

SUPREME COURT OF QUEENSLAND

CITATION: *Ure v Robertson* [2010] QSC 483

PARTIES: **LYNNE KATHLEEN URE**
(plaintiff)
v
PATRICIA JUNE ROBERTSON
(defendant)

LYNNE KATHLEEN URE
(first defendant by Counterclaim)
RONALD ARCHIBALD URE
(second defendant by Counterclaim)
SUMMERHILL PROPERTY DEVELOPMENTS PTY LTD (ACN 010 558 460)
(third defendant by Counterclaim)

FILE NO/S: 2634/07

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 22 December 2010

DELIVERED AT: Brisbane

HEARING DATE: 8 December 2010

JUDGE: Ann Lyons J

ORDER:

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES – Where proceeding commenced on 26 March 2007 – where Notice of Intention to Defend and Defence filed on 26 April 2007 and an amended Defence was filed on 22 October 2008 – where matter set down for trial on 28 October 2008 – where trial adjourned at request of defendant to enable her to proceed with a counterclaim – where defendant filed further amended defence and counterclaim almost two years later on 3 September 2010 – where by this application, filed 17 November 2010, the applicants (defendants by counterclaim) seek certain paragraphs of the counterclaim be struck out and certain items of the prayer for relief be set aside or declared ineffectual pursuant to r 371(2) of the UCPR – where the applicants also seek to strike out paragraphs of the

counterclaim pursuant to r 171 of the UCPR – where alternatively the applicants seek further and better particulars of the subject paragraphs – where alternatively the applicants seek the counterclaim be struck out in its entirety pursuant to r 171 – whether such Orders should be made.

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – where the respondents’ Counterclaim seeks an accounting of the sale proceeds between May 1999 and January 2003 – where the applicants contend that s10(2) of the *Limitations of Actions Act* 1974 (Qld) applies – whether the respondents’ Counterclaim is out of time and statute barred – whether the respondents were required to obtain leave to make an amendment contained in the Counterclaim insofar as it sought relief by way of the taking of accounts.

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – PARTICULARS – where the respondents alleges fraudulent misappropriation against the applicants – whether the particulars alleged in the Counterclaim to support the allegation of fraudulent misappropriation are incapable of sustaining the allegation – whether the paragraphs alleging fraud should be struck out – whether there should be liberty to replead – whether the disclosure by the applicants, sought by the respondents should be provided

Limitations of Actions Act 1974 (Qld), s 10(2), s 10(6)(b), s42
Uniform Civil Procedure Rules 1999 (Qld), r 150, r 371, r 375, r 376, r 378

Donkin v Official Trustee in Bankruptcy [2003] QSC 401

Draney v Barry [2002] 1 Qd R 145

Hennesy v Wright (1888) 24 QBD 445

Lyons v Kern constructions (Townsville) Pty Ltd (1983) 47 ALR 114

Zierenberg v Labouchere [1893] 2 QB 183

COUNSEL: M Amerena with N Jarro for the plaintiff/first, second and third defendants by Counterclaim

SOLICITORS: L Kelly SC with S Gerber for the defendant
 Callaghan Lawyers for the plaintiff/first, second and third defendants by Counterclaim

McCormick Lawyers for the defendant

Ann LYONS J:

History of the proceedings

- [1] The plaintiff, Mrs Ure, commenced these proceedings against the defendant Ms Robertson on 26 March 2007.
- [2] A Notice of Intention to Defend and Defence was filed by Ms Robertson on 26 April 2007 and an amended Defence was filed on 22 October 2008.
- [3] The matter was set down for trial on 28 October 2008.
- [4] At Ms Robertson's request, the trial was adjourned to enable her to proceed with a Counterclaim against Mrs Ure, Ms Robertson's brother, Ronald Ure (Mr Ure) and Summerhill Property Developments Pty Ltd (Summerhill).
- [5] Mrs Ure's former solicitors ceased representing her and new solicitors took over in July 2009.
- [6] It is clear that Ms Robertson has had some difficulties in obtaining subpoenaed material. There have also been unsuccessful attempts to obtain documents relating to the change of shareholdings and officers in Summerhill from the accountant who maintains the registered office for that company. A subpoena directed to that accountant and a notice of non party disclosure of 7 July 2010 have yielded a response that the accountant has no documents relating to the changing of the ASIC details of Summerhill.
- [7] A notice of non-party disclosure directed to Mr Ure was responded to on the basis that he objected to providing any of the documents sought.
- [8] Ms Robertson filed a further amended Defence and Counterclaim on 3 September 2010 almost two years after the trial was adjourned. The defendants to the Counterclaim have not pleaded to it.
- [9] The current applicant is the plaintiff (Mrs Ure) and the first, second and third defendants by Counterclaim Mrs Ure, Ronald Ure (Mr Ure) and Summerhill Property Developments Pty Ltd (Summerhill). The application seeks to challenge several aspects of Ms Robertson's pleadings.

