SUPREME COURT OF QUEENSLAND

CITATION:	*Mine & Quarry Equipment International Ltd v Robson & Ors* [2003] QSC 176
PARTIES:	**MINE & QUARRY EQUIPMENT INTERNATIONAL LTD** ARBN 079 139 683 (plaintiff/applicant) **v** **CHARLES WILLIAM ROBSON** (defendant/respondent) **CHARLES WILLIAM ROBSON** (plaintiff by counterclaim) **v** **MINE & QUARRY EQUIPMENT INTERNATIONAL LTD** ARBN 079 139 683 (first defendant by counterclaim) **GARY FRANCIS ROBSON** (second defendant by counterclaim)
FILE NO:	S8937 of 2000
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	2 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2003
JUDGE:	B W Ambrose J
ORDER:	**Application dismissed**
CATCHWORDS:	PRACTICE – Defence – Striking out – application for an order that various paragraphs of the defence of the defendant be struck out and that the counterclaim be struck out – whether arguable case – whether no prospect of success *Corporations Act* 2001 (Cth), s 9, s 180(1), s 181(1), s 553C(1), s 1317H Uniform Civil Procedure Rules 1999 (Qld), r 171, r 178(1) *Barnes v Addy* (1874) LJ Ch 513, considered *General Steel Industry Inc v Commissioner for Railways* (1964) 112 CLR 125, considered *Gye v McIntyre* (1991) 171 CLR 609, considered *Stein v Blake* [1996] 1 AC 243, considered
COUNSEL:	P E Hack SC for the applicant I R Perkins for the respondent

SOLICITORS: Hopgood Ganim for the applicant
Russell & Company for the respondent

[1] **AMBROSE J**: This is an application by the plaintiff ("the Vanuatu Company") and the second defendant by counterclaim ("GFR") for an order that various paragraphs of the defence of the defendant ("CWR") be struck out pursuant to UCPR 171 and that the counterclaim of CWR against the Vanuatu Company and GFR be struck out on the grounds that it does not comply with UCPR 178(1).

[2] The Vanuatu Company sues CWR for $412,842.17 as a debt allegedly due as a consequence of a series of financial arrangements made in 1993-1994 between Pacific Ventures Ltd ("Ventures") and Mine & Quarry Equipment South Pacific Ltd ("MQESP") which resulted ultimately in a debt allegedly owed initially by CWR to MQESP being assigned to Ventures which in turn then assigned it to the Vanuatu Company.

[3] The amended defence to the claim and counterclaim which runs for 61 pages puts all material allegations in the claim in issue and particularises at great length conduct on the part of GFR alleged to be fraudulent, unconscionable and amounting to a breach of the fiduciary duty which he owed to another company Mine & Quarry Equipment Pty Ltd ("the Australian Company") which is now in liquidation. It is the case for CWR that although he was the registered director of the Australian Company it was really GFR who was the controlling mind of that corporation as far as its financial management was concerned and was its de facto director.

[4] It is the case for CWR that although two accountants in Vanuatu are the registered directors of the Vanuatu Company, it was really GFR who was the de facto director/controlling mind of that corporation – as he was to some extent of the Australian Company of which CWR was the registered director.

[5] On 10 September 2002 the liquidator of the Australian Company assigned to CWR the right of action that it might have –

> "(a) against Gary Francis Robson [GFR], Mine & Quarry Equipment International ["the Vanuatu Company"] and/or Charles William Robson [CWR] or any other person involved either directly or indirectly in the management of [Mine and Quarry Equipment Pty Ltd, (the Australian Company)]; prior to the appointment of a provisional liquidator on 15 June 2000;
>
> (b) for but not limited to any claim for breach of fiduciary duty, breach of statutory duty, negligence or any other claim relating to the management or affairs of [the Australian Company] including but not limited to loss of profits or costs incurred by [the Australian Company] for or on behalf of [the Vanuatu Company].
>
> Nothing herein shall infer that the asset includes any debt owing to [the Australian Company] or any right of action against liquidators, their servants, agents or employees or any claim arising from the liquidation of [the Australian Company]. Any such actions are expressly excluded from this sale."

