SUPREME COURT OF QUEENSLAND

CITATION:	*Bentleys (Sunshine Coast) Pty Ltd & Ors v Thomson* [2018] QCA 358
PARTIES:	**BENTLEYS (SUNSHINE COAST) PTY LTD** ACN 010 527 876 (first appellant) **PETA GRENFELL** (second appellant) **ULRIKE BENDLE** (third appellant) **CHERYL BLINCO** (fourth appellant) **v** **CAROLYN MARY THOMSON** (respondent)
FILE NO/S:	Appeal No 6309 of 2017 SC No 4288 of 2016 DC No 3868 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 26 May 2017 (Boddice J)
DELIVERED ON:	21 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2018
JUDGES:	Fraser and Morrison JJA and Flanagan J
ORDERS:	**1. Allow the appeal.** **2. Set aside so much of the order made in the Trial Division as refused the application to strike out the further amended third party statement of claim.** **3. Strike out the further amended third party statement of claim, with leave to the respondent to re-plead within 30 days of publication of these reasons or as otherwise directed by a judge in the Trial Division.** **4. Within 21 days of the date upon which these reasons are published:** **a. The parties are at liberty to make submissions about costs. Such submissions are not to exceed two A4 pages unless otherwise ordered by the court, a judge of appeal, or the registrar.** **b. The parties are at liberty to file affidavit evidence about those costs, not exceeding in total five pages, unless otherwise ordered by the court, judge of**

appeal or registrar.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – where the plaintiff claimed damages pursuant to s 588M of the *Corporations Act* 2001 (Cth) – where the defendant/respondent brought a third party claim against four third parties – where those parties (the appellants to this proceeding) applied to strike out the respondent's amended third party notice and further amended statement of claim – where the primary judge struck out two paragraphs of the third party notice but refused to strike out the other paragraphs or the third party statement of claim – whether the primary judge erred in refusing to strike out the entirety of the pleadings – whether the pleadings disclosed no reasonable cause of action

Uniform Civil Procedures Rules 1999 (Qld), r 149(1), r 171(1)

Arifin v Secretary (Department of Families, Housing, Community Services and Indigenous Affairs [2014] FCAFC 61, cited
du Boulay v Worrell [2009] QCA 63, cited
Nobarani v Mariconte (2018) 92 ALJR 806; (2018) 359 ALR 31; [2018] HCA 36, cited
Robertson v Hollings [2009] QCA 303, cited

COUNSEL: C Sweeney QC for the appellant
The respondent appeared on her own behalf

SOLICITORS: HWL Ebsworth for the appellant
The respondent appeared on her own behalf

[1] **FRASER JA:** In proceedings in the Trial Division the plaintiff claimed against the defendant (the respondent to this appeal) damages pursuant to s 588M of the *Corporations Act* 2001 (Cth). The basis of that claim, to express it very broadly, is that between 20 March 2009 and 29 April 2015 the respondent acted as a director of Kadoe Pty Ltd (in liquidation) ("Kadoe") notwithstanding that she was not formally appointed as a director, Kadoe traded when it was insolvent, and it incurred a debt to the plaintiff.

[2] The respondent brought a third party claim against four third parties (the appellants in this appeal). The appellants applied in the trial division to strike out the respondent's amended third party notice and further amended statement of claim and (if the claim was not struck out) for an order that the third party proceeding be tried separately from the plaintiff's claim against the respondent.

[3] The primary judge struck out two paragraphs of the amended third party notice, which claimed against the appellants aggravated and exemplary damages. The primary judge refused to strike out the respondent's claims against the appellants (paragraph 1) to be indemnified by the appellants against the plaintiff's claim, (paragraph 2) that the appellants indemnify the respondent in relation to any future claims that may be made against her from the ascertainable class of creditors to the liquidation of Kadoe, (paragraph 6) that the appellants indemnify the respondent in

relation to any claim that may be made against her from any party that conducted business with Kadoe as trustee for "The For Three Trust" or any claim provable against Kadoe in its own capacity, and (paragraph 7) that the second and third appellants pay any judgment for the plaintiff against the respondent. The primary judge ordered the respondent to file and serve a further amended third party notice setting out in paragraphs 1, 2 and 6 the basis upon which the respondent said that the third parties were required to indemnify her.

[4] The appellants have appealed against those orders.

[5] The notice of appeal also contends (ground (x)) that the primary judge erred in refusing to rule upon the appellants' application for separate trials and it seeks an order (in the alternative to orders striking out the amended third party claim and further amended statement of claim) for a separate trial of the third party claim. In fact, the primary judge decided that the application for a separate trial should be adjourned to a date to be fixed because it was not practicable to determine what order should be made in that respect until the pleadings had closed.[1] And as the respondent submitted, an order was subsequently made for the third party proceeding to be tried separately. This part of the appeal thereby became moot and need not be considered.

