

SUPREME COURT OF QUEENSLAND

CITATION: *Sit Simplex Stulte Pty Ltd v. Carter & Ors* [2003] QSC 099

PARTIES: **SIT SIMPLEX STULTE PTY LTD (IN LIQUIDATION)**
(ACN 058 453 106)
(plaintiff)
v
REGINALD MICHAEL CARTER
(first defendant)
AND
MICHAEL PAUL NEWELL
(second defendant)
AND
PAUL JOSEPH HOPKINS
(third defendant)
AND
JOHN BERNARD AVERY
(fourth defendant)
AND
SAVANA HOLDINGS PTY LTD (ACN 056 349 056)
(sixth defendant)

FILE NO: S5675 of 2000

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 11 April 2003

DELIVERED AT: Brisbane

HEARING DATE: 11 March 2003

JUDGE: Helman J.

CATCHWORDS: CORPORATIONS – LEAVE TO AMEND CLAIM AND STATEMENT OF CLAIM – whether arising out of the same or substantially the same facts – whether claims statute barred – whether prejudice.

Corporations Act 2001 s.197
Corporations Law s.233
Limitations of Actions Act 1974 ss.10(1)(d), 10(2), and 10(6)(b).
Uniform Civil Procedure Rules 1999 r.376(4), r.377

Chittick v Maxwell (1993) 118 A.L.R 728
Draney v Barry [2002] 1 Qd.R. 145
Thomas v State of Queensland [2001] Q.C.A. 336

Young v Murphy [1996] 1 V.R. 279

COUNSEL: Mr D.P. O'Brien for the plaintiff
Mr R.W. Gotterson Q.C. with Mr K.A. Barlow for the defendants

SOLICITORS: Allens Arthur Robinson for the plaintiff
James Conomos Lawyers for the defendants

- [1] The plaintiff in this proceeding, which was begun on 30 June 2000, seeks leave by an application filed on 14 February 2003 to amend its claim and statement of claim. At the hearing of the application a proposed further amended statement of claim was received as exhibit 1 and the argument proceeded on it, subject to one amendment. Mr O'Brien, on behalf of the plaintiff, sought this amendment: to delete the words 'Trust Assets' in a proposed paragraph, 30D(a), and to insert in their place 'assets of the KISS Trust'. I have considered this application on the assumption that that amendment has been made.
- [2] The application, as it was argued on behalf of the plaintiff, was brought under rule 377 or alternatively under rule 376(4) of the *Uniform Civil Procedure Rules* 1999. Not all of the proposed amendments were opposed, but the inclusion of new paragraphs 30B, 30D to 30H, and 36 in the statement of claim was, as was the inclusion of new paragraphs 4, 5, 5A, and 6 in the claim. I should record that there were originally six defendants, but there are now only five, the proceeding having been discontinued against the fifth defendant. The opposition to the granting of leave was by all of the remaining defendants.
- [3] As the statement of claim is framed at present, or as it will be further amended without objection, it alleges: that the plaintiff is and was at all material times the trustee of a trust called the KISS trust, the terms of which were recorded in a deed of trust dated 4 January 1993; that the sixth defendant was at all material times the trustee of a trust called the Robert The Bruce trust; that each of the first to the fourth defendants was at material times a member of a firm of solicitors practising under the name Carter Newell, a director of the plaintiff, a beneficiary of the KISS trust, and a director of the sixth defendant; that in or about June 1993 the plaintiff, as trustee of the KISS trust, obtained a written lease pursuant to which the owners of a floor in a city building granted to the plaintiff the right to occupy the floor from 1 February 1993 until 30 June 1997 and on the same day entered into a written rental agreement subsequently dated 7 April 1994; that each of the first to the fourth defendants caused the plaintiff to obtain the lease and enter into the rental agreement, which it did at their request or direction; that pursuant to a services agreement between the plaintiff and Carter Newell the plaintiff permitted Carter Newell to occupy the floor, which it did until about December 1993; that the first to the fourth defendants on or about 30 June 1994, or alternatively in or about early 1995, caused the plaintiff to transfer certain specified assets of the KISS trust, which constituted all or substantially all of that trust's assets, to the sixth defendant, or alternatively caused, or permitted, the sixth defendant to take possession of, and to exercise control over, those assets; that the first to the fourth defendants caused or permitted the plaintiff not to pay rent in accordance with the lease and rental agreement after it has paid the rent for February 1995; that on or about 30 November 1995 an order that the plaintiff be wound up was made in this court on the application of the owners of the floor; and that pursuant to the lease, which

had been terminated on or about 18 July 1995, and the rental agreement the owners of the floor have an unsatisfied claim in excess of \$1,000,000 against the plaintiff for which the plaintiff is liable for arrears of rent and other charges, a further sum owing under the rental agreement, damages on account of lost rent, and interest.

