

SUPREME COURT OF QUEENSLAND

CITATION: *Abacus Funds Management Ltd v Nethurst P/L & Ors* [2003] QCA 423

PARTIES: **ABACUS FUNDS MANAGEMENT LTD** ACN 007 415 590
(plaintiff/first respondent)
v
NETHURST PTY LTD ACN 069 125 275
(first defendant/first appellant)
ANTOINE GHANEM AND ADRIENNE GHANEM
(second defendants/second appellants)
PETRIE POINT PTY LTD ACN 056 548 595
(second respondent)
ANGUS WILLIAM JOHNSON
(third respondent)

FILE NOS: Appeal No 10919 of 2002
SC No 10428 of 2001

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 26 September 2003

DELIVERED AT: Brisbane

HEARING DATE: 21 August 2003

JUDGES: McMurdo P, Muir and Holmes JJ
Separate reasons for judgment for each member of the Court, each concurring as to the order made

ORDER: **Appeal dismissed with costs**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – Amendment – where the appellants sought leave to amend their pleadings to include a counterclaim – where leave refused on the basis that the counterclaim has no prospects of success and because one of the claims was not made against the first respondent as required by r 178(1) *Uniform Civil Procedure Rules* 1999 (Qld) – whether the proposed pleading disclosed an arguable claim

TRADE AND COMMERCE – TRADE AND COMMERCE GENERALLY – MISCELLANEOUS PROVISIONS - where the appellants' proposed counterclaim sought relief under s

80 and declarations made pursuant to s 87 of the *Trade Practices Act 1974* (Cth) – whether a nexus between the conduct the subject of the injunction sought and the contravening conduct is a necessary precondition for the application of s 80

Trade Practices Act 1974 (Cth), s 80, s 87
Uniform Civil Procedure Rules 1999 (Qld), r 178(1), r 179

Australian Consumer & Competition Commission v Office Link (Aust) Pty Ltd (1997) ATPR 41-598, referred to
Australian Consumer & Competition Commission v Real Estate Institute of Western Australia Inc (1999) 161 ALR 79, referred to

Australian Consumer & Competition Commission v Virgin Mobile Australia (2002) SCA 1548, referred to
Bahr v Nicolay (No 2) (1988) 164 CLR 604, referred to
General Steel Industries v Commissioner for Railways (1964) 112 CLR 125, applied

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, applied

South Sydney District Rugby League Football Club Ltd v News Ltd (2001) 111 FCR 456, applied

Truth About Motorways v Macquarie Infrastructure Investment Management [2000] HCA 11 (1999) 200 CLR 591, followed

COUNSEL: J Bell QC, with D Kelly, for the first and second appellants
M Bland for the first respondent
B D O’Donnell QC for the second and third respondents

SOLICITORS: Hopgood Ganim for the first and second appellants
McCullough Robertson for the first respondent
Russell & Company for the second and third respondents

- [1] **McMURDO P:** I have had the benefit of reading the reasons for judgment of Muir J in which the facts and issues are set out. I agree with him that the learned trial judge was right in concluding that, for the appellants to succeed, it is necessary for it to demonstrate some nexus between the injunction sought under s 80 of the *Trade Practices Act 1974* (Cth) and the contravening conduct upon which it seeks to rely in its proposed counterclaim. The appellant has failed to demonstrate such a nexus sufficient even to establish the low threshold standard necessary to invoke the grant of leave to deliver the proposed counterclaim.
- [2] I agree with Muir J that the appeal should be dismissed with costs.
- [3] **MUIR J:** The appellants, who are the first and second defendants in the action, appeal against a decision by a chamber judge refusing an application by the appellants for leave to deliver a counterclaim. Rule 179 of the *Uniform Civil Procedure Rules 1999* (Qld) relevantly provides that a counterclaim “must be included in the same document and served within the same time as the defence”.

The defence was filed and served on 1 February 2002 and the application for leave to deliver the proposed amended defence and counterclaim was made on 14 November 2002.

- [4] Leave was refused on the basis that the claims sought to be advanced in the counterclaim had no prospects of success and because one of the claims was not made against the plaintiff (the first respondent to the appeal), thus infringing the requirement of r 178(1) that the plaintiff be a party to the counterclaim.