[6] The primary judge refused the application to strike out the amended third party notice and further amended third party statement of claim for the following reasons. The question was whether the pleading disclosed no reasonable cause of action or whether it satisfied the requirements of the rules which were designed to ensure that the opposing party appreciated the case it was required to meet. Some latitude should be given to the respondent because she was self-represented. Whilst the pleading was inelegant and included matters which would not necessarily be there if the respondent was legally represented, it did explain the basis of the respondent's contention that if she were found liable to the plaintiff she was entitled to recover the sum of that liability from the third parties. The pleading was not so deficient that it ought to be struck out. Although it might be the case that the respondent must lose at the trial the matter for decision was not whether the action would succeed but whether it disclosed no reasonable cause of action or contained matter that was unnecessary and liable to be struck out. The further amended statement of claim addressed the material issues and set out the facts sought to be relied upon and the basis upon which it was alleged that the third parties were liable if the defendant were to be found liable to the plaintiff.

[7] The appellants' notice of appeal articulates numerous grounds of appeal, but senior counsel for the appellants relied upon three main arguments, which I will discuss in turn.

[8] The appellants' first main argument is that the rule of law precluded the primary judge from deciding not to strike out the pleading. The effect of the argument is that, having regard to the serious nature and large number of deficiencies in the pleading, the primary judge's refusal to strike it out must have been attributable to his having excused the respondent from compliance with the rules of pleading because she is a self-represented litigant. The applicant cited judicial observations to the effect that the pleading rules are designed to ensure procedural fairness for opposing litigants and, although some leniency may be afforded to self-represented

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1 AB 76-77.

litigants, that cannot be taken to the extent of dispensation from those rules: *du Boulay v Worrell*,[2] *Robertson v Hollings*[3] and *Arifin v Secretary (Department of Families, Housing, Community Services and Indigenous Affairs)*.[4] To those authorities I would add a reference to the following passage of Samuels JA's reasons in *Rajski v Scitec Corporation Pty Ltd*[5] which the High Court (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ) quoted with approval in *Nobarani v Mariconte*:[6]

> "the absence of legal representation on one side ought not to induce a court to deprive the other side of one jot of its lawful entitlement … An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status, would be quite unfair to the represented opponent."

[9] The reference by the primary judge to allowing some latitude to a self-represented litigant is consistent with those principles. The appellants also argued that the primary judge described the further amended statement of claim as being "replete with irrelevant matters and liable to catch the appellants by surprise".[7] No such description appears in the primary judge's reasons. Otherwise, the first main argument invoked an inference sought to be drawn from the decision by the primary judge to allow the pleading to stand notwithstanding what was said to be its seriously defective character.

[10] Thus the real issue about the pleading is raised by the appellants' second main argument, which is that the pleading is so inherently flawed that it was not a proper exercise of discretion for the primary judge to allow it to stand. I would accept this argument.

[11] The appellants' application to strike out the further amended statement of claim and the amended third party notice were expressly made pursuant to rule 171 of the *Uniform Civil Procedures Rules* 1999 (Qld) and in the inherent jurisdiction of the Supreme Court. Rule 171 may not support an application to strike out a claim, but the appellants' application to strike out the amended third party notice as an abuse of process was competent.[8] Rule 171 empowers the court to strike out all or part of a pleading if it discloses no reasonable cause of action or defence, has a tendency to prejudice or delay the fair trial of the proceeding, is unnecessary or scandalous, is frivolous or vexatious, or is otherwise an abuse of the court's process (rule 171(1)); and upon the hearing of an application under the rule the court may receive evidence which is not limited to evidence about the pleading (rule 171(3)). Under this rule it is therefore not necessary to appeal to the inherent power in an application to strike out a pleading as an abuse of process.[9]

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2 [2009] QCA 63, which was applied in *Fung v Tam* [2012] QCA 10.
3 [2009] QCA 303 at [10]-[11].
4 [2014] FCAFC 61 at [30].
5 Unreported, New South Wales Court of Appeal, 16 June 1986 at [27].
6 (2018) 359 ALR 31 at [47].
7 Outline of argument – appellants filed 23 October 2017, paragraph [19].
8 *QNI Resources Pty Ltd v Sino Iron Pty Ltd* [2017] 1 Qd R 167 at [59]-[61].
9 *Batistatos v Road and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [15]-[25], which concerned a rule of the Supreme Court Rules of New South Wales, the provisions of which are substantially reflected within rule 171.

[12] In my respectful opinion, the further amended statement of claim includes many matters which are frivolous or for which no reasonable cause of action is disclosed, it includes much which is unnecessary, and the nature and extent of the disregard of the pleading rules is such that it has a tendency to prejudice the fair trial of the proceeding.

