SUPREME COURT OF QUEENSLAND

CITATION:	*Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd & Ors* [2003] QSC 253
PARTIES:	**SOUTHERN CROSS MINE MANAGEMENT PTY LTD (ACN 082 767 548)** (plaintiff) v **ENSHAM RESOURCES PTY LTD (ACN 005 995 782)** (first defendant) **BLIGH COAL LIMITED (ACN 010 186 393)** (second defendant) **IDEMITSU QUEENSLAND PTY LTD (ACN 010 236 272)** (third defendant) **EPDC (AUSTRALIA) PTY LTD (ACN 002 307 682)** (fourth defendant) **LG INTERNATIONAL (AUSTRALIA) PTY LTD (ACN 002 806 831)** (fifth defendant) **KENNETH JOHN FOOTS** (first defendant added by Counterclaim) **FOOTS PTY LTD (ACN 010 195 061)** (second defendant added by Counterclaim) **RAYMOND NORMAN BIRD** (third defendant added by Counterclaim) **LITTLE DIGGER MINING LIMITED (ACN 096 110 717)** (fourth defendant added by Counterclaim)
FILE NO/S:	SC No 9548 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	6 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	26 June 2003
JUDGE:	McMurdo J
ORDER:	**1. Norma Agnes Foots be joined as the fifth defendant added by counterclaim in these**

proceedings

2. **The defendants be granted leave to file an amended defence and counterclaim in accordance with exhibit RLM 19 to the affidavit of R L Morrison filed on 26 June 2003**

CATCHWORDS: PRACTICE – JOINDER OF PARTIES - where application to join the respondent as a defendant to the counterclaim – where application opposed – where respondent contends the case proposed to be pleaded cannot succeed – whether case proposed to be pleaded is arguable – whether there is utility in the joinder – whether the proposed proceeding is an abuse of process – whether the respondent should be joined

PRACTICE – PLEADING - where case pleaded in counterclaim alleges knowing participation in breach of fiduciary duty by second defendant added by counterclaim in acquiring shares in plaintiff– where counterclaim alleges second defendant added by counterclaim holds acquired shares as a constructive trustee for first defendant – where proposed respondent in receipt of those shares - whether knowledge or notice must be pleaded by plaintiff or lack of notice should be pleaded by the defendant

Uniform Civil Procedure Rules (1999), r 69

Barnes v Addy (1874) LR 9 Ch App 244, considered
Carl Zeiss Stiftung v Herbert Smith & Co (No 2) [1969] 2 Ch 276, considered
Consul Development Pty Ltd v DPC Estates Pty Ltd (1974-1975) 132 CLR 373, considered
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited
Muschinski v Dodds (1984-1985) 160 CLR 584, considered
United States Surgical Corporation v Hospital Products International Pty Ltd [1983] 2 NSWLR 157, applied

COUNSEL: W Sofronoff QC, with M Hoch for the first, second, third and fourth defendants
P Dunning for the respondent Norma Agnes Foot

SOLICITORS: Allens Arthur Robinson for first, second, third and fourth defendants
Conroy & Associates Solicitors for the respondent Norma Agnes Foot

[1] **McMURDO J:** This is an application to join Norma Agnes Foots as a defendant to the counterclaim. Mrs Foots holds shares in the fourth defendant to the counterclaim, Little Digger Mining Limited ("Little Digger"). The proposed counterclaim is for an account of profits derived from her shareholding in Little

Digger and for a declaration that she holds those shares on a constructive trust for the first defendant/first plaintiff by counterclaim, Ensham Resources Pty Ltd ("Ensham"). The application is made pursuant to r 69 of the *UCPR*. No question arises as to any limitation period. The application is opposed by Mrs Foots on a number of grounds, but in summary, it is submitted that the case proposed to be pleaded against her is one which cannot succeed or, put another way, is one which if pleaded would be bound to be struck out in accordance with *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125. The submissions for Mrs Foot for the most part are in reliance upon the terms of Ensham's existing and proposed pleadings, although at least one submission relies upon further facts which are said by her to be uncontroversial.