Summary of allegations in the statement of claim and defence

- [5] The following summary of the allegations in the statement of claim and defence provides a useful starting point for an understanding of the issues raised in the pleadings and proposed pleadings.
- [6] The first defendant leased premises in what is known as the Brunswick Centre from Petrie Point Pty Ltd, the second respondent.
- [7] For convenience, I will refer to Petrie Point Pty Ltd as “the Lessor”, the first defendant as “the Lessee” and the second defendants as “the Guarantors”. The first defendant and the second defendants will be referred to collectively as the appellants.
- [8] By a deed dated 27 April 1995, the Guarantors agreed with the Lessor to be liable for the performance by the Lessee of its obligations under the lease and to indemnify the Lessor in respect of any damage incurred by the Lessor in consequence of any breach by the Lessee of such obligations.
- [9] The Lessor assigned the benefit of the lease and of the guarantee to the plaintiff.¹ In breach of its obligations under the lease, the Lessee failed to pay rent, promotion fund contributions and interest totalling \$300,132.06. Furthermore, the Lessee abandoned the premises and thereby repudiated the lease.
- [10] On 1 July 2000 the plaintiff re-entered the premises and thereby elected to accept the Lessee’s repudiation and termination of the lease. The plaintiff demanded that the Guarantors pay the moneys owing by the Lessee under the lease. Failure to meet the demand is not alleged but that may be overlooked for present purposes.
- [11] The plaintiff claims against the appellants moneys payable under the lease and damages.
- [12] In their defence the appellants, amongst other matters, allege the following. They were induced not to exercise a contractual right to terminate an agreement for lease, which preceded the lease, in reliance on misrepresentations made by or on behalf of the Lessor. The plaintiff was aware (as a result of disclosure made in the instrument under which it acquired the Lessor’s interests under the lease) of the nature and details of the Lessee’s allegations of misrepresentation and that the Lessee had surrendered possession “on the basis of those assertions”. The plaintiff did not take “any action in relation to the Lessee’s surrender” of the demised premises causing the Lessee to assume that the plaintiff had agreed to a mutual surrender of the lease.

¹ The pleaded facts in relation to how the plaintiff came to stand in the position of lessor and took the benefit of the guarantee are somewhat more complicated than this but they are not contentious and it is not necessary, for present purposes, to explain them.

- [13] On the basis of such assumption the Lessee did not pursue any claim under the *Trade Practices Act 1974* (Cth) (“TPA or the Act”) against the Lessor or its director Angus Johnson, the third respondent, and any claim for such relief is now statute-barred. In the premises, the plaintiff is estopped from pursuing its claim against the appellants.

The proposed counterclaim

- [14] In their proposed counterclaim, the appellants relied on the allegations in the statement of claim, albeit considerably reduced and refined. They alleged a breach of duty against the Lessor and Mr Johnson then claimed the following relief –
1. Pursuant to s 80 of the TPA, against the assignee an injunction preventing it from enforcing against the Lessee the rights and liabilities alleged by it in these proceedings to have arisen under the lease.
 2. Pursuant to s 80 of the TPA, against the plaintiff an injunction preventing it from enforcing against the Guarantors the rights and liabilities alleged by it in these proceedings to have arisen under the deed of guarantee.
 3. Pursuant to s 80 of the TPA, against the Lessor and Mr Johnson an injunction preventing either or both of them from asserting any other rights or entitlements against the Lessee and the Guarantors under the lease and/or deed of guarantee.
 4. Pursuant to s 87(1) of the TPA, as against the Lessor and Mr Johnson, declarations that:
 - (a) the lease was void as of 1 October 1998; and
 - (b) by virtue of (a), the assignment by the Lessor to the plaintiff of the former’s interest in the Lease and the Deed of Guarantee was ineffectual as a matter of law.
 5. Pursuant to s 80, as against the Lessor, an injunction preventing it from asserting any rights against the appellants said to have arisen by virtue of such assignment.
 6. Pursuant to s 87(1) of the TPA, as against the Lessor and Mr Johnson, a declaration that their conduct was misleading or deceptive or likely to mislead or deceive within the meaning of s 52 of the TPA.
 7. Pursuant to s 87(1) of the TPA, as against Mr Johnson a declaration that he was knowingly concerned in the conduct.
 8. Further or in the alternative, pursuant to s 80 or s 87(1) of the TPA, as against the Lessor and Mr Johnson, an order that they pay to the plaintiff any sum found to be due by the appellants to the plaintiff pursuant to the lease and/or guarantee.
 9. Further or in the alternative, pursuant to 1 to 3, 5 and/or 8, pursuant to s 80 or s 87(1) of the TPA, as against the Lessor and Mr Johnson an order that they indemnify the appellants to the extent of their respective liabilities, if any, found to be owed to the plaintiff in the proceedings commenced by it against the appellants.
 10. As against the Lessor and Mr Johnson such further or other order or orders pursuant to s 87(1) of the TPA as to the court may seem appropriate.