The pleadings

The Statement of Claim

- [10] In the statement of claim Mrs Ure claims an alleged breach of contract. Mrs Ure alleges that on or about July 2002 Ms Robertson orally agreed that Mrs Ure was, for reward, to take all steps necessary to obtain development, building and operational works approvals from the Noosa Shire Council in respect of a vacant block of land that Ms Robertson owned at 10 Park Road, Noosa Heads (Noosa property).
- [11] Mrs Ure claims that by 27 November 2006 she had obtained a development approval subject to conditions and had applied for a building approval.
- [12] Mrs Ure claims a second oral agreement was entered into with Ms Robertson on 27 November 2006 at Clayfield in the presence of Mr Ure whereby Mrs Ure undertook to cause the fulfilment of the conditions imposed by the Council to obtain building

approval and operational works approval and Ms Robertson would pay for those services in the sum of “\$800,000 net of architect and engineer fees at settlement from the proceeds of the sale of the Property.”

- [13] Mrs Ure claims that building and operational approvals were obtained on 2 January 2007 and the property settled on 22 February 2007 for a contract price of \$3,015,000. Mrs Ure also claims that an amount of \$800,000 was paid by Ms Robertson into her solicitor’s trust account pending an order of the court. Mrs Ure claims that despite demand the amount of \$800,000 owing under the agreement has not been paid.

Defence

- [14] Ms Robertson denies the alleged oral agreements.
- [15] Ms Robertson pleads by way of defence that:
- (a) all arrangements she had were with her brother, Mr Ure, and not with Mrs Ure;
 - (b) she owned the property at 10 Park Road Noosa and Mr Ure owned the adjoining property at 8 Park Road Noosa;
 - (c) Ms Robertson and Mr Ure had previously been engaged in the joint development of property at Buderim through a company, Summerhill. Summerhill is the third defendant by Counterclaim.
 - (d) in relation to Mr Ure obtaining development approval for her Noosa Property there was an arrangement that Mr Ure represented in November 2003 that the money owing to Ms Robertson from the development of the Buderim land, through Summerhill (the vehicle for that development) would be used to defray expenses of architects, engineers, council and building approvals in respect of each of 8 and 10 Park Road;
 - (e) Mr Ure represented that the balance remaining in the Summerhill account, which account was under his control, would be shared between Mrs Ure and Ms Robertson once the costs of obtaining approvals had been met;
 - (f) there was no agreement that Mr Ure or Mrs Ure were to receive any personal reward for the obtaining of building approvals over the Noosa property owned by Ms Robertson.

The Counterclaim

- [16] The Counterclaim relates to a partnership or joint venture (the fiduciary relationship) entered into between Ms Robertson and her brother, Mr Ure and is pleaded on the basis set out below.
- [17] Summerhill was the corporate vehicle used. The purpose of the fiduciary relationship was to purchase and subdivide the Buderim property which was purchased by Summerhill in 1985.
- [18] The profits from the development and sale of the Buderim property were to be distributed equally between Ms Robertson and Mr Ure, through Summerhill.