[13] Before referring to examples of the pleading which fall into those categories, I will discuss the respondent's main arguments in support of the primary judge's decision. The respondent argued that the appellants had not filed a notice of intention to defend the third party proceedings, pursuant to UCPR rule 135 they were therefore required to seek the leave of the court before taking a step, and they did not obtain that leave before filing the strike out application. However paragraph 2 of that application did seek leave and it is apparent that the primary judge was not disposed to refuse to allow the application to proceed. A failure to obtain any necessary leave in this case would amount only to an irregularity which did not render the application a nullity (UCPR, rule 371(1)). The primary judge was empowered to deal with the application upon its merits despite the suggested irregularity and to make such orders as were appropriate, notwithstanding the suggested irregularity: see rules 371(2)(e) and (f).

[14] The respondent argues that her pleading was amended on three occasions at the appellants' request. She does not suggest, however, that the appellants invited her to respond to their complaints about the pleading by amending it in a way that disregards the basic rules of pleading. This argument has no bearing upon the question whether the further amended statement of claim and the amended third party notice comply with the rules or should be struck out.

[15] The respondent argues that the appellants should have sought particulars of the further amended statement of claim before applying to strike it out. But rule 157 obliges a party to include in a pleading particulars necessary to define the issues for, and prevent surprise at, the trial, enable the opposite party to plead, and support matters that must be specifically pleaded under rule 150. It is relevant to mention here that rule 150 requires a specific pleading of matters including (rule 150(1)) breach of contract, every type of damage, conditions of mind (including intention and knowledge), negligence, and (rule 150(2)) "any fact from which any of the matters mentioned in *subrule (1)* is claimed to be an inference". In any event, many of the appellants' challenges to the pleading do not involve complaints about inadequate particularity.

[16] The respondent also sought to support the pleading by reliance upon the provision in rule 371(1) that a failure to comply with the rules is an irregularity and does not render a document in a proceeding a nullity. That provision does not affect the court's power to strike out a pleading under rule 171 or in the exercise of the court's inherent power. The respondent also relied upon what she contended was evidence which supports the truth of allegations in her pleading. Those arguments are irrelevant. I have mentioned the bases of the strike out application, which do not include arguments about the evidence (except in so far as concerns the inappropriate pleading of evidence rather than material facts).

[17] It is necessary now to refer to the pleading in some detail.

[18] Ignoring formal parts, the further amended third party statement of claim occupies some 92 pages in the record book. That could not conceivably be justified by the nature of the case advanced by the respondent. The explanation for the length of the pleading largely lies in the numerous contraventions of the rule that a pleading must contain a statement of the material facts upon which the party relies "but not the evidence by which the facts are to be proved",[10] the unnecessary repetition of the same or similar allegations contrary to the rule that a pleading must "be as a brief as the nature of the case permits",[11] and in the pleading of matters that are unnecessary or incapable of supporting any claim.

[19] Paragraph 2 combines some of these defects. It commences with the introductory words, "At all material times the First Third Party, Bentleys (Sunshine Coast) Pty Ltd (formerly Peter Wilson & Associates and PWA Financial Group Pty Ltd):-". After referring to various changes of name of the first appellant (paragraphs (c) – (f)), to the irrelevant registration and change of name of a different company (paragraphs (g), (h) – (i)), and to other prefatory matters, paragraph 2(l) states:

> "(l) At all material times the First Third Party held itself out as possessing expertise in respect of accounting, taxation, business structuring and financial planning ("**expertise**") including by:
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> i. Advertising it's expertise on its website http://www.pwafinancial.com.au, which was automatically redirected to http://bentleyssunshinecoast.com.au/web/index.php on or about 15 October 2015; and
>
> ii. Admitting having this experience in paragraph 23 (b) of the First Third Party's Second Amended Reply and Third Amended Answer to Further Amended Defence and Further Amended Counterclaim filed in Supreme Court of Queensland, Brisbane Registry Proceedings number 10320/14 ("**Supreme Court Proceedings 10320/14**") on or about 5 November 2014 ("SARATAATFADAFAC") as follows:-
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> A. The First Third Party admitted it operated a business of providing accounting, taxation and business structuring for reward; and
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> B. The First Third Party admitted to holding itself out as possessing expertise in respect of accounting, taxation and business structuring on its website "http://www.pwafinancial.com.au"; and
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> C. The First Third Party admitted that the website http://www.pwafinancial.com.au existed and it did in fact advertise its expertise on this website; and
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> D. The First Third Party admitted that it had the expertise in respect of accounting, taxation and

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10 Rule 149(1)(b).
11 Rule 149(1)(a).