11. Further or in the alternative, as against the Lessor and Mr Johnson, damages for negligence representing:
 - (a) The amounts identified in attachment A to the proposed counterclaim;
 - (b) Alternatively to 1 to 9, for the amount claimed by the plaintiff against the appellants in these proceedings.
12. Interest.
13. Costs.

The central issue at first instance

[15] The crux of the arguments advanced to the primary judge to resist the application was that the facts alleged in the proposed pleading did not disclose an arguable claim by the appellants against the plaintiff pursuant to s 80 of the Act. That section relevantly provides –

- “(1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:
- (a) a contravention of any of the following provisions:
 - (i) a provision of Part IV, IVA, IVB, V or VC;
 - (ii) section 75AU or 75AYA;
 - (b) attempting to contravene such a provision;
 - (c) aiding, abetting, counselling or procuring a person to contravene such a provision;
 - (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;
 - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
 - (f) conspiring with others to contravene such a provision;
- the Court may grant an injunction in such terms as the Court determines to be appropriate.”

...

- (4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;
 - (b) whether or not the person has previously engaged in conduct of that kind; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.”

The contentions of the Lessor and Mr Johnson

[16] It is conceded that, after a 1983 amendment to the Act, s 80(1), if read literally, was no longer confined to the making of orders against persons who had engaged in or participated in “contravening conduct”.

- [17] The wide discretion conferred by s 80, however, is confined by the scope and purpose of the Act which is “aimed at the protection of the public interest, through the prevention of anti-competitive conduct and the fair treatment of consumers”.
- [18] There must be a nexus between the actual or apprehended contravening conduct which “satisfies the pre-condition” just mentioned and the conduct the subject of the injunction. In other words, it is not permissible to exercise the power under s 80(1) to restrain conduct unrelated to the contravention of the Act which enlivens the court’s powers under the section.
- [19] The granting of an injunction against the plaintiff is outside the scope and purpose of the Act as the plaintiff is itself a consumer and the effect of the injunction would be to place on the plaintiff, which is innocent of any contravention of the Act, the burden of relieving the Lessor from the consequences of its conduct. The plaintiff’s knowledge of the allegations made by the appellants is irrelevant. The Act deals with statutory rights and remedies and the acquisition of rights against the consumer, with knowledge of the unfair treatment of that consumer by another, is not activity proscribed or even regulated by the Act.
- [20] There is no relevant nexus as the only relationship between the alleged contravention of the Act by the Lessor and the grant of the injunction is that the grant of the injunction would relieve the Lessee of some of the consequences of its reliance on the contravening conduct (ie, its continuing liability under the lease). That is an insufficient relationship to make it “appropriate” to grant the injunction in the absence of an allegation that the plaintiff participated in the Lessor’s contravening conduct or, unless restrained, would itself engage in a contravention of the Act associated with or in continuation of the Lessor’s conduct.
- [21] As the effect of injunctions, if granted, would be to make orders preventing or reducing the loss to the Lessee suffered by reason of the Lessor’s alleged contravention of the Act, the orders come within “the ground covered by ss 87(1) and 87(1A)”. Such orders, however, could not be made under those provisions as they are restricted to orders “... against the person who engaged in the conduct or a person who was involved in the contravention ...”. From this, it is to be concluded that s 80 does not enable the making of orders “restraining A from enforcing rights under a contract, so as to prevent or reduce loss to B suffered by reason of a contravention of the Act, where A did not engage or participate in the conduct which involved the contravention, such that the orders could not be made under s 87(1) or s 87(1A)”.