- [19] As a result of the partnership (or joint venture) relationship a fiduciary duty arose between Ms Robertson, Mr Ure, and Summerhill.
- [20] The Buderim property was unencumbered when it was sold. It was subdivided and sold over the period from May 1989 to January 2003. The total sale proceeds were \$2,050,000.00, being the approximate net profits of the partnership, and were paid into Summerhill's ANZ bank account.
- [21] Ms Robertson, on her pleaded case, owned or was entitled to half of those proceeds.
- [22] Ms Robertson pleads that the proceeds have largely disappeared without her knowledge or consent and that the available inference is that they have been dishonestly misappropriated by Mr Ure with the knowledge of Summerhill (which he and Mrs Ure controlled).
- [23] Paragraph 26 of the Counterclaim alleges that in breach of the fiduciary duty owed to Ms Robertson, Mr Ure has refused to account to Ms Robertson for her share of the profits from the fiduciary relationship and has fraudulently misappropriated Ms Robertson's share of the profits.
- [24] The particulars relied on to support these allegations are set out in paragraphs 2(c)(iii), 2(c)(iv) and 9(g)(iv)A to 9(g)(iv)C of the further amended defence. Those allegations are as follows:
- (a) In November 2003, Mr Ure represented that the money owing to Ms Robertson pursuant to the fiduciary relationship would be used to meet the costs of obtaining development approval for her Noosa Property and for Mr Ure's neighbouring property.
 - (b) Mr Ure represented to Ms Robertson that the balance of the money in Summerhill's account (the profits from the partnership) would be shared equally between him and Ms Robertson.
 - (c) On 19 April 2005, without Ms Robertson's knowledge or consent, Mr Ure and Mrs Ure caused:
 - (i) Ms Robertson to be removed as one of the two directors of Summerhill (the other director being Mr Ure) and replaced by Mrs Ure; and
 - (ii) Ms Robertson to be removed as the company secretary of Summerhill, again without her knowledge or consent.
 - (iii) Ms Robertson's one share in Summerhill to be transferred to Mrs Ure (the other share being owned by Mr Ure).

The present application

- [25] By this application filed on 17 November 2010 Mrs Ure, Mr Ure and Summerhill, the defendants by Counterclaim, seek orders that:
- (i) Paragraph 26(a) of Ms Robertson's Counterclaim and items 1 and 2 of the prayer for relief be set aside or be declared ineffectual pursuant to r 371(2) of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) as a consequence of the alleged failure to comply with the rules;
 - (ii) Paragraphs 26(b) and 27 of Ms Robertson's Counterclaim be struck out pursuant to r 171 of the UCPR;

(iii) Alternatively, that further and better particulars of paragraphs 26 (b) and 27 be provided; and

(iv) Alternatively, that the Counterclaim be struck out pursuant to r 171 in its entirety.

- [26] At the hearing the defendants by Counterclaim essentially challenged two aspects of the plaintiff's Counterclaim.
- [27] First, insofar as the Counterclaim alleges an action for an account it is contended that leave pursuant to r 376 was required to amend as the claim for account was statute barred. Leave was not obtained and accordingly it is argued that there is an irregularity and pursuant to r 371 there should be a declaration in accordance with r 371(2)(c) that the amendment was ineffectual.
- [28] Secondly, in relation to paragraphs 26 and 27, the defendants by Counterclaim contend that the pleading discloses no reasonable cause of action and has a tendency to delay and prejudice the fair trial of the proceeding. Furthermore, it is inadequately particularised, particularly given it is an inadequate fraud pleading.
- [29] Counsel for Ms Robertson argues that the pleaded facts clearly support her counter claim, which should be permitted to go to trial.

Leave to plead an account not obtained

- [30] The plaintiff's Counterclaim was filed on the basis it was an amendment pursuant to r 378, which provides that before filing a request for trial date a party may, as often as necessary, make an amendment for which leave from the court is not required.
- [31] The Counterclaim seeks an accounting of the sale proceeds made between May 1999 and January 2003 in relation to a subdivision and sale of land at Buderim. The defendants by Counterclaim, however, argue that s 10(2) of the *Limitations of Actions Act 1974 (Qld)* applies. That section provides that an action for an account shall not be brought in respect of a matter that arose more than six years before the commencement of the action.
- [32] Accordingly, the defendants by Counterclaim argue that the plaintiff's Counterclaim, insofar as it seeks relief by way of an account, is out of time and statute barred because the relevant period of limitation under the *Limitations of Actions Act* ended in early 2009. That limitation period is calculated on the basis that the net proceeds of sale from the last sale were paid into the account of the third defendant by Counterclaim's bank account on 13 January 2003.
- [33] The defendants by Counterclaim therefore argue that the plaintiff by Counterclaim was required to obtain leave to make an amendment contained in the Counterclaim insofar as it sought relief by way of the taking of accounts. It is argued that leave was required as the general power to amend in r 375 is subject to r 376 and that r 376 requires that leave be obtained if a relevant period of limitation, current at the date the proceeding was started, has ended.