> business structuring that it advertised on its website "http://www.pwafinancial.com.au"."

[20] Thus paragraph (l) commences with words which repeat part of the introductory words of paragraph 2. In itself this is not important, but it is merely an example of many similar mistakes made throughout the document. Paragraph 2(l) does allege a fact – that the first third party held expertise in fields which may be relevant for claims made by the appellants – but subparagraph (ii) is one of many examples of the contravention of the rule against pleading evidence. In addition to being unnecessary, those parts of the pleading conceal rather than illuminate the nature of the case, and they require investigations into irrelevant topics. One example of that may be found in allegations referring to evidence of alleged advertisements or representations about the expertise of the appellants at times long after the period during which they are alleged to have been retained by the respondent.

[21] Apparently as support for paragraph 7 of the amended third party notice (which adverts to breaches of fiduciary duties owed by the second and third parties to the respondent) paragraphs 3(n) and 4(o) plead that the second and third appellants "[h]ad a fiduciary duty to the Defendant as Director [and, in the case of the second and third party, Managing Director] of the First Third Party:- (i) to act in good faith; and (ii) to act with honesty; and (iii) not to use her position, knowledge or opportunity for her own advantage; and (iv) not to use her position, knowledge or opportunity for her own personal interests". It is not inconceivable that employees of the first appellant who contributed to its performance of retainers to act for the respondent may have owed fiduciary duties to her, but these paragraphs plead as the foundation for the alleged fiduciary duties that they were owed "as Director" or "as Director and Managing Director" of the first appellant. That pleading is incapable of justifying claims that the appellants owed a fiduciary duty to the respondent the breach of which entitles her to remedies of the nature she claims.

[22] Paragraph 6 alleges that the respondent engaged the first appellant from on or about 14 October 2004 to prepare and lodge the first respondent's personal income tax returns. Various terms of the first retainer are pleaded in paragraph 6(c), but in each case with editorial comment that either substantially repeats the terms in slightly different words or inaccurately describes the effect of the terms. This is one of numerous examples of the unnecessary prolixity and confusing character of the pleading: see paragraphs 6(c)(i) – (xiv). In the course of this section of the pleading, there are references to the first appellant's intention and awareness of the terms of the retainer (for example, paragraph 6(c)(vii), (viii), (x), (xi)). Those states of mind are irrelevant to a claim against the first appellant in negligence or for breach of the first retainer, and no pleaded fact explains how they might be relevant to any cause of action.

[23] Confusingly, although paragraph 6 commences with the words "the defendant engaged", subsequent subparagraphs refer to matters which are not the subject of an engagement by the defendant (subparagraphs (d) – (k)). Apparently upon the basis of the conclusion asserted without any supporting material facts in paragraph 6(h) that the "First to Fourth Third Parties inclusive were to carry out the terms of the first retainer in accordance with the First Retainer Engagement Letter", there follows a series of allegations to the effect that each of the first to fourth appellants owed duties of care; and these are expressed in a variety of different ways and sometimes with reference to irrelevant "APESB" documents: see [41(a)] of these

reasons. Buried in the midst of paragraph 6 – which occupies some 14 pages – are some allegations from which it may be possible to construct individual duties of care, but the apparent allegation that the duty was owed in accordance with the first retainer is plainly unsupported by any pleaded fact.

[24] Paragraph 7 concerns what is alleged to be the provision by the first appellant of various matters "so that it could supply the services to the Defendant pursuant to the first retainer in accordance with the First Retainer Engagement Letter". Putting aside a series of defective allegations about evidence in the form of admissions in other pleadings, the matters appear to boil down to documents setting out the amount of trust distributions to be recorded as income in the respondent's personal income tax returns for the 2009 and 2010 financial years, documents recording distributions by Kadoe as trustee of the associate trust for the years ending 30 June 2009 and 30 June 2010 (which left no retained earnings in the trust), financial statements for the trust's tax returns for both years and source documents for the respondent for preparation of her personal income tax returns for those financial years pursuant to the first retainer engagement letter. Paragraphs 8 – 11 alleged that the first appellant lodged the respondent's and trust's tax returns for both years with the ATO in May 2010 and June 2011 pursuant to the first retainer.

[25] Pausing at that point, a more fundamental point is that the relevance of the extensive detail about the first retainer in paragraphs 6 and following is not apparent upon the face of the pleading. Those allegations are all consistent with what might be expected, namely that the first appellant obtained the necessary information for its preparation of the alleged documents from Kadoe. If the point of the claim about the first retainer relates to a subsequent allegation about the trust's validity, that is irrelevant for reasons mentioned in connection with that claim.

