in effect prevents even former clients of the first plaintiff from exercising their free choice to engage the defendants to perform work. The breadth of the clause arguably provides support to the defendants' application, but I refrain from reaching a concluded view on the point because the unsatisfactorily pleaded case may have obscured considerations relevant to such a determination.

[41] Matters of factual minutiae and degree are important to an assessment of the reasonableness or otherwise of the restraint and to whether an apparently unreasonable clause may be read down to make it reasonable. So, as was emphasised by Latham CJ in *Lindner v Murdock's Garage*:[18]

> "It was said in *Mason's Case*[19] per Lord Moulton, that the first task of the Court in dealing with a covenant in restraint of trade is to ascertain with due particularity the nature of the master's business and of the servant's employment therein." (emphasis added)

[42] Here part of the defendants' argument in favour of summary judgment relies upon the way in which the present state of the pleading throws into doubt the nature of "the master's business", for the pleading appears to allege the financial harm done was not to the business of the first plaintiff but to the business of the Argus group. This deficit may reflect a determinative problem for the first plaintiff or may simply be an incident of the foundational error of including the second and third plaintiffs as parties to an

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17 *Mitchel v Reynolds* (1711) PWms 181, 24 ER 347; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535.
18 (1950) 83 CLR 628, 635.
19 (1930) AC, 742.

action based on a breach of contract to which they were not parties. I am loathe to give material weight to this part of the defendants' argument in circumstances where a re-pleading of the struck out paragraphs might provide proper particularity as to the fact and mechanism of loss to the first plaintiff. The fact that each plaintiff claims separate loss or damage, is at least reason to think the re-pleading might provide such particularity.

[43] Given the finality of summary judgment the safer course is to also adjourn this component of the summary judgment application, strike out the offending pleadings, allow an opportunity for the first plaintiff to re-plead, if it can, and, if the summary judgment application is persisted in (whether in its current or amended form), to re-list it for supplementary argument on the fresh pleading and such evidence as has by then been filed.

Plaintiffs' application for an injunction

[44] The plaintiffs seek orders that pending determination of the case the defendants be restrained from working for or with or "making a solicited approach" to any client or former client of the plaintiffs. In light of the giving of summary judgment against the second and third plaintiffs this application is considered only it as relates to clients or former clients of the first plaintiff.

[45] The defendants submit without contradiction that the orders sought would entirely preclude the defendants from employment with their present employer, an entity apparently known as Kickstart Accounting. That provides a determinative basis to at least quarantine their work for that entity from the terms of the orders sought. It is not suggested that permitting them to remain in their current employment would cause loss which cannot be redressed by an award of damages. Even if the first plaintiff had proffered an undertaking as to damages, which it has not, the balance of convenience clearly favours the defendants being allowed to remain in their current employment. They should not be restrained from working for their present employer pending determination of the case.

[46] As to restraining orders relating to clients or former clients other than the entity known as Kickstart Accounting, such orders would be premised upon allegations in the paragraphs of the amended statement of claim which are to be struck out. It presently remains to be seen whether the first plaintiff can yet plead a viable case against the defendants regarding their dealings with any client of former client other than the entity known as Kickstart Accounting. Unless and until that occurs the first plaintiff is in no position to even arguably meet the first pre-requisite for injunctive relief, namely that there is a serious issue to be tried.

[47] It follows the application for an injunction should be refused. Costs should follow the event, with the plaintiffs bearing the defendants' costs of the application for an injunction on the standard basis.

[48] None of these reasons should be taken to suggest the first plaintiff does not have a serious issue to be tried. Perhaps it does. However, it might by now be obvious to the

plaintiff that its inability to properly articulate its case in its pleadings to date is a serious problem. This might give the plaintiff reason to reflect upon the wisdom of further pursuing its case without being legally represented.

Orders

[49] My orders are:

1. In respect of the plaintiffs' application for an injunction:

   (a) application dismissed;

   (b) the plaintiffs will pay the defendants' costs of the application to be assessed on the standard basis if not agreed.

2. In respect of the defendants' application for summary judgment and strike-out:

   (a) judgment for the defendants as against the second and third plaintiffs;

   (b) paragraphs 24 to 27 inclusive of the amended statement of claim are struck out, excluding sub-paragraphs 24(a) and 24(b);

   (c) the costs of the application are reserved pending the determination of the summary judgment application as against the first plaintiff;

   (d) if the first plaintiff seeks to continue its claim it will file and serve a further amended statement of claim by no later than 4 pm 19 January 2019, which further amended statement of claim is to resolve the pleading deficiencies identified in these reasons and reflect the removal of the second and third plaintiffs as plaintiffs;

   (e) the defendants will give notice to the first plaintiff by no later than 4 pm 28 January 2019 as to whether it seeks to continue its application for summary judgment as against the first plaintiff;

   (f) the matter is listed for review at 9.15 am 30 January 2019 at which time, if the application for summary judgment is to continue, directions will be made as to the future carriage of the application, and if it is not to continue, the parties will be heard as to the costs of the application.