- [34] The defendant by Counterclaim relies on a series of decisions including *Donkin v Official Trustee in Bankruptcy*¹ and *Draney v Barry*² to argue that r 376 is a mechanism by which the provisions of the *Limitations of Actions Act* cannot be circumvented.
- [35] As such, it is argued that an amendment pursuant to r 378 was inappropriate because r 378 only applies to amendments for which the leave of the court is not required. Furthermore, that not only was leave was not obtained, it would not have been granted because the provisions of r 376, subrules (2), (3) and (4) would not have been satisfied in any event.
- [36] It is therefore argued that the Counterclaim insofar as it concerns an action for account is an irregularity within r 371 and that paragraph 26(a) of the Counterclaim and items 1 and 2 of the prayer for relief should either be set aside or declared ineffectual.
- [37] Section 42 of the *Limitation of Actions Act* (the Act) clearly provides that a claim by way of Counterclaim shall be deemed to be a separate action and to have commenced on the same date as the action in which the Counterclaim is pleaded.
- [38] In my view, leave is not required under r 376 of the UCPR as pursuant to s 42 of the Act the Counterclaim is deemed to have commenced on 26 March 2007. The claim made by the Counterclaim was therefore commenced within the relevant period of limitation.
- [39] An examination of r 376 also makes it clear that the rule relates to amendments to an existing pleading. Rule 376(4) applies where a party has pleaded or has attempted to plead a cause of action in an earlier pleading. That has not occurred in this case.
- [40] When the Counterclaim was filed it was in fact a new proceeding. As Cairns³ states “A counter claim is treated as a proceeding in its own right.” In my view therefore the relevant rules are found at r 175 and 176 of the UCPR. Rule 175 provides that “This division applies to a Counterclaim and an answer to a Counterclaim with necessary changes and, in particular, as if the plaintiff in the original proceeding were a defendant and the defendant a plaintiff.” No objection to the Counterclaim has been made by reference to these rules.
- [41] I do not consider that r 371 applies, as I do not consider there has been a failure to comply with the rules as argued. I am not satisfied that there has been a failure to comply with r 376, because I do not consider that leave was required. I can see no basis therefore to set aside paragraph 26(a) or Items 1 and 2 of the Prayers for Relief pursuant to r 371.
- [42] Counsel for the applicants argues that this is unfair as it means that the applicants have been deprived of the limitation defence under s 10 of the Act. Counsel submits that in order to treat his client fairly an order should be made that the Counterclaim only takes effect from the date it was filed in this court, that is, 3 September 2010, rather than the date the original proceedings commenced on 26

¹ [2003] QSC 401

² [2002] 1 Qd R 145

³ 5th Edition p 208

March 2007. If such an order was made, Counsel submits that the applicants could plead the *Limitation of Actions Act* in their answer. In my view, such a course would defeat the clear legislative intent of s 42 of the Act. It is also clear that the defendants by counterclaim have not filed and served an answer to the Counterclaim.

- [43] It is also argued that s 38 (1) of the Act applies. That section provides that the limitation period is postponed in circumstances where it is alleged there has been fraud by the defendants to the Counterclaim such that the period of limitation does not begin to run until the plaintiff has discovered the fraud or could, with reasonable diligence, have discovered it. Counsel for Ms Robertson argues that the six year limitation period only started to run when Ms Robertson checked her balance in the Summerhill account following her conversation with the Ures on 27 November 2006 and discovered funds of only \$7,000 or \$8,000. Counsel for the defendants to the Counterclaim argue that, even if that assertion were true, that would not demonstrate that the plaintiff's right to an account was concealed by fraud of the defendant and neither has this been pleaded in the Counterclaim.
- [44] Given my views in relation to the clear meaning of s 42 of the Act, I do not consider it necessary to consider these arguments.
- [45] It is also submitted that s 10(6)(b) of the Act provides that the requirement that actions shall not be brought after the expiration of 6 years from the date on which the cause of action arose does not apply in relation to equitable relief. Counsel submits that the Counterclaim claims account as an equitable remedy because of a breach of a fiduciary duty and therefore the limitation period does not apply in any event. This is also disputed by Counsel for the defendants by Counterclaim. Once again I do not consider it necessary to consider this issue given my view that the action is not statute barred.
- [46] I do not consider that paragraph 26 (a) and items 1 and 2 of the Prayers for Relief should be set aside.