Ensham's Case

[2] Ensham is the operator of the Ensham Coal Project, a joint venture between the second, third, fourth and fifth defendants in the proceedings. Prior to June 2001, Mr K J Foots was the chief executive officer of Ensham, and Mr R N Bird was the mine manager. On 30 July 1999, the plaintiff Southern Cross Mine Management Pty Ltd ("SCMM") entered into an agreement with Ensham for the supply and maintenance of a dragline at the Ensham Mine, ("the Dragline Agreement"), and a dragline was subsequently acquired by SCMM for this purpose. Mr Foots and Mr Bird were directors of SCMM and came to control 51 per cent of its shares. In Mr Foots' case, that was through the company Foots Pty Ltd. The remaining shares in SCMM were allocated to other employees of Ensham.

[3] In May 2001, all shares in SCMM were transferred to Little Digger, in consideration of shares in Little Digger being issued to the former shareholders in SCMM. The result was that SCMM became a wholly owned subsidiary of Little Digger, and Foots Pty Ltd became the holder of 280,000 ordinary shares in Little Digger. On or about 1 November 2002, Foots Pty Ltd transferred 170,000 of its ordinary shares in Little Digger to Mrs Foots, and it is that parcel which is the subject of the proposed claims against her.

[4] The various claims within the existing and proposed counterclaim are based upon alleged breaches by Mr Foots and Mr Bird of fiduciary duties to Ensham and the joint venturers in relation to Ensham's entering into the Dragline Agreement and not itself purchasing the required dragline. Ensham has purported to rescind the Dragline Agreement, but it also claims against SCMM that the dragline itself is held by SCMM upon a constructive trust for Ensham. There are additional claims for an account of profits made by SCMM from the Dragline Agreement and for equitable compensation. Mr Foots and Mr Bird are the subject of claims for accounts of profits or equitable compensation. Against Foots Pty Ltd, Ensham claims an account of profits derived from its shareholding in SCMM and (in turn) Little Digger, together with a declaration that its (remaining) shareholding in Little Digger is held on a constructive trust for Ensham. There is also a claim against Little Digger for an account of profits derived from its shareholding in SCMM and for a declaration that this shareholding is held on a constructive trust for Ensham.

[5] There is no allegation that Mrs Foots was a fiduciary. The effect of the proposed claim against her is that the relevant shares in Little Digger were subject to a trust when they were transferred to her in November last year, being constructive trust, by which her transferor, Foots Pty Ltd, held the shares for Ensham. It was a trustee

of the shares in Little Digger because they were taken in exchange for its shares in SCMM, and those shares had been held by Foots Pty Ltd upon a constructive trust for Ensham.

Grounds for Opposing Joinder

[6] One of the submissions for Mrs Foots is that the proposed counterclaim does not plead a case by which Foots Pty Ltd held the relevant shares in Little Digger on trust for Ensham. That submission would have had force but for the amendments to the counterclaim made by the pleading filed on 10 June 2003. But in my view, there is now at least a tenable case that is pleaded as to the trusteeship of Foots Pty Ltd. Until 25 October 1999 Foots Pty Ltd was the sole shareholder of SCMM.[1] Foots Pty Ltd had applied to ASIC for the reservation of the name of a proposed new company, which became SCMM,[2] with the intention, through its director Mr Foots, that when registered, SCMM would acquire a dragline to be operated by Ensham.[3] That was achieved by the making the Dragline Agreement on about 30 July 1999. In breach of fiduciary duty, Mr Foots did not disclose that he and Mr Bird had proposed to become the majority shareholders in SCMM.[4] It is then alleged that SCMM dishonestly assisted breaches by Mr Foots and Mr Bird of their fiduciary duties, not only by entering into the Dragline Agreement but also by issuing shares to Mr Bird and to Foots Pty Ltd.[5] Foots Pty Ltd received those shares in SCMM with the knowledge (by its director Mr Foots) of his breaches of duty, and of SCMM's assistance in those breaches, including by its issue of those shares to Foots Pty Ltd.[6] According to this case, Foots Pty Ltd knowingly participated in breaches of fiduciary duty, and thereby became liable to account to the person to whom the duty was owed for any benefit received as a result of such participation: *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1974-1975) 132 CLR 373 at 397. For Mrs Foots, it is argued that Ensham's case must be confined to an "inquiry … to determine precisely what it was that was acquired in breach of fiduciary duty" and that what was acquired was the dragline itself, "the acquirer" being SCMM. That submission continues: "There is a clear causative relationship between its (the dragline's) acquisition and the breach alleged. However, the corpus of the acquirer does not in any way reflect what the fiduciary received from the breach, nor have any causative connection with it." There are at least two difficulties with this submission. The first is that the relevant inquiry is not limited to "what the fiduciary received from the breach", for it is clear that third parties, that is parties other than the fiduciary, can be liable to account for benefits which they receive in consequence of their knowing participation in the fiduciary's breach. Secondly, the submission overlooks the extent of the breach or breaches of fiduciary duty alleged against Mr Foots and Mr Bird. The breaches of fiduciary duty are pleaded as going beyond SCMM's acquisition of the dragline and the making of the Dragline Agreement. Part of their conduct complained of is that of causing the majority of the shares in SCMM to be put into effectively their hands. There is nothing particularly unusual in a case of this kind where it is alleged that a fiduciary has set up his own company to take advantage of some business or opportunity of the beneficiary and it is suggested that his shares in that company should be subject to a

