SUPREME COURT OF QUEENSLAND

CITATION: *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd & Ors* [2004] QSC 457

PARTIES: **SOUTHERN CROSS MINE MANAGEMENT PTY LTD (ACN 082 767 548)**
(plaintiff/applicant)
v
ENSHAM RESOURCES PTY LTD (ACN 011 048 678)
(first defendant/respondent)
and
BLIGH COAL LIMITED (ACN 010 186 393)
(second defendant/respondent)
and
IDEMITSU QUEENSLAND PTY LTD (ACN 010 236 272)
(third defendant/respondent)
and
EPDC (AUSTRALIA PTY LTD) (ACN 002 307 602)
(fourth defendant/respondent)
and
LG INTERNATIONAL (AUSTRALIA) PTY LTD (ACN 002 806 831)
(fifth defendant/respondents)
and
KENNETH JOHN FOOTS
(first defendant added by counterclaim/applicant)
and
FOOTS PTY LTD (ACN 010 195 061)
(second defendant added by counterclaim/applicant)
and
RAYMOND NORMAN BIRD
(third defendant added by counterclaim/not a party to the application)
and
LITTLE DIGGER MINING LIMITED (ACN 096 110 717)
(fourth defendant added by counterclaim/not a party to the application)
and
NORMA AGNES FOOTS
(fifth defendant added by counterclaim/not a party to the application)
and
KENNETH JOSEPH HILL
(third party to counterclaim/not a party to the application)
and
KENNETH JOHN FOOTS AND RAYMOND NORMAN

BIRD
(fourth parties to counterclaim/not a party to the application)

FILE NO:	SC No 9548 of 2002
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	7 December 2004
JUDGE:	Chesterman J
ORDERS:	**1. Order that pursuant to r 171 *Uniform Civil Procedure Rules* 1999 (Qld) paragraphs 48(1) (except insofar as it concerns the purchase of the Dragline), 48(j), 48(j1), 48(j2), 48(j3), 48(j4), 48(o)(ii), 48(p) (insofar as it concerns the Ensham lease case), 48(q) (insofar as it concerns the lease of the Dragline by Ensham), 48(s)(D) and the reference to spreadsheets 1, 2, 9, 11, 17 and 38 in each sub-paragraph of paragraph 48** **2. Order that the defendants have 14 days to re-plead those parts of paragraph 48 which have been deleted by these orders** **3. Order that the defendants pay the applicants' costs of the application to be assessed on the standard basis**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – PLEADING – DEFENCE AND COUNTERCLAIM – where the applicants sought to strike out parts of the seventh amended counter-claim under r 171 *Uniform Civil Procedure Rules* 1999 (Qld) – whether such parts of the pleading should be struck out *Uniform Civil Procedure Rules* 1999 (Qld), r 171 *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd & Ors* (1987) 14 FCR 215, cited *Dow Hager Lawrance v Lord Norreys & Ors* (1890) 15 App Cas 210, discussed *LBS Holdings Pty Ltd v The Body Corporate for Condor Community Title Scheme 13200 & Ors* [2004] QSC 229, discussed *Maguire & Anor v Makaronis & Anor* [1997] 188 CLR 449, discussed *Re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211, discussed *Youyang Pty Limited v Minter Ellison Morris Fletcher* [2003] 212 CLR 484, discussed

COUNSEL:	Mr H B Fraser QC, with Mr G D O'Sullivan, for the plaintiff/applicant Mr J D McKenna SC, with Mr S R Lumb, for the first and second defendants added by counterclaim/applicants Mr J K Bond SC, with Ms M Hoch, for the first, second, third, fourth and fifth defendants/respondents
SOLICITORS:	James Watt & Co for the plaintiff/applicant Minter Ellison for the first and second defendants added by counterclaim/applicants Allens Arthur Robinson for the first, second, third, fourth and fifth defendants/respondents

[1] The plaintiff has made an application, as have the first and second defendants added by counter-claim, to strike out parts of the seventh amended counter-claim, the most recent version of that pleading. The action is a complicated one to which many parties have been joined, many causes of action have been pleaded and copious defences have been found. Even a succinct summary of the issues in the action would occupy many pages. For present purposes it is enough, I hope, to essay the following précis.

[2] The second, third, fourth and fifth defendants are the owners of a coal mine, the Ensham Coal Project, situated near Emerald in central Queensland. The first defendant ('Ensham') is a company owned by the other defendants, the joint venturers, in accordance with their respective interests in the project. Ensham operates the mine on behalf of the joint venture companies.