- [4] The principal relief claimed against the defendants at present is: a declaration that the plaintiff has an equitable lien upon specified assets of the KISS trust for the purpose of securing its right of indemnity out of those assets in respect of its liability to the owners of the floor and the costs and expenses of the liquidator of the plaintiff incurred in identifying the assets of the KISS trust and in attempting to discharge the plaintiff's liability to the owners pursuant to the lease and the rental agreement (paragraph 1); an order that the specified assets of the KISS trust be realized as is necessary to discharge that liability and those costs and expenses and that the proceeds be paid to the plaintiff (paragraph 2); further and alternatively, a declaration that the first to the fourth defendants are obliged to indemnify the plaintiff in respect of that liability and those costs and expenses and an order that the first to the fourth defendants pay to the plaintiff moneys sufficient to meet such claims (paragraph 3); further and alternatively, damages as against the first to the fourth defendants for breaches of their common law and statutory duties as directors of the plaintiff (paragraph 4, to be renumbered as a new paragraph 7); and further and alternatively, an order that the first to the fourth defendants compensate the plaintiff for breaches of their equitable and fiduciary duties as directors of the plaintiff (paragraph 5, to be renumbered as a new paragraph 8).
- [5] The plaintiff now seeks to add claims to the following relief: a declaration that each of the first to the fourth defendants is liable to account to the plaintiff for the value of the specified assets (a proposed new paragraph 4); further and alternatively, a declaration that the sixth defendant is liable to account to the plaintiff for the value of those assets, and an order that such of those assets be realized, or alternatively that the sixth defendant otherwise put the plaintiff in funds, as is necessary to discharge the plaintiff's liability to the owners of the floor and the costs and expenses of the liquidator to which I have referred (a proposed new paragraph 5); further and alternatively, equitable compensation from the first to the fourth defendants for knowingly being involved in a breach of trust, and from the sixth defendant for knowingly being involved in a breach of trust and breach of fiduciary duty (a proposed new paragraph 5A); and further and alternatively, a declaration 'pursuant to s.197 of the *Corporations Act* (s.233 of the *Corporations Law*)' that the first to the fourth defendants, in their capacities as directors of the plaintiff, are jointly and severally liable to discharge the liability of the plaintiff to the owners of the floor and in respect of the costs and expenses of the liquidator to which I have referred, and an order that the first to the fourth defendants pay to the owners of the floor the amount of the plaintiff's liability to the owners, or such part as the court considers just (a proposed new paragraph 6).
- [6] The claims the plaintiff seeks to add may be divided into two categories: in the first are the claims in the proposed new paragraphs 4, 5, and 5A, and in the second is the claim in the proposed new paragraph 6.
- [7] It is convenient to deal with the claims in the proposed new paragraphs 4, 5, and 5A first. Those claims all proceed from allegations that the first to the fourth defendants were knowingly involved in a breach of trust, and that the

sixth defendant was knowingly involved in the plaintiff's breach of trust and in the first to the fourth defendants' breaches of fiduciary duty.

- [8] It was submitted on behalf of the defendants that each claim for a declaration of liability to account is a claim for an account and is statute-barred by operation of s.10(2) of the *Limitation of Actions Act* 1974, which provides that an action for an account shall not be brought in respect of a matter that arose more than six years before the commencement of the action. I am not persuaded that those claims are claims for accounts. There is, I think, a valid distinction to be drawn between a claim for a declaration of liability to account and a claim for an account. As Mr O'Brien put it in his oral submissions, what is sought in each case is a declaration that the defendant is obliged to compensate the plaintiff to a sum equivalent to the value of the specified assets.
- [9] It was also submitted on behalf of the defendants that the claims for equitable compensation too are statute-barred, reliance being chiefly placed on s.10(6)(b) of the *Limitation of Actions Act* which has the effect of applying provisions of s.10 to claims for equitable relief by analogy. In this case the analogy would be with claims in tort and for breaches of contract. But I am not satisfied that s.10 applies to claims for equitable compensation by analogy: see *Chittick v. Maxwell* (1993) 118 A.L.R. 728 at pp. 741-742. On behalf of the defendants it was also submitted that such a claim is analogous to a claim by a beneficiary for a non-fraudulent breach of trust, a claim which is by operation of s.27(2) of the *Limitation of Actions Act* subject to a six-year limitation period. I am not persuaded that that analogy can be drawn.
- [10] I see no reason to withhold leave to the plaintiff under rule 377 to amend its claim by adding those in the proposed paragraphs 4, 5, and 5A.
- [11] I should record that, if I am wrong in my conclusion in relation to the claims in the proposed paragraphs 4, 5, and 5A and those claims are statute-barred, I should nonetheless have given leave to the plaintiff under rule 376(4) to amend its claim because those claims arise out of the same facts, or substantially the same facts, as do the causes of action for which relief has already been claimed by the plaintiff, and there is no evidence of relevant prejudice which would be suffered by the defendants if such leave were granted: *Draney v. Barry* [2002] 1 Qd. R. 145 and *Thomas v. State of Queensland* [2001] Q.C.A. 336 at paras. 16-19.
- [12] The pleading of the additional facts upon which the new claims I have been discussing are founded is in the proposed paragraphs 30B, 30E to 30H, and 36 of the statement of claim. In paragraph 30B is alleged knowledge by the sixth defendant (being that of the first to the fourth defendants) of facts alleged in the pleading as it is at present when it received the specified assets. In paragraph 30E are alleged purposes for which the transfer to the sixth defendant was made, the absence of benefit to the plaintiff, and the breaches of duty by the first to the fourth defendants involved in the transfer. In paragraph 30F are alleged the absence of consideration for the transfer moving from the sixth defendant, and the breach of the KISS trust it constituted. In paragraph 30G is alleged knowledge by the first to the fourth defendants of the facts pleaded in paragraph 30F. In paragraph 30H are pleaded conclusions concerning the liability of the defendants to account to the plaintiff for the value of the specified assets. In paragraph 36 are pleaded conclusions concerning the sixth defendant's knowing involvement in the plaintiff's