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1 Counterclaim para 17
2 Para 30
3 Para 31
4 Para 48
5 Para 50
6 Para 53

constructive trust: see e.g. *Warman International Ltd v Dwyer* (1994-1995) 182 CLR 544 at 563-565. I reject the submission that in such a case, the beneficiary's entitlement goes no further than a remedy against the company which took up the relevant business or opportunity.

[7] It follows that there is an arguable case pleaded to the effect that Foots Pty Ltd knowingly participated in breaches of fiduciary duty in becoming the holder of some 254,900 shares in SCMM in October 1999, and that Foots Pty Ltd then held those shares as a constructive trustee for Ensham. In turn, that property could be traced into the 280,000 shares which Foots Pty Ltd held in Little Digger from May 2001. This first basis for opposing the joinder of Mrs Foots thereby fails.

[8] The next submission for Mrs Foots was that the facts to be pleaded by the proposed counterclaim, in relation to her knowledge or notice, would not be sufficient to make her a trustee. For Ensham, it was submitted that it was Mrs Foots who was obliged to plead and prove that she acquired the shares for value and without notice of Ensham's interest, for which Ensham relied upon Meagher Gummow and Lehane's *Equity Doctrines and Remedies* (4th ed 2002) at [8-300] and the cases there cited as well as other cases both in Australia and in England. The existence of this onus was recently explained by Lord Hoffmann in *Barclays Bank plc v Boulter* [1999] 4 All ER 513 at 518:

> "… that rule depends upon the fact that the land is burdened with an equitable proprietary interest. *Prima facie*, a purchaser cannot obtain a better title than his vendor was able to convey. The defence of purchaser in good faith for value without notice enables the purchaser to defeat a prior interest, which burdened the title. It is therefore for him to establish that defence."

However, in a case such as the present, the relevant shares when held by Foots Pty Ltd were not trust property in the strict sense: it was at most a constructive trustee. Foots Pty Ltd was a constructive trustee only if the circumstances of the case warranted the grant of the equitable remedy of a constructive trust. The grant of this remedy is affected by such considerations as the potential impact upon the interests of innocent third parties from the imposition of a constructive trust, and whether there is another remedy which is adequate: *Bathurst City Council v PWC Properties Pty Ltd* (1998-1999) 195 CLR 566 at 584-585; *Giumelli v Giumelli* (1998) 196 CLR 101 at 111-114. As a constructive trust of the relevant kind is a remedial response to the claim to equitable intervention made out by the plaintiff,[7] in a particular case the trust might be imposed only from the publication of the reasons for judgment: see e.g. *Muschinski v Dodds* (1984-1985) 160 CLR 584 at 599 (Mason J) and 623 (Deane J). Accordingly, a case of the present kind differs from the purchase of property which is trust property in the strict sense. The basis for the remedy against the transferee is not simply that the plaintiff had equitable rights in relation to the property against the transferor, but also that it would be unconscionable for the transferee to hold the property free of the plaintiffs interest where the transferee took with knowledge or sufficient notice of that interest. In *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, one of the respondents, Hospital Products International, had been found to have breached fiduciary duties owed to the appellant, by building up

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7 *Giumelli* at 112

a business of its own in preference to the interests of the appellant which had engaged it as its exclusive Australian distributor. Another respondent, Hospital Products Limited, had acquired that business in circumstances from which the Court of Appeal held that it became a constructive trustee for the appellant. This was reversed on appeal to the High Court[8] on the basis that there was no fiduciary relationship. However, the consideration in the Court of Appeal of this onus question was unaffected by the judgments in the High Court. In the Court of Appeal, the question was discussed in the judgment of the court at 258 as follows:

> "We have indicated, although in summary, the whole of the material which relates to the take over. There is no evidence that the directors of Aquila made any inquiries of any kind after the service of the statement of claim, and either before or after the extraordinary general meeting, for the purpose of investigating the allegations it contained. HPL (as Aquila had by then become) filed its defence well after the reverse take over had been completed. The question thus arises whether USSC carried the onus of proving that no such inquiries were made, or HPL of establishing that they were. The point did not arise in *Consul*, and we are not aware of any case which distinctly decides it.
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> Some analogical assistance may be derived from the weight of authority in support of the view that the onus lies upon the holder of a legal estate to plead and prove a defence of bona fide purchase for value without notice: *Attorney-General v Biphosphated Guana Co Ltd* (1879) LR 11 ChD 327; *Mills v Renwick* (1901) 1 SR (NSW) 173; 18 WN 213; *Wilkes v Spooner* [1911] 2 KB 473, at 486, per Farwell LJ; *GL Baker Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216; [1958] 3 All ER 540, and the other cases mentioned in Meagher, Gummow & Lehane's Equity (1975), par 859, at 224, 225. *Corser v Cartwright* (1875) LR 7 HL 731 and *Burkinshaw v Nicolls* (1878) 3 App Cas 1004 are to the contrary effect.
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> However, the doctrine of bona fide purchase for value without notice had no direct application to a case such as the present where, as we have at least assumed, the party sought to be made accountable did not take trust property in the strict sense. Here, the plaintiff seeking to make good an equitable right must, in our opinion, prove that the adversary acquired the property in suit with knowledge of that right. As we have endeavoured to show, this requirement may be satisfied if the evidence establishes facts which, to a reasonable man, would demand inquiry, and the absence of that inquiry. We do not doubt that the plaintiff must provide those facts by leading the necessary evidence; and must, at the end of the day be able to point the absence of inquiry. But we consider that once the plaintiff has led that evidence, an evidentiary onus falls upon the defendant to prove inquiry if he can; and thus to rebut, by means which lie in his hands rather than the plaintiff's, the inference which the facts, unanswered and unexplained, would readily permit. In the present case HPL

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8 (1984) 156 CLR 41

> made no attempt to discharge that burden. In the absence of evidence from the quarter from which, if available, it should have come, we conclude that HPL made no inquiries, and that this omission was deliberate and prompted by the conviction that inquiries would reveal the truth of what USSC alleged. For these reasons, we are of the opinion that HPL acquired the assets it took in the take over with knowledge that rendered it accountable to USSC as a constructive trustee."

Foots Pty Ltd is not alleged to have held the relevant shares as "trust property in the strict sense" and, to make good its equitable right to the shares in the hands of Mrs Foots, it is necessary for Ensham to prove that she acquired the shares with sufficient knowledge of the relevant facts. The question is whether what is proposed to be pleaded as her state of mind is sufficient.

[9] It is proposed to add a paragraph[9] which, apart from its proposed particulars, is in these terms:

> "56. Mrs Foots received the shares with knowledge that:
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> (a) Ensham and the JV parties claim a constructive trust in respect of the shares; and
> (b) the transfer of the shares to her was in breach of trust."

Within the particulars there is a series of allegations of facts from which "actual knowledge may be inferred", with a further paragraph of the particulars in these terms:

> "(B) Alternatively, with knowledge of the claim and proceedings, Mrs Foots wilfully and recklessly failed to make the following inquiries that an honest and reasonable person would make before taking the shares, namely, enquiries of:
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> (1) Any person on the part of Ensham or the JV parties in respect of the claims; or
> (2) Any other person in respect of the claim."