[3] Until June 2001 Mr Foots, the first defendant added by counter-claim, was Ensham's Chief Executive Officer. On 30 July 1999 the plaintiff and Ensham entered into a dragline agreement pursuant to which the plaintiff agreed to supply and maintain a third dragline at the mine. Ensham, of course, agreed to pay for its use.

[4] The plaintiff was a company which was incorporated by Mr Foots in December 1998 for the purpose of entering into such a contract with Ensham. At that time Mr Foots was the only director of the plaintiff and Foots Pty Ltd, was its sole shareholder. Mr Foots and his wife were the directors and shareholders of Foots Pty Ltd. The shareholding has changed subsequently.

[5] Prior to the making of the dragline agreement Mr Foots had discussed with Ensham and the joint venturers the means by which Ensham could acquire a third dragline for use at the mine.

[6] In the action Ensham claims that its entry into the dragline agreement was induced by fraudulent statements made by Mr Foots, and by breaches by him of fiduciary and contractual duties he owed it. Ensham's case, in essence, is that if Mr Foots had not misstated things Ensham would not have made the agreement with the plaintiff but would have purchased the dragline itself.

[7] On 16 September 2002 Ensham rescinded the dragline agreement. Since then it has continued to use the dragline. The plaintiff claims moneys due under the dragline agreement and damages for its use by Ensham subsequent to the recission. Ensham claims that the dragline is held on a constructive trust for it. It seeks an account of profits or equitable compensation from Mr Foots and Foots Pty Ltd.

[8] The applications are brought pursuant to *UCPR* 171 and seek an order that sub-paragraphs 48(i) (excepting so far as it concerns the purchase of the dragline), 48(j), 48(j)(1), 48(j)(2), 48(j)(3), 48(j)(4), 48(o)(2), 48(p) (insofar as it concerns the Ensham lease case), 48(q) (insofar as it concerns the lease of the dragline by Ensham), 48(s)(D) and a reference to spreadsheets 1, 2, 9, 11, 17 and 38 in each subparagraph of paragraph 48 of the seventh amended counter-claim, be struck out.

[9] The defendants' counter-claims for equitable relief against the plaintiff, and the first and second defendants by counter-claim, are based on allegations contained in paragraph 50 of the counter-claim that the plaintiff dishonestly assisted breaches of fiduciary duty by Mr Foots (and Mr Bird). It is further alleged that Foots Pty Ltd knowingly assisted Mr Foots' breach of fiduciary duty and has derived a profit therefrom. Paragraphs 49, 49A and 49B of the counter-claim allege the breaches of fiduciary duties including non-disclosure by Mr Foots, the detail of which is set out in paragraph 48.

[10] That paragraph alleges three categories of breach of fiduciary duties which comprise of the non-disclosure of matters which, it is said, should have been disclosed because they were material to the conduct of the defendants' business. The three categories of matters which should have been disclosed are alleged to be:

> (a) The availability of the dragline for purchase by the defendants.
>
> (b) The availability and the suitability of a dragline for lease by the defendants.
>
> (c) The availability and suitability for purchase or lease by the defendants not of the dragline but of a different larger dragline.

The allegations concerning categories (b) and (c) are those which the applicants wish to have struck out, and which are identified in paragraph 8 above. They are submitted to be irrelevant because of recent amendments made to the counter-claim.

[11] Prior to the amendments paragraph 51 of the counter-claim alleged that the consequences of the non-disclosures were that:

> (a) The defendants did not purchase the dragline but instead Ensham, as their agent, entered into the dragline agreement with the plaintiff.

(b) Ensham did not itself lease the dragline.

(c) Ensham did not buy or lease a dragline more suitable to its needs, i.e. one with a larger bucket capacity.

The amendment deleted the second and third of these consequences. The surviving allegation is that by reason of the alleged non-disclosures:

- Ensham did not purchase the dragline.
- Ensham entered into the dragline agreement with the plaintiff.
- Foots Pty Ltd became a shareholder in the plaintiff.
- Foots Pty Ltd received dividends from the plaintiff and/or earned profits from its shareholding in the plaintiff.

Mr Foots is, as I mentioned, a substantial shareholder in Foots Pty Ltd.