[26] Paragraphs 12 and 13 unnecessarily repeats previous allegations (see paragraph 6(h)(iv)) to the effect that the respondent relied upon the expertise of the first to fourth appellants or the first and second appellants, to exercise reasonable care and skill. There are some, relatively small departures from the preceding pleading in the expressions in paragraphs 12 and 13, which serve only to confuse.

[27] Paragraph 14 alleges that the respondent engaged the first appellant on or about 25 February 2009 "to provide advice on the personal implications to the Defendant arising out of the business structure the First Third Party had advised Mr Thomson was the most suitable for his new business" ("**the Second Retainer**")". The second retainer is alleged to have included a retainer of the first appellant to advise the respondent about her legal obligations as shareholder of Kadoe, her legal obligations as beneficiary of the trust, "(iii) any impact on her own personal assets if she agreed to be a shareholder of Kadoe; (iv) any impact on her own personal assets if she agreed to be a beneficiary of the trust; (v) assets protection advice and services; (vi) liability protection advice and services; (vii) and provide that advice for the Defendant on an ongoing basis after Kadoe and its associate trust had been created on or about 21 March 2009".

[28] Particulars of the retainer are then given. But with the single exception of an allegation that the retainer occurred during a telephone conversation between the fourth appellant and the respondent on or about 25 February 2009, all of those particulars inappropriately refer to evidence in the form of admissions in another pleading. And paragraph 14(a)(viii) makes a contradictory reference to "[t]he First

Third Party pursuant to the Second Retainer on or about 25 February 2017 which was oral and partly implied".

[29] Paragraph 14(b) alleges that the first appellant owed a duty to exercise reasonable care, skill and diligence in carrying out the terms of the second retainer. Paragraph 14(c) and (d) allege that the second and third appellants owed a duty of care to the respondent in providing services to her pursuant to the second retainer.

[30] The duty of care is alleged to include, not only the exercise of reasonable care and skill, but also duties to act honestly and to avoid conflicts of interest. (I have endeavoured to summarise what appears in nine of the ten subparagraphs of each of paragraphs 14(c) and (d) – yet another manifestation of the unnecessary prolixity of this pleading.) The appellants argue that if a relevant duty of care did exist, there is no basis for contending that it imposes duties of good faith and honesty and acting without a conflict of interest. Certainly it is difficult to extract the bases for such claims for what is alleged in the pleading, but it cannot now be confidently concluded that fiduciary duties of that kind are incapable of being pleaded.

[31] Paragraphs 15 and 17 allege what advice was given and not given to the respondent pursuant to the second retainer. The effect of some of the allegations in those paragraphs is that pursuant to the second retainer the fourth appellant advised the respondent on or about 25 February 2009 to the effect that the corporate and trust structure designed by the first appellant, under which she was to be a fifty per cent shareholder in Kadoe and a beneficiary of the trust, would not involve her in any personal liability or legal obligations other than her obligation to pay personal tax on trust distributions out of any profit earned by the corporate trustee, the first appellant would provide the respondent with the amount of the trust distributions and include them in her personal tax returns pursuant to the first retainer, the family home she purchased in her own name would be protected, and the fourth appellant did not give any advice to the respondent concerning risks to her own personal assets that would arise if she worked in any capacity in her husband's business.

[32] Paragraph 16 alleges that if the respondent had been advised that she might be found to be a shadow director because of her association with her husband, she would not have agreed to become a shareholder of Kadoe, a beneficiary of the trust, or to carry out any functions in the business. Paragraph 18 alleges that the defendant relied on the advice she was given pursuant to the second retainer and believed that her assets were protected and she was not a director of Kadoe in any capacity.

[33] I pause here to note that, exceptionally, paragraphs 14 – 18 include allegations which indicate that the respondent may be able to construct a viable pleading for damages for negligent advice, amounting to an indemnity or a partial indemnity, against the plaintiff's claim. Unfortunately, those allegations are intertwined with objectionable matter, as I have indicated.

[34] The next section of the further amended statement of claim is again replete with references to evidence. The burden of the respondent's case in much of paragraphs 20 – 37 appears to be that:

(a) The first appellant, by the second to fourth appellants, failed to ensure that the trust was perfected because they did not ensure that the ten dollar settlement sum intended to be paid to the trustee was in fact paid.

(b) The fourth third party, who is alleged to have been the settlor of the trust, subsequently made a journal entry which was designed to conceal the negligence of the first appellant in not creating the trust validly.

(c) One or other of the appellants engaged in other actions designed to conceal their negligence in not creating a valid trust.

(d) The appellants withheld that knowledge from the defendant.

(e) If instead the appellants had revealed at an early point that the trust had not been created, then Kadoe and others would not have conducted their affairs as though it had been created.

