SUPREME COURT OF QUEENSLAND

CITATION:	*Thomas v D'Arcy & Ors* [2004] QSC 260
PARTIES:	**GRAHAM ARNOLD PRANCE THOMAS** (plaintiff) **v** **IAN KENNETH D'ARCY** (first defendant) **&** **ALEXANDER MACGILLIVRAY, CRAIG DOUGLAS GREEN, LYNDEN ELIZABETH STONE, JACQUELINE KNOWLMAN** (second defendants)
FILE NO/S:	S740 of 1995
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	18 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2004
JUDGE:	Douglas J

ORDER:

1. That pursuant to rule 171 of the Uniform Civil Procedure Rules 1999, the following parts of the plaintiff's amended statement of claim be struck out:

- **(a) Subparagraphs 8(f)(i) and (ii);**
- **(b) Subparagraph 30(b);**
- **(c) The following words in subparagraph 44(a):**
  - **(i) "The Plaintiff's shareholding and/or";**
  - **(ii) "(b) and";**
  - **(iii) "$1,300,000";**
- **(d) The following words in the first prayer for relief:**
  - **(i) "Namely his shareholding and Movado and Meadowbury".**

2. That, pursuant to rule 223 of the Uniform Civil Procedure Rules 1999, the plaintiff file and serve on the defendant an affidavit stating:

- **(a) the circumstances in which the**

documents from file 15054 that have not been disclosed (including, without limitation, the memorandum of advice from Mr Cooper of counsel dated on or about 28 or 29 November 1990) ceased to exist or passed out of the plaintiff's possession or control;

(b) either:

(i) that files 12416, 13636, 15436 and 11512 never existed; or

(ii) that files 12416, 13636, 15436 and 11512 were never in the plaintiff's possession or control; or

(iii) the circumstances in which files 12416, 13636, 15436 and 11512 ceased to exist or passed out of the plaintiff's possession or control.

Further submissions invited as to costs and any ancillary orders.

CATCHWORDS: CORPORATIONS – SHAREHOLDERS – RIGHTS – Shareholder's claim for the loss of value of his shareholding – Whether personal action maintainable in circumstances where the loss claimed is not separate and distinct from the loss suffered by the company, notwithstanding an alleged breach of duty independently owed to the shareholder

PROCEDURE - SUPREME COURT PROCEDURE – QUEENSLAND - PRACTICE UNDER RULES OF COURT – PLEADING – GENERALLY – STRIKING OUT – Application to strike out under rule 171 of the Uniform Civil Procedure Rules – Where the loss claimed cannot be recovered under Australian law

PROCEDURE - SUPREME COURT PROCEDURE – QUEENSLAND - PRACTICE UNDER RULES OF COURT – OTHER MATTERS BEFORE TRIAL – DISCLOSURE OF DOCUMENTS – Application pursuant to rule 223(2) of the Uniform Civil Procedure Rules – Where the plaintiff is required to swear an affidavit stating the circumstances in which documents ceased to exist or passed out of his possession or control

Uniform Civil Procedure Rules 1999 (Qld), rules 171 & 223

Gould v Vaggelas (1985) 157 CLR 215, referred
Prudential Assurance Co Ltd v Newman Industries Pty Ltd [1982] 1 Ch 204, followed
Johnson v Gore Wood & Co [2002] 2 AC 1, followed
Christensen v Scott [1996] 1 NZLR 273, not followed
Harris v Milfull (2002) 43 ACSR 542, distinguished

COUNSEL: R G Bain QC with him R J Anderson for the plaintiff
A M Pomerenke for the defendant

SOLICITORS: Abbott Tout for the plaintiff
Brian Bartley & Associates for the defendant

[2] **DOUGLAS J**: The plaintiff has sued his former solicitors seeking damages for an alleged breach of retainer and breach of duty by negligent advice and services provided by them in the early 1990s. The plaintiff then had an interest in a mobile phone business through owning 50% of the shares in Movado Pty Ltd which itself owned all of the shares in the Carphone Company of Great Britain Pty Ltd. He also owned 50% of the shares in Meadowbury Pty Ltd. The amended statement of claim alleges that he retained the defendants in 1987 to provide advice in relation to the management of those business interests and his personal affairs. Those companies were lent money by National Australia Bank in 1989 and 1990 in return for which the bank took mortgages and company charges over the assets and undertakings of each of the companies and over real property owned by the plaintiff and by Movado as trustee. The bank called in its securities on 8 June 1990 and appointed an agent to recover the amounts owed to it, a Mr Ebbage of Arthur Andersen. Mr Ebbage sold the assets of the companies and the other mortgaged properties in circumstances where the plaintiff alleges he breached duties owed to the plaintiff and to the companies by realising the properties at a significant undervalue.