The contentions of the plaintiff

- [22] The plaintiff advances the following additional reasons why s 80(1) should be construed as permitting an injunction only against a person who has engaged or proposes to engage in conduct of the kind specified in paragraphs 80(1)(a) to (f) of the Act.
- [23] A natural reading of s 80(1) which states that “the Court may grant an injunction ... where the Court is satisfied that a person has engaged, or is proposing to engage, in conduct” of the specified kind requires the conclusion that the provision permits injunctions to be granted only against a person who has engaged, or who proposes to engage, in conduct of the kind specified in the provision.

- [24] The construction favoured by the appellants leaves no basis for limiting the class of persons against whom an injunction may be granted as the word “appropriate” in the section merely applies to the terms on which an injunction may be granted.
- [25] The appellants' construction renders s 80(1)(e) superfluous. To prove that a person is party to a contravention, it is necessary to prove a contravention by another person. If the only purpose of paragraphs 80(1)(a) to (f) is to enliven the court's jurisdiction to grant an injunction, it would always be sufficient to prove a contravention under s 80(1)(a) and never necessary to prove that someone else was a party to it under s 80(1)(e). The same reasoning applies to the words “aiding” and “abetting” in s 80(1)(c) and to the word “inducing” in s 80(1)(d).
- [26] Section 80(4)(b) permits an injunction to be granted against a person whether or not the person has previously engaged in the conduct to be restrained but s 80(4)(a), which permits an injunction to be granted against a person whether or not the person intends to engage in the conduct to be restrained in the future, only applies to a person who has previously engaged in that conduct. Section 80(4) thus does not permit an injunction to be granted against a person who neither has previously engaged nor proposes to engage in the conduct to be restrained.

The appellants' contentions

- [27] There is no express or implicit limitation in the language of s 80(1) such as that for which the other parties contend. That is made plain, inter alia, by *Truth About Motorways v Macquarie Infrastructure Investment Management*.²
- [28] Sections 80 and 87 do not provide “mutual and dependent remedies” but have “a separate and independent existence”. That may be seen, inter alia, from the fact that orders under s80 may be applied for “by any other person” whereas remedies under s 87(1A) are available only to persons who have suffered loss and damage or to the Trade Practices Commission. It thus does not follow that a restriction on the power of the court contained in s 87 should be implied in s 80. If there is validity in the plaintiff's “scope and purpose arguments”, it is met by the fact that an application for injunctive relief under s 80 is one for protection of the public interest.³ The public interest sought to be protected is the interest in preventing victims of misleading and deceptive conduct from being exposed to liabilities in consequence of that conduct. That the injunction sought will protect also the incidental or collateral private interests of the appellants does not detract from its public interest utility.⁴ In this case, the public interest is particularly relevant where the person, who is actually seeking to enforce the liability consequent upon the misleading and deceptive conduct, acquired the ‘right’ to enforce the liability with notice of allegations concerning the conduct and of the injured party's intention to claim.

The construction of section 80(1)

- [29] As the above account of the competing contentions in this matter makes plain, the counterclaim raises a difficult question of construction. Plainly, if s 80(1) is construed literally, there is power under it to grant injunctive relief against persons other than those identified in the subsection.

² (2000) 200 CLR 591, 601 [13].

³ *Truth About Motorways* at 602 [17].

⁴ *Truth About Motorways* at 602 [17].

- [30] In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited*,⁵ Gleeson CJ and McHugh J observed –

“It has been established for more than 20 years that **s 80 means what it says**. In *Phelps v Western Mining Corporation Ltd* (1978) 33 FLR 327; 20 ALR 183 the Full Court of the Federal Court rejected an argument that the words ‘any other person’ in s 80 should be read down as meaning that only persons who are affected by a contravention of Pt V could seek relief under s 80.” (emphasis added)

- [31] Their Honours then went on to refer to discussion in judgments in *Phelps* of the meaning of the phrase “any other person”. But as Senior Counsel for the Lessor and Mr Johnson pointed out, the observations in *Truth About Motorways Pty Ltd* relied on by the appellants were directed to the meaning of a phrase contained in the section. Plainly, their Honours did not have in mind the question now under consideration.

