SUPREME COURT OF QUEENSLAND

CITATION:	*Ausarc Limited v Craig Graeme Chapman & Ors* [2008] QSC 290
PARTIES:	**AUSARC LIMITED ACN 126 933 783** Plaintiff **V** **CRAIG GRAEME CHAPMAN AND JOANNE CHAPMAN** First Defendants **GRAEME PERCIVAL CHAPMAN** Second Defendant **ROSLYN CHAPMAN** Third Defendant **SCOTT CHAPMAN** Fourth Defendant **CYRIL JINKS** Fifth Defendant **PATRICK JOSEPH STAUNTON** Sixth Defendant
FILE NO/S:	BS 8729 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	21 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2008 and 12 November 2008
JUDGE:	McMurdo J
ORDER:	**1. That the sum presently held on trust by Hemming + Hart Lawyers pursuant to the order of 8 September 2008 be paid to the plaintiff.** **2. That there be judgment for the plaintiff against**

the defendants upon the defendants' counterclaim.

CATCHWORDS: EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – Plaintiff claims damages for breach of fiduciary duty by the defendant and under s 182 of the *Corporations Act* 2001 (Cth) for the transfer of funds from the company of which the defendant was a director – Where the defendant claims to be entitled to make that transfer to refund option-holders their consideration

EQUITY – GENERALLY – MISTAKE – EQUITABLE RELIEF IN CASE OF MISTAKE – Rectification – Defendant seeks rectification of an option agreement to provide for the return of consideration paid for the options in the event that a certain person ceases involvement in the management of the company for which the options were issued – Whether a subsequent acknowledgement that the plaintiff "understood" the defendant's view is relevant to the availability of rectification

Corporations Act 2001 (Cth), ss 181, 182, 708(8), 708(12)

COUNSEL: Mr G Handran for the plaintiff

Mr S Courper QC and Mr D deJersey for the defendants

SOLICITORS: Hemming + Hart Lawyers for the plaintiff

HWL Ebsworth Lawyers for the defendants

[1] The plaintiff is an unlisted public company which carries on a panel beating business in several States. Last year it issued 800,000 share options, most of which were issued to the defendants. The circumstances in which the options are exercisable have not yet occurred. The defendants and another option holder have purported to rescind the agreement by which they were granted their options, and they wish to recover the $1 per option which they paid. That consideration was not refundable in the event that the circumstances for its exercise did not occur or the option was not exercised. What was paid for the options became in all respects the plaintiff's property.

[2] One of the defendants is Mr GC Chapman, who until last month was a director of the plaintiff. He decided to use his access to the plaintiff's bank account to repay himself, the other defendants and two others. So on 2 September last, he electronically transferred $560,000 from the plaintiff's account to an account in the names of himself and his wife Joanne Chapman, who is another defendant.

[3] The plaintiff applied for an interim injunction to protect those funds. On 8 September, Douglas J ordered that they be paid into the trust account of the plaintiff's solicitors. By a subsequent order made by consent, $55,000 of those funds, which was paid by an option holder who does not claim to be entitled to the return of his money, was repaid to the plaintiff.

[4] This is an application by the plaintiff for summary judgment upon its claim for the repayment of the balance of $505,000, which is the total of the amounts paid by the defendants and another option holder, Mr Edwards whose interests also Mr Chapman was apparently protecting. The defendants plead and argue that upon several bases that they were entitled to terminate their agreements and to the return of the monies paid under them.

[5] The dispute has arisen in these circumstances. The plaintiff is controlled by Platinum Outcomes Pty Ltd ("Platinum"), which holds all of its issued shares, three-quarters beneficially and the remainder for others, including 10 per cent which are held for an entity associated with another defendant, Mr Staunton. With his exception, none of the defendants is a shareholder or has any interest in the shares presently issued.