[3] The plaintiff's case as pleaded is that during that period he regularly consulted with the defendants as to what could be done to prevent the sale occurring at an undervalue and to delay until last, and only if necessary, the sale of real property at Moons Lane, Brookfield that he owned himself. He alleges that the advice he received was negligent because it did not advise him of the immediate action he could have taken to seek to prevent a sale then thought to be at an undervalue. In these applications parts of the amended statement of claim are attacked and orders are sought in respect of the disclosure made by the plaintiff.

Strike out application

[4] Paragraph 30 of the amended statement of claim alleges that the plaintiff suffered loss and damage in that, but for the first defendant's failure to ensure that the bank and/or Mr Ebbage acted in good faith and took reasonable care to sell the assets at market value, he could have retained, among other things, all or a part of the value of his shareholding in Movado and Meadowbury. Paragraph 44 goes on to allege that the loss and damage suffered by the plaintiff included the value of his shareholding in Movado and Meadowbury.

[5] The defendants seek to strike out those parts of the pleading that claim the loss of value of the plaintiff's shareholding in those companies on the basis that that is a claim which should have been brought only by the companies and not by a shareholder. They rely in part on what was said by Gibbs CJ in *Gould v Vaggelas* (1985) 157 CLR 215, 219-220:

> "It is of course elementary to say, as was said in *Prudential Assurance Co. Ltd v Newman Industries Ltd*…, 'that A cannot, as a general rule, bring an action against B to recover damages or to

> secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested'. Any loss suffered by Gould Holdings as a consequence of the fraud can be recovered only by the company itself. Even if the company had not commenced an action within the limitation period, its failure to enforce its own rights would not have enhanced the rights of the Goulds…"

[6] His Honour went on to point out that the plaintiffs there could still recover damages for losses which they had suffered personally and which were separate and distinct from the loss suffered by the company; see also per Wilson J at 245, Brennan J at 253 and Dawson J at 269. In *Gould v Vaggelas* the Court decided that the loss suffered by the plaintiffs was one that should be characterised as a loss that was distinct from the loss suffered by the company. They had been influenced by the misrepresentations in forming the company, providing it with funds to complete a contract to purchase a resort and by guaranteeing its borrowings. That is different from the case pleaded here where the companies were in existence and operating businesses before any of the conduct of the defendants criticised by the plaintiff and where the companies themselves were not acquired or made the subject of any investment by the plaintiff because of the defendants' conduct.

[7] There are substantial grounds, therefore, for the application made by the defendants. It is resisted principally on the basis that the New Zealand Court of Appeal has taken a different attitude from that adopted earlier in England in *Prudential Assurance Co Ltd v Newman Industries Pty Ltd* [1982] 1 Ch 204, 210, 222-223, a decision which was itself approved by the High Court in *Gould v Vaggelas*. The defendants, through their counsel, Mr Bain QC, also assert that the recent decision of the House of Lords in *Johnson v Gore Wood & Co* [2002] 2 AC 1 should not necessarily be read as precluding the pleaded cause of action.

[8] The relevant passage in the decision of the New Zealand Court of Appeal, *Christensen v Scott* [1996] 1 NZLR 273, appears at 280 as follows:

> "We do not need to enter upon a close examination of the *Newman Industries* decision. It has attracted not insignificant and, at times, critical comment. See eg LCB Gower, *Gower's Principles of Modern Company Law* (5th ed, 1992) at pp 647-653; LS Sealy, "Problems of Standing, Pleading and Proof in Corporate Litigation" (Ed, BG Pettit) at p 1 esp at pp 6-10; and MJ Sterling, 'The Theory and Policy of Shareholder Actions in Tort' (1987) 50 MLR 468, esp at pp 470-474. It may be accepted that the Court of Appeal was correct, however, in concluding that a member has no right to sue directly in respect of a breach of duty owed to the company or in respect of a tort committed against the company. Such claims can only be bought (sic) by the company itself or by a member in a derivative action under an exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461. But this is not necessarily to exclude a claim brought by a party, who may also be a member, to whom a separate duty is owed and who suffers a personal loss as a result of a breach of that duty. Where such a party, irrespective that he or she is a member, has personal rights and these rights are invaded, the rule in *Foss v Harbottle* is irrelevant. Nor would the claim necessarily have the calamitous

