

# SUPREME COURT OF QUEENSLAND

CITATION: *Kimberley College Ltd v Thomson & Ors* [2019] QSC 227

PARTIES: **KIMBERLEY COLLEGE LTD**  
ACN 080 765 760  
(plaintiff)  
v  
**PAUL THOMSON**  
(first defendant)  
**AMY FERGUSON**  
(second defendant)  
**KEVIN FERGUSON**  
(third defendant)  
**JENNIFER THOMSON**  
(fourth defendant)  
**DEBORAH HORN**  
(fifth defendant)

FILE NO: BS No 3151 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 September 2019

DELIVERED AT: Brisbane

HEARING DATE: 18 July 2019

JUDGE: Martin J

ORDER: **1. On the defendant's application, the plaintiff is to provide further and better particulars of Schedules A and B. Otherwise the application is dismissed.**

**2. The plaintiff's application is dismissed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – where the plaintiff alleges a variety of types of misconduct against the defendants – where the defendants contend that the statement of claim is insufficiently particularised and should therefore be struck out – where the plaintiff contends in reply that there are matters solely within the knowledge of the defendants or unknown third parties – where the plaintiff otherwise relies upon lengthy and detailed financial reports created by forensic accountants – whether the plaintiff's statement of claim is insufficiently particularised – whether the statement of claim should be struck out in whole or part – whether the plaintiff should

provide further and better particulars

PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – TO PREVENT ABUSE OF PROCESS – GENERALLY – where the plaintiff alleges a variety of types of misconduct against the defendants – where the plaintiff further alleges that the defendants have been attempting to dispose of certain chattels and real property – where the plaintiff contends that a commercially prudent person would infer a danger of default on behalf of the defendants – whether a freezing order should be made

*Uniform Civil Procedure Rules* 1999, r 149, r 171, r 250, r 260A

*Arnold and Butler v Bottomley & Ors* [1908] 2 KB 151, cited

*Lyons v Kern Constructions (Townsville) Pty Ltd* (1983) 47 ALR 114, cited

*Parbery & Ors v QNI Metals Pty Ltd & Ors* [2018] QSC 107, applied

*Ross v Blake's Motors* [1951] 2 All ER 689, cited

*WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175, cited

COUNSEL: BA Hall for the plaintiff  
T Morris QC for the defendant

SOLICITORS: Minter Ellison Gold Coast for the plaintiff  
Australian Law Partners for the defendant

- [1] There are two applications before the court. The plaintiff seeks a freezing order against the defendants. The defendants apply to strike out the whole of the statement of claim or particular parts of the statement of claim or that further and better particulars be provided.

### **The parties**

- [2] Kimberley College Ltd conducts an independent college at Carbrook in South East Queensland. It is funded mainly by the Commonwealth and the State and, to a lesser extent, by fee paying students. It is a registered charity.
- [3] Paul Thomson (the first defendant) was involved with the school from its creation. He was, from 2000 until his employment was terminated in June 2018, the College's only principal.
- [4] Amy Ferguson (the second defendant) is Paul and Jennifer Thomson's daughter. She was the Chief Financial Officer of the College until June 2018.
- [5] Kevin Ferguson (the third defendant) is Amy Ferguson's husband. He was a director and, later, a manager of the plaintiff and worked at the College.

- [6] Jennifer Thomson (the fourth defendant) is Paul's Thomson's wife and was employed as his personal assistant.
- [7] Deborah Horn (the fifth defendant) is Paul and Jennifer Thomson's daughter and was employed as one of the deputy principals of the College.

**The claim**

- [8] The plaintiff alleges a variety of types of misconduct against the defendants and seeks against them a number of items of relief including:
- (a) declarations that the defendants have breached s 181 and s 182 of the *Corporations Act* 2001,
  - (b) damages or the recovery of money ranging from \$112,113 to \$2,198,822 against various of the defendants, and
  - (c) declarations that the plaintiff has an equitable interest in a number of identified properties.
- [9] The defendants have not filed any defences – on the basis that they cannot respond to the pleading in its current state.