[6] The plaintiff became registered as a company in August 2007. From then until December 2007, it granted the options. For the most part they were granted to persons introduced by Mr Chapman. Until August 2008, the plaintiff's directors were Mr Chapman, Mr Staunton and a Mr Gaudet. Until July 2008, a Mr Hembrow was its chief operating officer. He held 100,000 of the options. When he resigned last July, he agreed with Mr Chapman and Mr Staunton for the plaintiff that his option agreement would be rescinded and his $100,000 would be repaid. A further 80,000 options were then issued by the plaintiff to some of the defendants.

[7] On 21 August 2008, Mr Shreeve was appointed a director and the executive chairman of the plaintiff. He replaced Mr Gaudet on the board. The arrival of Mr Shreeve was not welcomed by Mr Chapman and Mr Staunton. Mr Shreeve wished to act as the chief executive officer and to perform work which Mr Staunton, who was not an employee, claimed that he had been performing. Upon his appointment as a director, Mr Shreeve told Mr Chapman and Mr Staunton that they were to be removed as directors.

[8] On 2 September 2008, Platinum gave notice that it intended at the next general meeting to remove that Mr Chapman and Mr Staunton from the board. On the following day, Mr Chapman sent an email to the company secretary of the plaintiff, saying that he had transferred "the option monies of all of the investors I introduced … into trust", and made the electronic transfer of $560,000.

[9] Before going to the arguments, I should mention one matter which had been raised but has now been abandoned by the defendants. When the plaintiff first made this application, no defence had been filed, and for that reason[1] and others, the hearing was adjourned. On that first occasion, the defendants had argued that it was of some significance that the options had been offered without the disclosure required by the *Corporations Act* 2001 (Cth).[2] But as the defendants then conceded, the effect of s 708(12) of the Act was that an offer of the options did not need disclosure in so far as it was made to a senior manager or the manager's spouse, parent, child, brother or sister, so that on that basis no disclosure had to be made to

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1 UCPR r292(1).

2 Under Part 6D.2 of the Act.

the option holders whose funds are in issue here, save for the fifth defendant, Mr Jinks and Mr Edwards. However, the plaintiff made no disclosure to any potential investor, because the options were meant to be offered only to sophisticated investors within the meaning of s 708(8), to whom disclosure was not required. At the first hearing, the defendants argued that the plaintiff had not proved that each offeree was a sophisticated investor. But that point is not pleaded or now argued by the defendants.

[10] The first matter which is pleaded by the defendants is that each option agreement should be rectified, to include a term which the plaintiff and that defendant mistakenly omitted. The missing term is pleaded as follows:

> "The investor is entitled to rescind this option agreement and to [a] refund of their consideration if Mr Chapman's involvement in the management of the plaintiff is terminated."

[11] For that case, they plead that Mr Chapman and Mr Staunton, then acting on behalf of the plaintiff, induced the other defendants and Mr Edwards to acquire their options by writing or saying certain things. First, there was an email by Mr Chapman on 5 September 2007 in these terms:

> "Dear Friends,
>
> Please find attached a draft IM and Seed Terms for the latest venture I am involved in.
>
> I have secured a very limited amount of Seed (ASIO) and need to know your interest/commitment by late this week and payment due early next week.
>
> There is only $500K with overs of $500K available.
>
> I am personally committing $100K in seed and taking a non-executive director's position.
>
> I will also be investing in the Notes (CAN) once final terms are negotiated with the brokers. We are meeting with the banks & brokers tomorrow …"

[12] Next there was a PowerPoint presentation given to the defendants by Mr Chapman which included the following statements:

> "Management with a proven track record of the successful integration and change management in automotive businesses …
>
> Key Board & Management
>
> Craig Chapman, Non Exec Director

- CFO and Company Secretary of the ASX listed Greencross Ltd;

- Former CFO and COO for S8 Ltd."

[13] They further plead that, again in about September 2007, Mr Chapman said to the third and fourth defendants (Mr Chapman's mother and brother) that he "was involved in running the plaintiff", and that he said to the fifth defendant (Mr Jinks) that Mr Chapman "would be continually involved in the management of the plaintiff."