Has there been a failure to provide particulars of the allegation of fraud?

- [47] Counsel for the applicant/defendants by Counterclaim argue that the particulars alleged to support the allegation of fraudulent misappropriation by Mr Ure involving Mrs Ure and Summerhill are incapable of sustaining an allegation of fraudulent misappropriation. Counsel points out that there is no mention in the particulars of a dishonest application or taking, by Mr Ure, of any money. In my view, there is considerable force to this submission.

Submissions on the Counterclaim

- [48] Counsel for Mrs Robertson argues that Ms Robertson only discovered that this large sum of money, and her share of it, was missing when she checked the bank account following a meeting with Mr and Mrs Ure on about 27 November 2006. By that time, of the net profits of \$2,050,000 which should have been in the account, only something between \$7,000 and \$8,000 remained.
- [49] Counsel submits that on Ms Robertson's case, as pleaded in the Counterclaim, the conduct referred to above was:

- (a) done without Ms Robertson knowing, realising or understanding that it had occurred;
- (b) done without the involvement of the accountant whose office is the registered office for Summerhill – as no document was returned pursuant to a notice of non-party disclosure. The accountant's letter of 16 July 2010 indicated that he had no correspondence at all in relation to the changing of the ASIC details of the company, the forms not being lodged by his office and that he was not aware of the situation;
- (c) destructive of and inconsistent with Ms Robertson's entitlements in the fiduciary relationship with her brother, which were enjoyed through the vehicle of Summerhill;
- (d) conduct that involved the expropriation of property from Ms Robertson (her share in Summerhill) and her rights as a director, which were fundamental attributes of the fiduciary relationship, without her consent.

[50] On Ms Robertson's case it is not just Mr Ure who had to be involved in this conduct. It also involved Summerhill, which had the knowledge of Mr Ure and which was the vehicle of the joint venture relationship. Further, it is argued that Mrs Ure would be expected to have been involved as she took over the rights of Ms Robertson as a director and took the property that Ms Robertson held in Summerhill, namely her share in that company. The claim against Mrs Ure and Summerhill is that they were knowingly involved in Mr Ure's breach of fiduciary duty.

[51] The difficulty with paragraphs 26 (b) and 27 is that both paragraphs are embarrassing. Those paragraphs are a jumble of allegations of breach of partnership, or breach of a joint venture or breach of a fiduciary relationship. They then raise an allegation of fraudulent misappropriation, effectively as an element of the breach of partnership or joint venture agreement, and a breach of fiduciary obligation: and not by pleading the material facts for a claim for fraud, but by reference to particulars of other allegations. That does not plead the material facts in a way which clearly identifies them as material facts, and which enables the other parties properly to plead to them. The material facts are not pleaded.

[52] Counsel for Ms Robertson argues that the appropriate direction is that the defendants by Counterclaim should be required to file an Answer and Reply within 14 days as they have no difficulty in understanding the case of dishonesty against them and can plead a response to the allegations made against them. I do not consider however that the case of dishonesty has in fact been sufficiently pleaded.

[53] Pursuant to r 150(1)(f) of the UCPR fraud is a matter which has to be specifically pleaded and pursuant to r 150(2) every fact from which fraud is claimed as an inference must also be specifically pleaded.

[54] I do not consider that every fact which forms the basis of the allegation of fraud or every fact from which an inference of fraud could be made, has in fact been properly pleaded. All specific pleadings must be accompanied in the pleading by particulars necessary to support them. The pleadings are clearly deficient in this regard.

[55] I consider that paragraph 26 (b) and 27 should be struck out.