[6] It is the case for CWR that the two corporations conducting business operations out of Australia were controlled by GFR and that CWR had no conscious input into various intercompany activities and consequent book keeping/financial records made at the instance of GFR. It is also the case for CWR that GFR controlled and manipulated various financial activities of the Australian Company of which CWR was the registered director.

[7] CWR and GFR are brothers. Both were interested in the acquisition, repair and resale of heavy earth moving equipment located or to be located both in the South Pacific and in Australia.

[8] It is the case for CWR that the business activities of the Vanuatu Company and the Australian Company – and presumably some of the other corporations to which I have referred registered in Vanuatu and/or Fiji were inextricably interwoven and the controlling mind of the financial side of those activities in any event was GFR.

[9] It is the case for CWR that his attention was confined to the performance in Australia by the Australian Company of those business activities involving the acquisition, repair, servicing, disposal etc of heavy earth moving equipment.

[10] It is the case for CWR that he left to GFR as de facto director of the Vanuatu and Australian Companies the task of keeping financial records etc of the various activities in which both corporations were involved.

[11] Eventually CWR and GFR became involved in bitter disputes concerning the joint operation of their earth moving equipment business in Australia and the South Pacific.

[12] It was then that the Australian Company went into voluntary liquidation.

[13] In the course of that liquidation the Vanuatu Company submitted a proof of debt which was accepted in part by its liquidator.

[14] Stated shortly it is the case for the Vanuatu Company and indeed for GFR that many of the assertions in the defence and counterclaim by CWR were properly the subject of setoff on the part of the liquidator of the Australian company. It is asserted that whether or not all the items in respect of which CWR counterclaims against both the Vanuatu Company and GFR may have been properly setoff by the liquidator when admitting to proof the debt the Vanuatu Company succeeded in proving against the Australian Company, nevertheless as a consequence of the operation of s 553C(1) of the *Corporations Act,* the liquidators admission to proof of the net amount owing by the Australian Company to the Vanuatu Company discharged the Vanuatu Company from any liability for claims or items which the Australian Company may have been entitled to setoff – whether or not it did so.

[15] Reliance is placed upon *Gye v McIntyre* (1991) 171 CLR 609, 622. It is also contended that after admission to proof choses in action are no longer capable of assignment – *Stein v Blake* [1996] 1 AC 243, 255.

[16] In my judgment it is reasonably arguable that the assignment to which I have referred in para 5 did no more than purport to assign to CWR whatever rights the liquidator of the Australian Company had to pursue GFR for breach of fiduciary duty and of any other duty which he owed to it as its de facto director and to pursue

also the Vanuatu Company under the principle of *Barnes v Addy* (1874) LJ Ch 513 and/or as being vicariously liable for the misfeasance of GFR its de facto director and/or authorised agent.

[17] It is arguable that the various breaches of fiduciary duty of GFR as director of the Australian Company pleaded, amount to misfeasance on his part and that no question arises as to mutuality with respect to the liability of GFR and/or the Vanuatu Company for such misfeasances and the Australian Company's liability for debts or dealings within the contemplation of s 553(C)(1).

[18] It is the contention of GFR and the Vanuatu Company he allegedly controls that they are discharged from any obligation to pay compensation or to make refunds to the Australian Company which the liquidator could have setoff when he accepted the Vanuatu Company's proof of debt. It is contended that the only way those matters can now be raised is by the liquidator rescinding his decision and reassessing the Vanuatu Company's proof of debt against the Australian Company. As a consequence of taking this course it might be possible upon a detailed consideration of the intercompany dealings between the Vanuatu and Australian Companies that perhaps the Vanuatu Company was indebted to the Australian Company rather than vice versa.

[19] In my view the business affairs of CWR and GFR have been complicated by the use of corporations through the medium of which the two brothers carried on business. Essentially it is the case for CWR that GFR dishonestly manipulated the financial affairs of the various corporations of which he was de facto director to the great financial disadvantage of CWR as sole shareholder of the Australian Company. It seems to be his case that the claim brought by the Vanuatu Company against him is really part of another effort by GFR to put him at further financial disadvantage. Relying upon the assignment to which I referred in para 5 he counterclaims against GFR as de facto director of the Australian Company damages or equitable compensation for breach of his fiduciary duties owed to that company in the sum of $1.4M or alternatively $1M in respect of such matters pleaded and particularised in his very long and detailed counterclaim.