> consequences predicted by counsel in respect of the concept of corporate personality and limited liability. The loss arises not from a breach of the duty owed to the company but from a breach of duty owed to the individuals. The individuals (sic) is simply suing to vindicate his own right or redress a wrong done to him or her giving rise to a personal loss.
>
> We consider, therefore, that it is certainly arguable that, where there is an independent duty owed to the plaintiff and a breach of that duty occurs, the resulting loss may be recovered by the plaintiff. *The fact that the loss may also be suffered by the company does not mean that it is not also a personal loss to the individual. Indeed, the diminution in the value of Mr and Mrs Christensen's shares in the company is by definition a personal loss and not a corporate loss. The loss suffered by the company is the loss of the lease and the profit which would have been obtained from harvesting the potato crop. That loss is reflected in the diminution in the value of Mr and Mrs Christensen's shares. They can no longer realise their shares at the value they enjoyed prior to the alleged default of their accountants and solicitors.* (For a discussion of the policy issues which arise in considering these questions, see Sterling (supra) at pp 474-491.)" (My emphasis)

[9] It is the second of the two paragraphs I have extracted, at 280 ll. 25-35 of the report, and particularly the passage emphasised by me, that is controversial. In *Johnson v Gore Wood & Co* the propositions relevant to cases of this nature were analysed in detail in a manner clearly inconsistent with the approach of the New Zealand Court of Appeal. Lord Bingham's speech at 35-36 contains the major criticism and also formulates the following propositions:

> "(1)Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. So much is clear from *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, particularly at pp 222-223, *Heron International*, particularly at pp 261-262, *George Fischer*, particularly at pp 266 and 270-271, *Gerber* and *Stein v Blake*, particularly at pp 726-729. (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. This is supported by *Lee v Sheard* [1956] 1 QB 192, 195-196, *George Fischer* and *Gerber*. (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from

> that suffered by the company caused by breach of a duty independently owed to the shareholder each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. I take this to be the effect of *Lee v Sheard*, at pp 195-196, *Heron International*, particularly at p 262, *R P Howard*, particularly at p 123, *Gerber* and *Stein v Blake*, particularly at p 726. *I do not think the observations of Leggatt LJ in* Barings *at p 435[B] and of the Court of Appeal of New Zealand in* Christensen v Scott *at p 280, lines 25-35, can be reconciled with this statement of principle.*
>
> These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim should be upheld. On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. *The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible and whether (to use the language of* Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) *[1982] Ch 204, 223) the loss claimed is 'merely a reflection of the loss suffered by the company'. In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company.* In other cases, inevitably, a finer judgment will be called for. At the strike-out stage any reasonable doubt must be resolved in favour of the claimant." (My emphasis)

[10] A similar approach was taken by Lord Goff at 41-42 and by Lord Millett at 61-63. At 62E Lord Millett referred to the situation where the company suffers loss caused by the breach of a duty owed both to the company and to the shareholder and said:

> "In such a case the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action."

[11] Mr Bain QC criticised his Lordship's reasoning there and at 66-67 and submitted that it was unorthodox by comparison to the first proposition formulated by Lord Bingham at 35F which was limited to the situation where the shareholder sues "in that capacity and no other". That submission does not reflect all of Lord Bingham's analysis, however. It is true that the plaintiff here sues in vindication of his personal rights as well as his rights as a shareholder but it is my view that, even where Lord

Bingham's third proposition applies, his Lordship did not envisage that it extended to the shareholder's recovery of loss caused to the company by breach of the duty owed to it; see at 35H-36A and 36D-E extracted above.