[12] Prior to the amendments paragraph 51A alleged that, but for the non-disclosures (and other breaches of duty), Ensham would not have entered into the dragline agreement with the plaintiff. Instead it would have:

(a) Purchased the dragline; or

(b) Leased the dragline; or

(c) Purchased or leased a larger dragline.

The amendments removed the second and third alternatives.

[13] Prior to the amendments paragraph 51B alleged that in consequence of the breaches of duty, including the non-disclosures, Ensham suffered loss being, alternatively,

(a) The amount by which its costs of removing overburden at the mine was higher than it would have been had Ensham itself purchased the dragline.

(b) The additional cost Ensham incurred as a result of making the dragline agreement with the plaintiff rather than itself buying or leasing a larger dragline.

The amendments deleted the second alternative.

[14] The amendments were not accompanied by any corresponding change to paragraph 48. The applicants therefore submit that the logical causal connection between the

alleged non-disclosure concerning the advantages in leasing the dragline rather than making the dragline agreement with the plaintiff; or purchasing or leasing a larger dragline no longer exist in the pleadings. There is said to be an illogicality, if not an inconsistency, in alleging that Mr Foots failed to disclose the advantages to Ensham of leasing the dragline, or the advantages in leasing or purchasing a larger dragline, with the consequence that Ensham entered into the dragline agreement with the plaintiff. It is submitted that Ensham entering into the dragline agreement with the plaintiff is not an obvious or logical consequence of its being kept ignorant of the advantages of leasing the dragline or acquiring a larger one. Ignorance on those matters may well explain Ensham not acquiring a larger dragline, or of buying what became the plaintiff's dragline, but it does not explain why Ensham should make the dragline agreement with the plaintiff. The matters with respect to which Ensham was kept ignorant by the alleged non-disclosure were relevant when the counter-claim contained allegations that, but for their non-disclosure, Ensham would have leased the dragline or would have acquired a bigger one.

[15] The parties are agreed upon the relevant principles. In any cause of action in respect of which causation is an essential element it is necessary to plead the material facts which are said to give rise to the causal connection. In particular it is necessary to plead the facts which lead to a reasonable inference that the acts complained of (here the relevant non-disclosure) and the alleged later event (here the making of the dragline agreement) stand to each other in the relation of cause and effect. Douglas J put it this way in *LBS Holdings Pty Ltd v The Body Corporate for Condor Community Title Scheme 13200 & Ors* [2004] QSC 229 (at para [3]):

> '… The principle relied on is that facts must be set out which lead to a reasonable inference that the acts complained of and the loss claimed stand to each other in the relation of cause and effect and that the plaintiff must plead the necessary facts showing that causal link …'.

His Honour referred to *Dow Hager Lawrance v Lord Norreys & Ors* (1890) 15 App Cas 210 at 221 and *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd & Ors* (1987) 14 FCR 215 at 221-222. In the first of those cases Lord Watson had said;

> 'There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and injuries complained of stood to each other in the relation of cause and effect.'

[16] The applicants' complaint, in summary, is that the seventh amended counter-claim does not plead any fact which supports an inference that the alleged non-disclosures about the availability and advantages for Ensham of buying or leasing a larger dragline, and about leasing rather than purchasing the plaintiff's dragline, is

causally connected to the transaction which Ensham seeks to impugn; i.e. its entry into the dragline agreement with the plaintiff following on the plaintiff's purchase of the dragline. It is submitted that 'the disclosure to Ensham of the alleged superiority for [its] purposes of a … larger dragline, could not rationally have caused Ensham to purchase the dragline'.

[17] Stripped to its essentials the defendants' claim is that Ensham acted to its disadvantage in making the dragline agreement with the plaintiff. It asserts that its decision in that regard was a consequence of breaches of contractual and fiduciary duties owed to the defendants by Mr Foots. Properly informed and acting in its best advantage the defendants would have bought the dragline themselves. It is not easy to understand how, in this account, the defendants can say they made the impugned agreement because they were not told that they should lease the dragline, or lease or buy a bigger one. It may be possible for the defendants to make out such a case but it does not emerge from the facts presently pleaded.

[18] The defendants had two answers to the attack on their pleading. The first was to submit that the allegations of non-disclosure, the subject of the applications, were relevant to the defendants' decision as to the manner in which it would acquire the use of the dragline. The answer begs the question. The pleading must specify the relevance of the non-disclosure to the decision complained of. How is it that being kept ignorant of the advantages of leasing the dragline or of acquiring a bigger one, affected the decision to make the agreement with the plaintiff rather than buying the dragline itself? It is this question which the pleading leaves unanswered.