(f) The result would have been that Kadoe's liability to the plaintiff would have been limited to the period between 21 September and 17 November 2009; and upon that theory, the debt upon which the plaintiff sued Kadoe (and subsequently the claim against the defendant) would not have been incurred by Kadoe in its capacity as trustee of the associate trust.

[35] The pleading includes repetitious and in some cases differing allegations about the last point, but paragraphs 24(e) – (h) seem to make it clear that the respondent's real case about this concerns the conduct of Kadoe "in its capacity as trustee of the associate trust":

> "(e) All credit purchases made by Kadoe in its capacity as trustee of the associate trust from the Plaintiff in the period 21 September 2009 and 17 November 2009 were paid in full and not part of the dispute in District Court legal proceedings 2152/11 ("**District Court proceedings 2152/11**").
>
> (f) Kadoe in its capacity as trustee of the associate trust would not have purchased any further goods from the Plaintiff or any other supplier after 17 November 2009 because this trading structure had not been created and did not exist.
>
> (g) Kadoe in its capacity as trustee of the associate trust would not have continued to conduct its affairs as if the trust had been created when it had not, from 17 November 2009 to 30 June 2013.
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> (h) A dispute could never have arisen between the Plaintiff and Kadoe, and there would have been no reason for the Plaintiff to institute District Court proceedings 2152/11 on 17 June 2011."

[36] I accept the submissions for the appellants that this case is unsustainable. Whether or not the trust was valid has no bearing upon Kadoe's liability for a debt it incurred to the plaintiff; at least, no fact is pleaded which is capable of suggesting that the alleged invalidity of the trust has any such bearing. Assuming in the respondent's favour that the failure to pay the settlement sum rendered the trust invalid as between parties who are alleged to have acted throughout upon the assumption that it was valid, no basis is pleaded for a conclusion that the discovery of the invalidity of the trust at an early period in the trading life of the company would have resulted in the company not incurring the debt to the plaintiff. Let it be assumed, as is alleged in paragraphs 24(e) – (g), that Kadoe would not have incurred the debt in its capacity as trustee of the associate trust. That does not supply an arguable basis for

a conclusion that Kadoe would not have incurred the debt or that the respondent would not have incurred her alleged liability as a "de facto" director.

[37] That is a fundamental problem for the case theory about the allegedly invalid trust. But it is not the only defect in paragraph 24. Each of the 23 events alleged in paragraphs (a) – (w) (which include the central allegations in (e) – (g) which I have set out) is preceded by the introductory words that, "It was foreseeable by a reasonable person if [the appellants] had advised the Defendant, Mr Thomson, Kadoe and ANZ between on or about 29 October 2009 and 17 November 2009 that they had not created the trust that…". Technically, paragraph 24 contains an allegation only about what was foreseeable. Apparently it was intended instead to allege each of the matters in the 23 subparagraphs as a fact in addition to alleging that each of those matters was foreseeable by a reasonable person.

[38] The same technique is employed in paragraph 26. It alleges that a reasonable person in the position of the respondent would reasonably foresee eight matters, including the contradictory allegations in (e) and (f) that "the trust distributions would be invalid if the First Third Party had not created the trust" and that "as a result the trust may be seen to be insolvent at 30 June 2009 and 30 June 2010". The same paragraphs include allegations ((g) and (h)) that if the second appellant terminated the first retainer on or about 25 July 2012 "they were using the termination of the first retainer with the Defendant so that they could withdraw from the situation to prevent their negligence from ever becoming known to anyone outside of the employment of the First Third Party" and "the First Third Party could withdraw from the first retainer before the Defendant detected they had been negligent in the delivery of professional services pursuant to the First Engagement Letter and it would never need to admit its negligence". These conclusions of serious wrongdoing are not revealed by the pleading to be relevant to any cause of action.

[39] There follows a series of paragraphs through to the end of the pleading, most of which are premised upon the misconceived allegations about the effect of the alleged invalidity of the trust upon Kadoe incurring liabilities to the plaintiff. Those are not the only defects in these paragraphs. Paragraph 27 repetitively alleges the respondent's reliance upon advice given by the appellants. There follow a series of allegations that are irrelevant because they do not relate (so far as the pleading reveals) to the indemnity claims made by the respondent. Paragraph 28 irrelevantly alleges that the first appellant was incapable of completing the first and second retainers because, amongst other matters, it had not created the trust. Paragraph 28(g) irrelevantly alleges that it "is not insignificant" that because the trust did not exist the respondent's personal tax returns did not comply with the *Income Tax Assessment Act* 1936. Paragraph 28(i) irrelevantly alleges (in a very serious allegation in respect of which supporting facts are not pleaded) that the reason why the fourth appellant signed a photocopy of one of four copies of the trust deed was "to hide its negligence to provide to ANZ so that it did not need to admit its negligence and this is not insignificant". Paragraph 28(k) irrelevantly alleges that the appellants could have avoided breaches of the duty of care "at the minimal cost of creating a new trust with a corporate trustee". Paragraph 28(l) alleges that if the first appellant had created a new trust to replace the associate trust it had not created on or about 17 November 2009 "the period of loss would have been confined to between 21 March 2009 and 17 November 2009 and would have stopped all parties from conducting business with each other at 17 November 2009"; no fact is pleaded in support of that generally expressed conclusion.