[12] Lord Hutton, while critical of the decision in *Prudential Assurance,* said at 55 that it should be upheld as did Lord Cooke who had been a party to the decision of the New Zealand Court of Appeal in *Christensen v Scott*. He went out of his way to say that he accepted *Prudential Assurance* to the full at 45F.

[13] In this case, therefore, the question is whether the loss pleaded can be characterised as a loss separate and distinct from that suffered by the companies and caused by breach of a duty independently owed to the shareholder or was it merely a reflection of the companies' losses.

[14] I accept that the solicitors may well have owed a duty to the plaintiff separate from that they owed to the companies but it seems to me that the loss pleaded here is loss which would have been made good if the companies had enforced the rights they may have had against Mr Ebbage and Arthur Andersen & Co. They had such rights but did not seek to enforce them. The pleadings here relevantly allege no loss other than the decrease in the value of the shareholdings in the companies attributable to the allegedly negligent advice. That is the type of loss described in the last passage from *Johnson v Gore Wood & Co* at 36D-E that I have emphasised above and which Lord Bingham described as a case where the answer was clear.

[15] It is not a case such as *Harris v Milfull* (2002) 43 ACSR 542 where there were rights asserted arising out of a timeshare scheme which were capable of characterisation as a loss to the shareholder separate from the company's loss. That led the Full Court of the Federal Court not to strike out the relevant parts of the pleading in question there. It does not seem to me that this pleading contains such elements of doubt. It is structured in such a way that the only conclusion I can draw is that the plaintiff's claimed loss is merely a reflection of the companies' losses from its assets being sold allegedly at an undervalue.

[16] The only basis, therefore, on which I should refuse to strike out the relevant passages of this amended statement of claim is if I were persuaded that the decision in *Christensen v Scott* might be followed in Australia or, perhaps, that the decision in *Johnson v Gore Wood & Co*, in particular, some of the discussion in it of the decision in *Christensen v Scott*, should lead me to conclude that the law was in such a state of uncertainty as to allow these issues to go to trial.

[17] Given the treatment of *Prudential Assurance* in *Gould v Vaggelas* and in *Johnson v Gore Wood & Co* it is my view that its authority is such that I should disregard the views expressed in *Christensen v Scott* that the companies' loss reflected in the diminution in the value of the shareholders' shares can be recovered by the shareholders in circumstances where they have personal rights. That does not, in my view, represent the law in Australia. Nor do the facts pleaded give rise to a situation such as that discussed in *Harris v Milfull* where it was not clear whether the company's claim arose out of the same facts as the shareholder's claim. Accordingly I propose to strike out the relevant parts of the pleading.

Disclosure

[18] The defendants have also sought orders requiring the plaintiff to swear an affidavit stating the circumstances in which documents from a file known as file 15054 which have not been disclosed, including a memorandum of advice from Mr Cooper of counsel dated on or about 28 or 29 November 1990, ceased to exist or passed out of the plaintiff's possession or control. They also seek further orders in respect of the documents in that file and in respect of other files numbered 12416, 13636, 15436 and 11512.

[19] The defendants did not retain a copy of the files when the plaintiff went to other solicitors. A consent order was made on 17 September 2003 that the plaintiff would make disclosure of documents including 5 boxes of files provided by the first defendant to the plaintiff's new solicitors in 1995 and further files including but not limited to certain files listed in an annexure to that consent order. One of the documents contained in file 15054, a letter from the defendants to the plaintiff dated 19 November 1990, is very significant to the case pleaded. It reveals advice from the solicitors of a different nature from the oral advice said to have been given by them to the plaintiff in paras 17 and 19 of his amended statement of claim and refers to the need to seek urgent advice from counsel about the possibility of obtaining an injunction to restrain further sales of the secured properties.

[20] A memorandum of fees in relation to that file also referred to 72 letters of which only 17 were produced for inspection. Four specific files identified in the annexure to the consent order were also not produced for inspection. They are the files numbered 12416, 13636, 15436 and 11512 to which I have already referred. The defendants had been pressing the plaintiff for further disclosure or the provision of an affidavit pursuant to r. 223(2) of the *Uniform Civil Procedure Rules* since October 2003 only to be met by assertions from the plaintiff's solicitors that full disclosure had been completed by them on 23 October 2003.