**Should the statement of claim be struck out?**

- [10] The defendants argue that the statement of claim (together with the further and better particulars provided in May 2019) is so inadequate that it should be struck out under r 171 of the *Uniform Civil Procedure Rules* 1999.
- [11] Rule 171 provides:
- “(1) This rule applies if a pleading or part of a pleading—
    - (a) discloses no reasonable cause of action or defence; or
    - (b) has a tendency to prejudice or delay the fair trial of the proceeding; or
    - (c) is unnecessary or scandalous; or
    - (d) is frivolous or vexatious; or
    - (e) is otherwise an abuse of the process of the court.
  - (2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.
  - (3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading.”
- [12] The broad complaint made is that the statement of claim is insufficiently particularised. The plaintiff answers that by saying that the matters requested are solely within the knowledge of the defendants or unknown third parties and are to be provided following disclosure. The defendants contend that this demonstrates that the allegations in the statement of claim are not

founded in the plaintiff's actual knowledge and therefore do not comply with r 149(b) and r 149(c) of the UCPR.

- [13] The defendants seek, in the alternative, a number of orders including that particular parts of the Statement of Claim be struck out and that certain documents be disclosed.
- [14] It is important, when considering an application of this kind, to take a step back and consider the fundamental basis of the claim being made. The plaintiff's case is moderately clear: the defendants (in particular Mr Thomson and Ms Ferguson) were, for a long time, in control of the college and, during that time, the defendants used college money to their own benefit contrary to their duties to the college. It is also the plaintiff's case that the defendants did not keep a proper record of the college's finances and, at least, if such records do exist they are not in the possession of the plaintiff.
- [15] There are five areas in the pleading which the defendants identify as insufficiently particularised. They are:
- (a) That the first and second defendants were permitted by the Board to control the College and act as directors.
  - (b) That the defendants received the benefit of payments made by the College at the first defendant's direction in the sum of \$2,198,822.57.
  - (c) That the defendants derived further financial benefits from the College which were wrongly characterised as loans.
  - (d) That the defendants used College money to pay off mortgages on properties owned by the defendants.
  - (e) That the first and fourth defendants, and the second and third defendants, were financially integrated.
- [16] The plaintiff's reply to the defendants' complaints is based upon lengthy and detailed financial reports created by forensic accountants which are, in turn, based upon the material available to the plaintiff. The statement of claim is grounded, in large part, on the investigation which is the subject of those reports. The plaintiff answers the complaints of the defendants in the following way:
- (a) many of the requests for particulars are, in fact, requests for evidence,
  - (b) the plaintiff cannot provide further identification of documents because those documents are not in the possession of the plaintiff,
  - (c) there has been sufficient particularisation of the transactions and they appear in Schedules A and B,
  - (d) some of the particulars sought, such as the identity of the person who drafted the schedule to the statement of claim, are not proper particulars, and
  - (e) the loans the subject of the statement of claim are detailed in Schedule B.

- [17] It is argued on behalf of the College that the allegations of financial integration are material to the cause of action because it is alleged that the spouse of each of the respective defendants obtained the benefit of the monies alleged to have been misappropriated by their spouse.
- [18] It is not uncommon in a case of this nature that a plaintiff cannot provide full particulars until after disclosure. The nature of such cases was discussed by Fitzgerald J in *Lyons & Anor v Kern Konstructions (Townsville) Pty Ltd & Anor*.<sup>1</sup> His Honour examined a series of authorities from the 19<sup>th</sup> century to the time of his decision. He observed that discovery before particulars is not available as a matter of course but that exceptions are made, for example, where a plaintiff in a fraud action can provide one or more specific instances, which seems to have been accepted as sufficient to enable the plaintiff to have discovery before being required to particularise further examples of the defendant's misconduct of which it is not and could not be aware.<sup>2</sup> Disclosure can be allowed before the provision of further particulars where sufficient evidence is shown to ground a suspicion that the party seeking disclosure has a good case, proof of which is likely to be aided by disclosure.<sup>3</sup>
- [19] This is not a case in which a plaintiff has made a series of broad allegations which do not provide a defendant with any reasonable understanding of the case sought to be made. The plaintiff says that, as a result of the conduct of the defendants, it is not able to provide further particulars until after disclosure. It supports that by the forensic analysis of the material available to it in the form of the accountants' reports.
- [20] While the defendants may not be able to respond in a detailed fashion at the moment, they are able to plead by way of denial or non-admission (as they see fit) with respect to the pleading in its current form. It is a consequence of the nature of this type of action, which is based upon allegations of conduct which, by themselves, prevent the provision of particulars, that a plaintiff should be entitled to proceed to obtain disclosure and then to provide an amended pleading based upon such disclosure.
- [21] There is, though, one aspect of the complaint made by the defendants which the plaintiff must remedy before the defendants are required to plead. Schedules A and B are not sufficiently well explained or described for the defendants to be in a position to deal with them. Some of the columns have no headings. There are entries with Delphic descriptions such as: "Accounting the deposite [sic] from" which defy understanding. And there are others – "Loan AT-Financial Review" – which are of equal opacity. The plaintiff will be required to better particularise those two schedules.