[14] The rectification case is also pleaded in reliance upon affidavits sworn by each of the defendants. Mr Chapman's wife says simply that she decided to invest "because of my husband's involvement in the company", believing that he "would represent my interests as an option holder in the management of the company." There are affidavits in the same terms sworn by the second, third and fourth defendants. Mr Jinks has sworn that he invested because Mr Chapman was "directly involved in the company" and that "because of his role and his previous prudent operating history, the options would be a good investment", adding that he invested because Mr Chapman "was an integral part of the operating strategy of the company…[and] would represent my interests as an option holder in the management of company". He swore that he then believed that Mr Chapman "would continue to be involved in the management of the company". Mr Edwards' affidavit was worded differently but is to the same effect: he invested only because of Mr Chapman's involvement, and upon an understanding that Mr Chapman would continue to be involved.

[15] Mr Staunton swears that he acquired his options because of his own involvement in the company and also because of that of Mr Chapman.

[16] For present purposes those affidavits must be accepted as true. In each case the affidavit would establish that the investor entered into the option agreement and paid for the options upon an expectation that Mr Chapman would be actively involved in the management of the plaintiff. Further, it must be accepted that this was because of what Mr Chapman, who was then a director of the plaintiff, had said or written. However, the evidence falls far short of proving that there was an agreed term as is now alleged, or that it was intended by both the plaintiff and the option holder that their agreement would contain such a term. In no case has the investor sworn that Mr Chapman or Mr Staunton said that the option consideration could be recovered back from the plaintiff if Mr Chapman ceased to be involved in its management. Nor does Mr Chapman or Mr Staunton swear that this was said, let alone promised, to an investor. And no one has sworn that there was a mistake in the written option agreement by the omission of such a term. It is one thing to have invested upon an expectation of Mr Chapman's role, and another to have done so upon a contractual condition that if that role was not continued, the option agreement could be rescinded and the consideration recovered. The evidence does not show that there is any real prospect of making out this claim for rectification.

[17] A further case pleaded by the defendants is based upon what occurred on 21 August 2008. According to the Defence, when Mr Shreeve said to Mr Chapman and Mr Staunton that if they did not agree to his appointment as a director and executive chairman, Platinum would call a shareholders' meeting to appoint him and remove them as directors, Mr Chapman replied with words to this effect:

> "If you want us to leave then we will be taking our option monies and those of all investors that we introduced, as I do not invest in companies to this extent unless I am associated with the company. A precedent has already been set with the departure of John Hembrow where the company paid back his option monies and then we tried to place the options with other investors."

The defendants plead that in response and on behalf of the plaintiff, "Mr Shreeve assented to Mr Chapman withdrawing the said option monies by saying words to the effect of 'I understand'". From this it is alleged that Mr Shreeve, for the plaintiff, authorised Mr Chapman to withdraw these funds once Mr Chapman had learned, as he did on or about 2 September, that a general meeting was being called.

[18] Mr Chapman has sworn that this conversation occurred and again for present purposes, that must be accepted. But again, the evidence falls far short of the proof of what is required to make out the defence. On no view of Mr Shreeve's "I understand" could it be said that he agreed, on behalf of the company, to vary the terms of the option agreements, and to pay a large sum of money to investors who were not otherwise entitled to it. Clearly, Platinum was able to control the composition of the board and Mr Shreeve did not have to bargain with Mr Chapman and Mr Staunton to ensure their departure. Nor apparently was there any argument which was then put to Mr Shreeve to the effect that the plaintiff might have been bound to repay these funds. In particular, according to the defendants' evidence, it was not put to Mr Shreeve that investors would be entitled to a refund in the event that Mr Chapman departed because of the term which is now said to have been mistakenly omitted from the written option agreements. It is relevant here that the option holders were required to pay further money if and when they exercised their options, so that Mr Chapman's threat may have been understood as referring to the prospect that those funds would not be forthcoming. In any case, in the circumstances the words "I understand" could have meant only that Mr Shreeve understood the threat, but not that the company was yielding to it.