[21] After this application was brought a further list of miscellaneous documents was produced by the plaintiff's solicitors together with an affidavit of Mr Hocking from the plaintiff's solicitors firm and an affidavit of the plaintiff. Those documents consist of an original handwritten chronology apparently produced by the plaintiff together with approximately 99 original documents from file 15054 sitting behind that chronology. Ms Greer's affidavit deposes to the view that the documents appear to have been pulled from their original file.

[22] It seems clear that a written advice was given by Mr Cooper of counsel which the solicitors' letter of 19 November 1990 suggests is likely to have addressed some of the issues about which the plaintiff alleges he obtained wrong advice. It should have been in file 15054. The plaintiff's solicitors have sought to explain what happened in relation to file 15054 in the following terms:-

> "In relation to file 15054, we believe the *entire file has been disclosed* in separate sections. Given that the files and documents that were actually provided by MacGillivrays and Mr D'Arcy have been in the possession of our client's solicitors for some 9 years, during which time they were disclosed and used in another complex matter, it would appear that the contents of the file were removed from the file cover as follows:

1. Documents to which a claim of privilege attached in the NAB proceedings, removed from the file cover at that time, and disclosed in these proceedings among Part C Items 43 to 160 of our clients list of documents;

2. documents which were disclosed in the NAB proceedings, removed from the file cover at that time, and disclosed in these proceedings among Part D of our client's list of documents;

3. Documents removed from the file cover at some point in time by our client for the assumed purpose of, or including, instructing legal representation."

[23] That explanation from a letter from the plaintiff's solicitors is similar to paragraph 10 of Mr Hocking's affidavit dealing with this issue which is confirmed by the plaintiff swearing an affidavit that to the best of his knowledge and belief "the affidavit of Mr Hocking represents [the plaintiff's] understanding of this matter".

[24] Mr Hocking has not found the files numbered 12416, 13636, 15436 and 11512 when searching his office and there is no explanation directly from the plaintiff as to the absence of those files. Mr Bain QC for the plaintiff argued that the combination of his solicitor's affidavit with that of his client was enough to satisfy the defendants as to what had happened with these documents. I do not agree. It seems likely that the plaintiff had direct contact with the documents in file 15054. The absence of many of those documents, particularly of counsel's advice, from what has been disclosed creates a circumstance which demands explanation directly by him. The absence of the files numbered 12416, 13636, 15436 and 11512 in circumstances where they had been referred to in a consent order also calls for a direct explanation from the plaintiff.

[25] In these circumstances it seems to me that it is appropriate to require the plaintiff himself to swear directly as to the circumstances in which the documents from file 15054, which have not been disclosed, ceased to exist or passed out of his possession or control. Those circumstances might include appropriately information of the type also sought by the defendant stating the date on which or the manner in which the plaintiff disassembled that file or what he did with each component part of the file but I shall limit the order to the language of the rule. I also believe that the plaintiff should swear an affidavit in the terms sought in respect of the files numbered 12416, 13636, 15436 and 11512.

[26] Accordingly I propose to order as follows:

1. That pursuant to rule 171 of the Uniform Civil Procedure Rules 1999, the following parts of the plaintiff's amended statement of claim be struck out:
   (a) Subparagraphs 8(f)(i) and (ii);
   (b) Subparagraph 30(b);
   (c) The following words in subparagraph 44(a):
      (i) "The Plaintiff's shareholding and/or";
      (ii) "(b) and";
      (iii) "$1,300,000";
   (d) The following words in the first prayer for relief:
      (i) "Namely his shareholding and Movado and Meadowbury".

2. That, pursuant to rule 223 of the Uniform Civil Procedure Rules 1999, the plaintiff file and serve on the defendant an affidavit stating:
   (a) the circumstances in which the documents from file 15054 that have not been disclosed (including, without limitation, the memorandum of advice from Mr Cooper of counsel dated on or about 28 or 29 November 1990) ceased to exist or passed out of the plaintiff's possession or control;
   (b) either:
      (i) that files 12416, 13636, 15436 and 11512 never existed; or
      (ii) that files 12416, 13636, 15436 and 11512 were never in the plaintiff's possession or control; or
      (iii) the circumstances in which files 12416, 13636, 15436 and 11512 ceased to exist or passed out of the plaintiff's possession or control.

[27] I shall hear further submissions as to costs and any ancillary orders.