breach of trust and in the breaches of fiduciary duty by the first to the fourth defendants and its liability to account to the plaintiff for the latter's loss. The newly-pleaded facts add little to the facts already pleaded beyond obvious inferences (as, for instance, knowledge) and conclusions that may be drawn from the latter.

- [13] In the proposed paragraph 6 of the claim the plaintiff seeks to add a claim to the declaration pursuant to the *Corporations Law* or the *Corporations Act* 2001. Section 233 of the *Corporations Law* and its successor s.197 of the *Corporations Act* provide for the liability of directors of a corporation for debts and other obligations incurred by the corporation as a trustee. The additional facts upon which the plaintiff seeks to rely in making this claim are pleaded in the proposed paragraph 30D. In sub-paragraph (a) it is alleged that a plaintiff is not entitled to be indemnified out of the assets of the KISS trust in respect of the plaintiff's liability to the joint owners, and in sub-paragraph (b) that the plaintiff has not discharged, and cannot and/or is unable to discharge, the plaintiff's liability to the joint owners. Sub-paragraph (c) is a conclusion that on those facts each of the first to the fourth defendants is liable to pay the plaintiff's liability to the joint owners pursuant to the provisions relied on.
- [14] On behalf of the defendants it was submitted that the claim in the proposed paragraph 6 is statute-barred by operation of s.10(1)(d) of the *Limitation of Actions Act* which provides for a six-year limitation period for a proceeding for recovery of 'a sum recoverable by virtue of any enactment'; but as this proposed claim also arises out of substantially the same facts as the causes of action for which relief has already been claimed in the proceeding, and because, were it not for a feature of the claim I shall mention, it would be appropriate to allow it to be added and no prejudice would be suffered by the defendants in allowing it to be added, I should have given leave for it to be added. That feature is that the facts relied on by the plaintiff could not give rise to the liability alleged because the operation of the provisions relied on is confined to cases in which the liability is incurred to creditors like the joint owners in breach of trust: as to s.233 of the *Corporations Law* see *Young v. Murphy* [1996] 1 V.R. 279 at pp.311-315 per J.D. Phillips J., with whom Brooking and Batt JJ. agreed; and as to s.197 of the *Corporations Act* 2001 *Ford's Principles of Corporations Law* (11th ed., 2003), para. 20.170, pp. 886-888. The liability to the joint owners was not, on the plaintiff's case as pleaded, incurred in breach of trust; what is sought is satisfaction of that liability as a result of an alleged breach of trust. Accordingly it would not be appropriate to permit the addition of the proposed paragraph 6 of the claim or the proposed paragraph 30D of the statement of claim.
- [15] There has been delay in the plaintiff's advancing the proposed new claims. The original statement of claim was attached to the claim filed on 30 June 2000. The claim and statement of claim were not served, however, until 14 March 2001. An amended statement of claim was filed on 18 June 2001, and notice of these proposed amendments was not received by the solicitors for the defendants until 17 January 2003. As the proposed amended claim and statement of claim are really little more than new formulations of cases already pleaded and the new claims are based on substantially the same facts as those relied on from the beginning of this proceeding I see no reason to refuse the application because of the plaintiff's delay in advancing the new claims.

- [16] The plaintiff will have leave to make the amendments sought except for the proposed new paragraph 6 of the claim and the proposed new paragraph 30D of the statement of claim. I shall invite further submissions on costs.