[19] At least on the first hearing of this application, the defendants seemed to argue that the effect of this exchange on 21 August 2008 was that the company, not by Mr Shreeve but by a majority of its then directors in Mr Chapman and Mr Staunton, authorised Mr Chapman to withdraw the funds. That case is not within the subsequent pleading filed by the defendants, although there is something of it in the defendants' present submissions. This argument involves the curious notion that a majority of directors could authorise future dealings by them with the company's property, and in particular an appropriation of the company's funds to themselves for no consideration, in the event that they were by then removed as directors by the shareholders. This argument, if it is still advanced, must be rejected.

[20] The defendants also rely upon evidence by Mr Staunton of a telephone discussion between Mr Chapman, Mr Staunton and Mr Gaudet, in his capacity as a director of Platinum, on or about 30 August last. Mr Staunton says that Mr Chapman then said words to the effect that:

> "if [Mr Shreeve] dictates, then the consequences will be many, including return of investor's option monies, as per John Hembrow and our discussions with [Mr Shreeve] at the most recent board meeting."

Mr Gaudet is said to have "acknowledged the statement" by saying words to the effect of "right" or "okay". According to what are said to be contemporaneous notes taken by Mr Chapman of that discussion, Mr Chapman did say those things to Mr Gaudet. But the notes have no record of any response by Mr Gaudet. Mr Staunton says that on or about 31 August he sent an email to Mr Gaudet saying that if he and Mr Chapman were removed as directors, then "we would remove the seed capital we invested, and the seed capital invested by Mr Chapman's family and associates." There is no alleged response to that email. This evidence of Mr Staunton adds nothing to the defendants' case. Assuming that Mr Gaudet responded with the word "right" or "okay", the effect was not an authorisation of the payment of the plaintiff's funds to the investors. It was simply an acknowledgement, like that of Mr Shreeve, that the threat had been made and was understood.

[21] Accordingly, there is no question of fact which requires a trial. The arguments for Mr Chapman's payment from the plaintiff's account have no real prospects of success. It is not suggested that by further investigation, the defendants' case might be improved. It is not to the point that Mr Shreeve's version of events, which it has been unnecessary to detail here, differs from that of Mr Chapman and Mr Staunton, because even on their version the defendants could not succeed. Nor is it to the point that Mr Hembrow was repaid when he had departed at the beginning of July. This does not support the rectification case. There may be many reasons why the company agreed to repay Mr Hembrow. There is no evidence that it did so because of what the plaintiff thought had been agreed with investors when Mr Hembrow had paid for his options. Nor does the fact that Mr Hembrow was repaid affect what could have been understood from the words attributed to Mr Shreeve and Mr Gaudet.

[22] The plaintiff's case, as pleaded by its amended statement of claim on 31 October 2008, seeks damages for breach of fiduciary duty or under s 181 and s 182 of the *Corporations Act* 2001, in the sum of $560,000. Alternatively, it seeks an order that the sum presently held by the plaintiff's solicitors be paid to the plaintiff. Apart from that last order, there is no relief claimed which affects other defendants. Nor is there any allegation that some further loss has been suffered in consequence of the appropriation made by Mr Chapman. Accordingly, the plaintiff's position will be restored by an order for the payment of the sum now held by its solicitors. That includes $50,000 attributable to Mr Edwards, who is not a defendant. This judgment will not preclude any claim by Mr Edwards for

repayment. However the defendants, and Mr and Mrs Chapman in particular, have no entitlement to those funds and they too should be repaid to the plaintiff.

[23] There is a counterclaim by the defendants for rectification and for declaratory relief. In particular they seek declarations that they have duly rescinded their option agreements and are entitled to the return of the monies paid under them. It follows from these reasons that the plaintiff should have judgment against the defendants upon their counterclaim. I will hear the parties as to costs.