[10] It is submitted that the proposed pleading goes no further, in effect, than alleging "actual knowledge" of the existence of the allegations made by Ensham rather than of the facts alleged: *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276. It seems to me however that the proposed claim goes further, at least by para [B] of the proposed particulars. The proposed case is that Mrs Foots not only knew of the relevant claims in relation to these shares, but she deliberately failed to inquire into them. In my view this pleads at least an arguable case that her conscience has been relevantly affected so as to make her susceptible to equitable relief. If the case is to be characterised as one of the so called "first limb" of *Barnes*

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[9] Numbered 56 in the Draft Additions to the Pleading set out within Exhibit RLM-19 to the affidavit of R L Morrison filed on 26 June 2003

v Addy,[10] then constructive notice of Ensham's right would be sufficient: *Jacobs' Law of Trusts in Australia* (6th ed 1997) at [1334]. The many authorities concerning the notice required for the so called second limb would make this case, if of that kind, one for which the matters to be pleaded would provide at least a tenable claim.[11] The case as developed by the particulars in para [B] is one where Mrs Foots is alleged to have deliberately not inquired as to the truth notwithstanding the known potential for adverse consequences for Ensham. Honesty is an objective standard, and "acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty."[12] Part of the attack upon this pleading was to the effect that Mrs Foots could not have been expected to make enquiries of her husband's adversaries in relation to their claim so that this allegation has no prospects of being established in fact. But the proposed case goes further: it alleges that she failed to enquire of "any other person in respect of the claim". That would include enquiries of Mr Foots himself. These allegations may or may not be true but the facts alleged are not so obviously untrue that Ensham should be refused leave to plead them. In my view there is a sufficiently pleaded case that Mrs Foots had the requisite state of mind to make her susceptible to equitable relief.

[11] A further submission for Mrs Foots is that Ensham has made a binding election and which limits it now to a claim for relief in relation to the dragline. Mrs Foots relies upon not only Ensham's conduct of its counterclaim, but also upon its alleged conduct involving its possession of the dragline as well as certain correspondence. A party may be required to elect between alternative equitable remedies, such as between an account of profits and equitable compensation: *Warman International v Dwyer* at 569, although "this is distinct from election at common law, because the election arises as an element of the relief in the particular case notwithstanding that in an appropriate case, both remedies may be ordered": Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* (4th ed 2002) at [39-025]. Ensham has claimed not only to have rescinded the dragline agreement, but also to be entitled in equity to that asset under a constructive trust. As already discussed, the imposition of such a trust is not certain. It is potentially affected by a consideration of what remedies are appropriate and sufficient, having regard to, amongst other things, the interests of third parties. The interests associated with the alleged fiduciaries do not make up all of the shareholders of SCMM. It is conceivable that Ensham could succeed but not obtain the remedy of the imposition of a constructive trust upon the dragline. By its original counterclaim, Ensham claimed such a constructive trust over the dragline, but at the same time it made claims in relation to the relevant shares in SCMM and in Little Digger. Accordingly, it has not by the conduct of the proceedings made the alleged election. The submission depends upon proof that by one or more events outside the conduct of the proceedings, Ensham has in some way elected between alternative equitable remedies, although it is not clear that it was required to do so. Mrs Foots places particular reliance upon Ensham's continued use of the dragline and its refusal to hand it over to SCMM upon its purported rescission of the Dragline Agreement. The election question however involves issues of fact, requiring a proper inquiry into the circumstances of this conduct and whether Ensham's conduct as a whole towards SCMM should deprive it now of equitable relief against another party. That factual inquiry should not be undertaken in the context of this application. Ultimately, it might be found that

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10 (1874) LR 9 Ch App 244

11 See *Jacobs' Law of Trust in Australia* at [1335] and the cases there cited

12 *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 390-1

Ensham has so elected. The present question is whether it is so plain that it is bound by such an election that it should be refused leave to join Mrs Foots. In my view the claim against her is not so obviously bad upon this ground that leave would be refused.

[12] The fourth point advanced on behalf of Mrs Foots is that there was no "utility in the joinder". Again, this relies upon the relief claimed against SCMM. It is said that if that claim succeeds, there is no need for relief against anyone else, especially Mrs Foots. That submission should be rejected for reasons that appear from what I have said already. At least arguably, Ensham is not presently bound to pursue only SCMM.

[13] Lastly, it was submitted that the proposed proceeding is an abuse of process, because it is to pursue "an object different or beyond the recovery of the shares". The object is not identified. But it was said that the object must be different from that of obtaining the equitable relief to be claimed, for (again) that would have no utility for Ensham. There is nothing in this last submission which warrants the refusal of leave to join Mrs Foots.

Conclusion

[14] I order that Norma Agnes Foots be joined as the fifth defendant added by counterclaim in these proceedings, and that the defendants be granted leave to file an amended defence and counterclaim in accordance with exhibit RLM 19 to the affidavit of R L Morrison filed on 26 June 2003.

[15] I shall hear the parties as to costs.