[20] He makes claims for the same monies on alternative bases.

[21] His claim against the Vanuatu company as I understand it is based upon the contention that it is liable for the breach of fiduciary duty of which GFR was guilty as de facto director of the Australian Company. In my view it is arguable in the circumstances pleaded in this case in that if GFR was the de facto director of both the Vanuatu and the Australian Companies the Vanuatu Company would be vicariously liable for his breach of fiduciary duty as de facto director of the Australian Company in advancing the interests of the Vanuatu Company to the detriment of those of the Australian Company by conducting the financial affairs of the earth moving business conducted by both in such a dishonest way as to deprive the Australian Company of the financial returns from the conduct of its business to which it was entitled for the benefit of the Vanuatu Company which he also managed and controlled. There might also be a liability in the Vanuatu Company under the principle of *Barnes v Addy* (supra).

[22] With respect to his counterclaim against GFR, CWR alleges that GFR breached ss 180(1) and/or 181(1) of the *Corporations Act* 2001. Compensation is claimed in the

same sums essentially as are claimed against the Vanuatu Company pursuant to s 1317(H) of the Act and equitable compensation is also claimed for breach of fiduciary duties.

[23] Under s 9 of the *Corporations Act* "director" of a company is defined to mean–

> "(a) …
>
> (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
>
> (i) they act in the position of a director; or
> (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes;"

[24] It is unnecessary on an application of this kind to examine the evidence upon which CWR will or may rely to establish that GFR was a director of both the Vanuatu Company and the Australian Company; or for that matter a director of various other corporations referred to in the pleadings. The extended definition of director under the *Corporations Act* would not necessarily constitute him a director of foreign corporations unless there is a similar definition of director in operative corporation law where those corporations were incorporated which is a matter which was not canvassed. In any event it seems to me that the essence of CWR's claim against GFR is GFR's de facto directorship of the Australian Company in its Australian operations and whether or not it could be demonstrated that he was a de facto director of the Vanuatu Company, CWR claims that he was at least the authorised agent of that corporation which became vicariously liable to the Australian Company for the activities in which he engaged in connection with the financial management of the Australian Company in Australia which CWR asserts involved him deliberately breaching the fiduciary duty he owed to it for the benefit of the Vanuatu Company and ultimately of course for his own personal benefit.

[25] CWR contends that he was the only shareholder and registered director of the Australian Company. GFR was the de facto director of the Australian Company. He was also either the de facto director of the Vanuatu Company or at least its agent when he did the things in his management of the financial affairs of both corporations about which CWR complains and wishes to litigate in this action.

[26] I do not propose to analyse in detail all the particulars of his alleged misconduct detailed in CWR's defence and counterclaim. Stated briefly they may be characterised as allegations that GFR in his dual capacity as the controlling mind and/or agent of the Vanuatu Company and the de facto director of the Australian Company –

(i) Diverted profits to which the Australian Company was entitled to the Vanuatu Company.
(ii) Failed to record the Vanuatu Company's indebtedness to the Australian Company with respect to costs incurred by the Australian Company in reinstating equipment owned by the Vanuatu Company for its sole benefit.
(iii) Failed properly to record any indebtedness of the Vanuatu Company to the Australian Company for its use of the Australian Company's equipment and assets generally.

(iv) Recorded the Australian Company's indebtedness for expenses incurred by the Vanuatu Company for its own sole benefit.

[27] It is clear that it is only in the clearest case that a defence and counterclaim will be struck out as having no prospect of success – *General Steel Industry Inc v Commissioner for Railways* (1964) 112 CLR 125 at 129.

[28] In my view this in essence is an action between two brothers who together for many years conducted business in Australia and the South Pacific by the use of corporations to achieve commercial and ultimately perhaps taxation advantages.

[29] It is the case for CWR that GFR over the years used his authority as de facto director of the Australian Company of which CWR was the sole shareholder and in effect the operational manager in Australia to advance the interests of the Vanuatu Company of which GFR was the operational manager and thereby to cause a detriment to the Australian Company resulting in a benefit to the Vanuatu Company, and to himself as a consequence.

[30] I am unpersuaded that any part of the defence and counterclaim of CWR ought be struck out on the basis that it discloses no reasonable cause of action or amounts to an abuse of the process of the court.

[31] I dismiss the application.