- [32] The following observations in the joint judgment in *Project Blue Sky Inc v Australian Broadcasting Authority*⁶ and many other authorities show that statutory interpretation is not merely a linguistic or semantic exercise and that statutory provisions cannot be looked at in isolation –

“The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213, per Barwick CJ. The meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole’. In *Commissioner for Railways (NSW) v Agalinos*⁷ Dixon CJ pointed out that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.” (citations omitted)

- [33] More recently, Lord Steyn observed –⁸

“Interpretation is not a science. It is an art. It is an exercise involving the making of choices between feasible interpretations. Structural arguments must be considered. Competing consequentialist arguments must be taken into account. Broader policy considerations may be relevant. Educated intuition may play a larger role than an examination of niceties of textual analysis. The judge’s general philosophy may play a role. Ultimately, however, a judge must be guided by external standards in making his choice of the best

⁵ (2000) 200 CLR 591 at 601.

⁶ (1998) 194 CLR 355 at 381-382.

⁷ (1955) 92 CLR 390 at 397.

⁸ “The Intractable Problem of the Interpretation of Legal Texts”, The John Lehan Memorial Lecture 2002 given by Lord Steyn.

contextual interpretation. He must put aside his subjective views and consider the matter from the point of view of the reasonable person.

...

It will be rare for a statute to have one obvious meaning which can be determined without taking into account the context of the legislation.”

- [34] To my mind it would be surprising if s 80(1) contemplated the granting of an injunction against a person other than one who had engaged in proscribed conduct. Absent that limitation, the section would sanction orders against persons against whom no cause of action arising under the Act had been alleged, let alone established. Also, as the respondents’ arguments point out, it would be odd if a plaintiff, who could not obtain orders against a person under s 87, because that person was not one who had engaged in or been involved in a contravention of the Act, could achieve the same practical result by obtaining an order under s 80(1).
- [35] The appellants’ argument placed emphasis on the legislative history of the two sections under consideration.
- “Section 80 was originally confined to granting injunctions restraining a person from engaging in conduct that constituted or would constitute a contravention of a relevant section of the Act.⁹ Section 87 originally provided (so far as presently relevant) that the Court may, in addition to granting an injunction under s.80, ‘... make such other orders as it thinks fit to redress injury to persons caused by any conduct to which the proceeding relates ...’ (underlining added). There was no restriction on the persons against whom s.87 orders could be made. By a 1977 amendment¹⁰ s.87 was amended so as to restrict the orders that could be made to orders against ‘the person who engaged in the conduct (in contravention of the Act) or a person who was involved in the contravention ...’. Subsequently, in 1983, s.80 was amended to broaden the Court’s powers, as mentioned above.”
- [36] It was pointed out that there is no suggestion in the explanatory memorandum accompanying the Bill for the Act which made the 1983 amendments to s 80, that the amendment was intended to confer the power removed from s 87 to make orders against a person who had not contravened or been a party to a contravention. It is argued that the appellants’ interpretation infringes the principle that where a statute confers both “a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to do that which is the subject of the special power”.¹¹
- [37] The primary judge did not find it necessary to decide this point in order to determine the matter at first instance and neither do I. Although I have sympathy with the more restrictive construction of s 80(1) urged by the respondents, I think it desirable that resolution of the point should await a more suitable factual platform. The primary judge based her determination on the lack of nexus between the

⁹ This was the form of s 80 being considered in *Thomson Australian Holdings v TPC* (1981) 148 CLR 150.

¹⁰ *Trade Practices Act Amendment Act 1977*, s 52.

¹¹ *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 678 and *Medibank Private Ltd v Cassidy* [2002] ATPR 41-895.

injunction sought and the contravening conduct. Additionally, she concluded that the application must fail as the plaintiff could not be made, legitimately, a party to the counterclaim.

[38] I accept that no relevant nexus has been shown and that it is necessary to demonstrate one.

[39] In *South Sydney District Rugby League Football Club Ltd v News Ltd*,¹² Merkel J, with whose reasons Moore J relevantly agreed, said –

“Section 80 of the Act confers power upon the Court to grant an injunction where it is satisfied that a person is engaging, or proposing to engage, in conduct that constitutes or would constitute, inter alia, a contravention of the Act. As was explained in *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, s 80 confers a very broad discretion on the Court which, although devoid of traditional equitable constraints, must be exercised judicially, appropriately and consistently with the policy of the Act: see Lockhart J at 256, Gummow J at 267 and French J at 268. See also *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* (1997) 78 FCR 197 at 203-204.”