[40] Paragraphs 35 – 37 contain discursive allegations which are apparently designed as support for the claim in paragraph 2 of the amended third party notice for an indemnity against any further claims that may be made against the respondent by creditors in the liquidation of Kadoe other than the plaintiff. Shorn of editorial and irrelevant matter, the facts pleaded in support of that claim are that the first appellant settled other litigation with the liquidators of Kadoe relating to the negligence of the first appellant in not creating the trust, the plaintiff received a benefit of more than $5,000 from that settlement, and the appellants paid $20,000 to the liquidators which was not the full amount claimed in the proceedings which were settled. Those allegations are patently incapable of supporting a general order for an indemnity of the kind claimed in paragraph 2 of the amended third party notice.

[41] That catalogue of defects is not comprehensive. For example:

(a) The further amended statement of claim includes a number of allegations to the effect that the third parties were obliged to comply with what are alleged to be "Australian Standards", but which are in fact publications by the "APESB", which apparently refers to the Accounting Professional and Ethical Standards Board. No fact is pleaded which might justify reference to documents of that kind, which on their face are irrelevant to any case brought by the respondent against the appellants, including in relation to alleged duties of care owed by the appellants to the respondent.

(b) Other paragraphs of the pleading refer to offices and shareholdings held by the second to fourth appellants in the first appellant at times before and after the period during which the events relevant to the respondent's claim allegedly occurred. Again, no fact is pleaded which might justify reference to those matters which, on the face of the pleading, are unnecessary distractions.

[42] The form of the further amended third party statement of claim is so deficient as to require an order striking out that pleading in its entirety. It should not be thought that this reflects a pedantic approach to technical pleading rules. This is a case in which the pleading is so obtuse and unnecessarily complex that it fails to comply with "the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him".[12]

[43] I am not persuaded, however, that the amended third party notice should be struck out in its entirety. The appellants may be correct in contending that whatever causes of action are potentially available to the respondent do not include an entitlement to be indemnified against the plaintiff's claim. But the technical distinction between a claim to an indemnity and a claim for damages amounting to an indemnity, or a partial indemnity, is not a sufficient basis for striking out an originating process drawn by an unrepresented litigant. The substantial question about the attack on the third party notice is whether or not the court has that "high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way" such as would justify its summary dismissal.[13] That point has not been reached. It is not clear that the respondent is incapable of pleading a viable claim that each of the appellants owed to her and breached duties of care, and the first appellant breached terms of the second retainer to advise her

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12 *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286.

13 See *Agar v Hyde* (2000) 201 CLR 552 at 575-576 [57].

about the possible impact upon her personal liability as a "de facto" director, for which the respondent might claim damages amounting to an indemnity, or partial indemnity, against the plaintiff's claim.

[44] The appellants' third main argument is that the primary judge erred in failing to conclude that the third party claim is an abuse of process designed by the respondent for an impermissible purpose. In part, this argument relied upon affidavits by the respondent.

[45] In an affidavit filed on 3 February 2017 filed in support of the application to serve the third party notices out of time, the respondent deposed that the third parties "will be required to be subpoenaed at the trial of this proceeding if they are not added to these proceedings because they were negligent in the delivery of accounting services, where their error is directly relevant to me being placed in a position where these proceedings were filed against me and where I relied solely on their advice that the company was not trading insolvent and that I have never been a shadow director". It is apparent that the respondent asserted a belief that the appellants should be added to the proceedings as third parties because the plaintiff's claim against the respondent was attributable to the appellants' negligence. In an earlier paragraph, the respondent deposed that she was applying for leave to serve the third party notices out of time "because but for the actions of the third parties … I would not be liable for or placed in this position of defending the Plaintiff's claim and statement of claim in these proceedings". She went on to depose in terms that she wished to proceed against the third parties so that she could be indemnified or seek substantially the same relief that the plaintiff was seeking from her because the proceedings directly flowed from the appellants' negligence. The passage upon which the appellants rely was further explained in an immediately following paragraph, in which the respondent deposed that it "will be more cost effective and a better use of Court's time to add the third parties and it [sic] all heard together". That affidavit as a whole is opposed to the appellants' contention that the respondent brought the third party proceedings for the purpose of avoiding the necessity of subpoenaing the appellants as witnesses, rather than for the proper purpose of seeking available relief against the appellants.