### **Should there be a freezing order?**

- [22] Rule 260A of the UCPR provides for the making of a freezing order:

“(1) The court may make an order (a *freezing order*) for the purpose of preventing the frustration or inhibition of the court's process by seeking to meet a danger that a judgment or prospective judgment of the court will be wholly or partly unsatisfied.

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<sup>1</sup> (1983) 47 ALR 114 at 128-130.

<sup>2</sup> See, for example, *Arnold and Butler v Bottomley & Ors* [1908] 2 KB 151.

<sup>3</sup> *Ross v Blakes Motors, Ltd* [1951] 2 All ER 689; *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175, 181.

- (2) A freezing order may be an order restraining a respondent from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets.”

[23] The requirements for a freezing order were recently considered by Bond J in *Parbery & Ors v QNI Metals Pty Ltd & Ors*<sup>4</sup> where he identified the three considerations which are relevant to the exercise of the jurisdiction:

- (a) a plaintiff has a good arguable case for relief against the defendant,
- (b) there is a real risk that steps will be taken to frustrate future enforcement processes, and
- (c) the interests of justice favour the making of such an order.

[24] Notwithstanding the arguments by the defendant about inadequate particulars, the evidence of the forensic accountants allows me to comfortably conclude that there is a “good arguable case”. The real issue on this application is whether the plaintiff has demonstrated the risk of danger which must exist in order for a freezing order to be made.

[25] The plaintiff contends that these are circumstances in which, on the available evidence, a commercially prudent person would infer a danger of default. It says that the “abuse of power” alleged against the first and second defendants demonstrates a real danger of improper dealings. It is the case that there are situations in which it is appropriate to infer the existence of such a risk partly or wholly from being satisfied that there is a good arguable case for relief. I am not satisfied that this is such a case.

[26] While it has been established, for example, that there have been efforts by the defendants to list certain properties for sale, those properties are subject to caveats lodged by the plaintiff.

[27] I am satisfied that there is evidence to demonstrate that some of the defendants have been attempting to dispose of a limited number of chattels, but I am also satisfied that that has been explained by the need to obtain some form of income since those defendants are no longer employed.

[28] One of the allegations against Mrs Ferguson is that she intends “to leave the district”. I do not accept that the evidence supports a conclusion that she is seeking to leave the jurisdiction. The reference to “district” was with respect to a school and it is consistent with her expression of a desire to leave a particular school area. On the whole of the material it is more likely than not that the reason for the disposition of the chattels is to provide for living expenses rather than to frustrate future enforcement processes. I am satisfied that to make such an order as is sought would be more prejudicial than justifiable and the application is dismissed.

[29] The plaintiff also seeks delivery up of certain chattels – two paintings, a ride-on lawn mower and a motor vehicle. An order to that effect may be made under r 250 of the UCPR. I’m not satisfied that any ground has been made out for such an order.

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<sup>4</sup> [2018] QSC 107.

**Orders**

- [30] On the defendant's application, the plaintiff is to provide further and better particulars of Schedules A and B. Otherwise the application is dismissed.
- [31] The plaintiff's application is dismissed.