[40] In *Australian Competition & Consumer Commission v Z-Tek Computer Pty Ltd*,¹³ Merkel J summarised the limitations on a court’s power to grant relief under s 80 as follows –

“In summary, in determining whether an injunction under s 80 is ‘appropriate’ there are, at least, three limitations on the Court’s power.

First, the power is confined by reference to the scope and purpose of the TPA and in particular s 80. It is within the scope and purpose of s 80 to grant injunctive relief which is designed to prevent a repetition of the conduct for which the relief is sought.

Secondly there is a contextual limitation within s 80 itself. As the jurisdiction to grant an injunction is enlivened by an alleged or actual contravention of a provision of Part IV, IVA or V of the TPA, there must be a sufficient nexus or relationship between the contravention and the injunction granted. It is that nexus or relationship that enables determination by the Court of whether the injunction sought is ‘appropriate’.

Thirdly, there is the constitutional limitation which requires that the injunction granted be related to the case or controversy the subject of the proceeding.”

[41] A similar approach has been taken in other decisions in the Federal Court.¹⁴

[42] I am unable to accept that a sufficient nexus between the alleged conduct contravening the Act and the injunction exists merely because of the matters

¹² (2001) 111 FCR 456.

¹³ (1997) 78 FCR 197 at 203-204.

¹⁴ *Australian Competition & Consumer Commission v Office Link (Aust) Pty Ltd* [1997] ATPR 41-598 at 44,261; *Australian Competition & Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79 at 87-88 and *Australian Competition & Consumer Commission v Virgin Mobile Australia* [2002] FCA 1548 at para 19.

pleaded in the defence or referred to in paragraph [44] hereof. Those matters disclose no more than involvement by the plaintiff in a commonplace commercial transaction quite distinct from any conduct alleged against the Lessor and Mr Johnson.

- [43] I am of the view also that the orders were appropriate by virtue of the fact that, even if the appellants have a claim which is open to them in strict legal theory, its prospects of success are so minimal that there is no serious issue to be tried. To put it another way, the claim against the plaintiff in the counterclaim does not meet the tests propounded by Barwick CJ in *General Steel Industries v Commissioner for Railways*¹⁵. Plainly, that was a matter relevant to the exercise of the primary judge's discretion.
- [44] It will be recalled that there is no allegation that the plaintiff knew of any breach by the Lessor of the provisions of the Act. No such breach has been established, even now. The plaintiff knew of the existence of the appellant's allegations and of threatened litigation in that regard. It is not alleged that the Lessor and the plaintiff were not at arms length or that the plaintiff had any purpose or intention of assisting the Lessor or of interfering with the Lessee's claims or rights against the Lessor.
- [45] Acceptance of the appellants' argument would result in introducing into commercial dealings a substantial and hitherto un contemplated hazard – the prospect that the acquirer of real or personal property might take it subject to the rights of third parties (not asserting any proprietary interest) with claims under the *Act* against the assignor/dispositor.
- [46] It has long been established under the Torrens system that there is no fraud on the part of a registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest.¹⁶ Such conduct has, for generations, not been deemed such as to attract legal sanction. Here, the appellants do not claim an interest in the lease or the leased property. On the contrary, the Lessee admits that it abandoned its interest as lessee. I refer to these matters, not in order to suggest a limitation on the powers conferred by s 80(1) but to demonstrate the unlikelihood that a court would grant an injunction against the plaintiff of the nature of that claimed in the counterclaim, assuming there was power to do so.
- [47] On the pleaded case, I can see no sensible justification for the granting of injunctive relief against the plaintiff.
- [48] It was not argued on behalf of the appellants that if the claims against the plaintiff were not to be allowed the addition of the counterclaim should nevertheless be permitted. Accordingly, I would dismiss the appeal with costs.
- [49] **HOLMES J:** I agree with the reasons for judgment of Muir J and the order he proposes.

¹⁵ (1964) 112 CLR 125 at 129.

¹⁶ *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 613.