[46] In an affidavit filed on 15 February 2017 the respondent deposed that the participation of the third parties in the proceedings was crucial to her case, it was imperative that the appellants be questioned and evidence be given by them about what happened with the creation of the trust and this was "best done as parties to these proceedings so that I can be sure that I have the benefit of the judicial system for them to fully comply". Those statements followed many earlier paragraphs in which the respondent deposed to what were evidently her views that the appellants were legally responsible for the plaintiff's claims against her. Again, this affidavit is opposed to the appellants' third main argument.

[47] The appellants also rely upon a statement in an affidavit of the respondent filed on 19 May 2017, in which she referred to the paragraph already quoted from her affidavit sworn 3 February 2017 and deposed that, "[b]efore the addition of the third parties to these proceedings I was in a position where I would have been required to subpoena the third parties to give evidence relating to their negligence in the provision of accounting services to me, where their error is directly relevant to the issue of insolvency". In the following paragraph the respondent confirmed "that as the matters are directly interrelated it will be more cost effective and a better use of the

Court's time to add the third parties and the matters all heard simultaneously [sic]." This also does not support the appellants' argument that the respondent's proceedings were bought for an improper purpose.

[48] The appellants refer to statements by the respondent in which she referred to her belief that the appellants were insured and submitted that "the only purpose the respondent could intend by habitually referring to the insurance status of the appellants, is to seek to curry favour with the tribunal and gain an unfair advantage over the appellants".[14] No basis appears for inferring that the respondent's purpose was the unachievable one identified by the appellants.

[49] The appellants contend that some of the amendments within the further amended statement of claim were made in response to the statements at an earlier review hearing, when a different judge sought to discourage the respondent from lightly making serious allegations in the pleading. In that context, the judge explained that if a pleader made allegations of dishonesty against an insured defendant then the insurance company might wish to refuse indemnity. The judge added that he was not the respondent's adviser but she should think about it, to which the respondent replied that she would take that on board. At the hearing before the primary judge the respondent submitted that she had taken the suggestions about dishonesty on board and removed them from the further amended statement of claim, even though, she submitted, there was evidence to prove what happened.[15] It will already be apparent that the pleading still contains serious allegations against the appellants, although the amendments omit allegations of criminal offences. In oral argument, it was not submitted that this evidenced an improper purpose by the respondent or that it justified striking out the pleading or the third party notice as an abuse of process. The appellants' outline of argument contends, however, that the third party claim "has been designed by the defendant, on what she perceives is judicial advice, for an impermissible purpose".[16] The omission from the pleading of allegations of criminality that originally were in it is incapable of justifying a finding that the third party claims are actuated by an impermissible purpose.

Disposition and orders

[50] The appellants sought orders that the respondent be required to obtain leave before filing any new or amended third party notice or statement of claim against the third parties. It is not appropriate to impose such a condition at this stage.

[51] At the parties' request, they should be given an opportunity to make submissions about costs and, if necessary, file brief evidence about that.

[52] The further amended third party notice was amended pursuant to the order made by the primary judge that the respondent set out in paragraphs 1, 2 and 6 of that document the basis upon which it is said that the third parties are required to indemnify the defendant. The orders sought by the appellants do not include an order relating to those amendments. In light of the conclusions which I have reached it may be that the amendments are inappropriate, but the form of the current version of the third party notice should be reconsidered, if required, in the Trial

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14 Outline of argument – appellants filed 23 October 2017, paragraph [34].
15 AB 65 at ll 3-11.
16 Outline of argument – appellants, paragraph [13].

Division, perhaps after the respondent delivers any further pleading which she wishes to deliver pursuant to the orders I propose.

[53] The following orders are appropriate:

(1) Allow the appeal.

(2) Set aside so much of the order made in the Trial Division as refused the application to strike out the further amended third party statement of claim.

(3) Strike out the further amended third party statement of claim, with leave to the respondent to re-plead within 30 days of publication of these reasons or as otherwise directed by a judge in the Trial Division.

(4) Within 21 days of the date upon which these reasons are published:

(a) The parties are at liberty to make submissions about costs. Such submissions are not to exceed two A4 pages unless otherwise ordered by the court, a judge of appeal, or the registrar.

(b) The parties are at liberty to file affidavit evidence about those costs, not exceeding in total five pages, unless otherwise ordered by the court, judge of appeal or registrar.

[54] **MORRISON JA:** I agree with the reasons of Fraser JA and the orders his Honour proposes.

[55] **FLANAGAN J:** I agree with the orders proposed by Fraser JA and with his Honour's reasons.