[19] The second answer was a submission that because the defendants seek equitable relief, recission of the agreement and an account of profits, the imposition of constructive trusts and equitable compensation, the rules concerning causation, and the need to plead the facts giving rise to it, are relaxed. The defendants refer to the judgment of Brennan, Gaudron, McHugh and Gummow JJ in *Maguire & Anor v Makaronis & Anor* [1997] 188 CLR 449 at 467:

> 'This equity to a decree of recission is immediately generated by the preceding breach of fiduciary duty. Contrary to submissions by the appellants, issues of "causation", by analogy with those found with the recovery of damages in tort or contract, do not emerge in this case.'

They also refer to the judgment of Street J in *Re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 at 214-5:

> 'The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. …
>
> [I]f a breach has been committed then the trustee is liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter. …

> The principles … do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach. …'

[20] The submissions do not, I think, state the law with complete accuracy. A plaintiff cannot recover for breach of a fiduciary duty, or breach of trust, unless it establishes that it suffered loss as a result of the breach. This was made plain by the High Court in *Youyang Pty Limited v Minter Ellison Morris Fletcher* [2003] 212 CLR 484 (paras 43 and 44):

> '43. … To adapt what was said by Fry LJ in *Webb v Stenton* …, Minters has made itself "personally liable to pay money to [Youyang] *by reason of* some breach of trust or default in the performance of [its] duties of trustee". …
>
> 44. This appeal turns upon the significance for the facts of the causal requirement expressed by Fry LJ in the phrase "by reason of". That serves to remind … that "[t]here is no equitable by-pass of the need to establish causation" and that "[i]n questions of causation it is important to focus on the relevant equitable duty" … .'

[21] *Maguire* was a case in which solicitors lent money to a client, secured by a mortgage, without telling the clients that they would be the mortgagees or that they should obtain independent legal advice. These failures were a breach of the solicitors' fiduciary duty to the client. The head note to the report in the Commonwealth Law Reports is that:

> '[T]he mortgage was liable to be set aside at the suit of the clients as a result of the solicitors' breach of fiduciary duty in entering into the mortgage in the absence of informed consent of the clients to the solicitors' interest in the transaction, whether or not … the clients would have entered into the mortgage if the solicitors had disclosed their identity as mortgagees.'

The accuracy of this synopsis, which is expressed in terms of causation, is supported by the judgment which pronounced that the decree of recission was made available 'by the preceding breach of fiduciary duty' and by the remark that 'the breach of the duty was patent at the creation of the very thing which is to be set aside.' There was, in effect, a presumption that the breach of fiduciary duty by the solicitors had brought about the client's entry into the loan and mortgage. Because of their fiduciary position, and their failure in that regard, the solicitors were precluded from arguing that the position would have been the same had they performed their duty. This is not the same as saying that equitable relief is available where there is no causal connection between the breach complained of and the transaction entered into, or the loss suffered.

[22] The decision in *Dawson* is not opposed to this principle. In that case there was a breach by a trustee of the terms of the trust by which part of the estate was lost. Street J's remarks were directed to the assessment of the amount which the defaulting trustee had to restore. It was in that context that the point was made that considerations which might, in actions at law, reduce the amount a defendant has to pay, such as remoteness of damages, intervening causes and failure to mitigate, would be ignored. The case does not stand as authority for the proposition that a beneficiary may recover a sum of money from a defaulting fiduciary whether or not the default has, in some way, caused loss. The point is made by the joint judgment in *Maguire* where a contrast is made with the right of a beneficiary to rescind a transaction, at the creation of which the breach of fiduciary duty was patent. Their Honours said (468):

> 'Different considerations arise where the plaintiff seeks … an account of profits, as a personal rather than proprietary remedy … or … compensation for that which the plaintiff has lost … Likewise where what is sought is a proprietary remedy in the nature of a constructive trust. In these instances, there directly arises a need to specify criteria for a sufficient connection (or "causation") between breach of duty and the profit derived, the loss sustained, or the asset held.'

[23] Accordingly I think that the defendants' submissions are not a sufficient answer to the applicants' complaint about the counter-claim. I make an order in terms of paragraph 1 of both applications. I will give the defendants 14 days to re-plead those parts of paragraph 48 which have been deleted by my order. The defendants should pay the applicants' costs of the application to be assessed on the standard basis.