- [56] There should be liberty to plead. Ms Robertson needs to plead the material facts on which the allegation of fraudulent misappropriation is based.
- [57] It would seem clear, however, that she cannot do this, with proper particulars, without the disclosure sought by Ms Robertson.
- [58] The affidavit material indicates that Ms Robertson has been attempting to obtain information in relation to the allegations in her Counterclaim by way of non party disclosure against both Mr Ure and the accountants for Summerhill. It is clear that the documents sought have not been provided. A number of reasons have been propounded for this failure, namely that they are alleged to be the property of Summerhill, are not relevant to the proceedings, do not prove the matters asserted in the amended defence or are a ‘fishing expedition’. It is also submitted that a “decades worth of documentation over a wide range of matters” is involved and that the request was oppressive given the expense and inconvenience involved.
- [59] Counsel for Ms Robertson therefore argues that she is currently unable to provide further particulars of the allegations in paragraphs 26(b) and 27 of the Counterclaim. I accept the submission from Counsel for Ms Robertson that the particulars sought are solely within the knowledge of the defendants by Counterclaim.
- [60] It is therefore argued that further particulars can only be provided after the defendants by Counterclaim have made disclosure. Reliance was placed on the decision in *Lyons v Kern constructions (Townsville) Pty Ltd*⁴ where it was held that discovery could be granted even before delivery of a statement of claim if exceptional circumstances exist and the discovery was necessary to formulate the pleading. That decision examined the principles which applied in the exercise of the discretionary judgment and held:⁵

“In *Leitch v. Abbott* (1886) 31 Ch.D 374, the plaintiff alleged that he had employed the defendant as a stock broker but that the defendant had had in many of the transactions dealt with himself as principal and had also charged the plaintiff with monies not paid. The Court of Appeal held that though there were no particulars of the fraud alleged, the plaintiff was entitled to answers to interrogatories asking for details of the dealings by the defendant on behalf of the plaintiff and the names of the person with whom the defendant had dealt and the amounts paid. Commencing at the foot of p.376, Cotton L.J. said:

‘There is here a general allegation of fraud and the Plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings, but to say that he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed. ... there is here a statement of the nature of the fraud alleged. The Plaintiff may hereafter have to condescend to particulars, but, in my opinion, it would be wrong to say that he is not entitled to have this discovery now, because he has not given full details of the fraud which

⁴ (1983) 47 ALR 114 at 126-130

⁵ (1983) 70 FLR 135 at 149-150

he alleges. We may possibly have to decide to what extent the Defendant is obliged to go into all these matters, but, in my opinion, it would be wrong to say that the Court has a discretion to deprive the Plaintiff of discovery altogether, either until the trial of the action, or until he has given details of the fraud which he alleges. He wants the discovery in order to enable him to give those details, and to establish his right to relief at the trial. I think, therefore, that the Defendant must give a further answer to the interrogatories ... ‘.

Commencing at the foot of p.378, Bowen L.J. said:

‘Ought, then, the generality of an allegation of fraud to be a bar to the right to discovery? It seems to me that the very fact that the pleader is unable to plead except in general terms, is in many cases the very reason why he should have discovery from the other party, so as to enable him to plead the fraud in detail. If at a particular stage of an action you are stopped by reason of your ignorance of some fact which is known only to the other party, that is the very reason why you should have discovery of that fact from him, and what difference does it make whether you are stopped at the trial or before? . . .’”

...

The ability of a plaintiff in a fraud action to provide one or more specific instances seems to have been accepted as sufficient to enable him to have discovery before being required to particularise further examples of the defendant’s misconduct of which he is not and could not be aware: see per Farewell LJ in *Arnold and Butler v Bottomley* [1908] 2KB 151 at 157.”

- [61] It is clear that such an order for discovery prior to particulars is not the norm but as *Kern* established “Each case must be decided on its merits and particular circumstances. The ultimate object is to mould the court’s procedures to do justice between the parties.”⁶ In *Zierenberg v Labouchere*⁷ it was held that “discovery has never been allowed in the absence of some relationship between the parties to the action, except under exceptional circumstances, such as one party keeping back something the other is entitled to know.”
- [62] In my view it would appear that Mr Ure (and perhaps Mrs Ure) is keeping back something which Ms Robertson is entitled to know. Ms Robertson claims that she has been removed as a director and that her shareholding has been transferred to Mrs Ure. As a former director and shareholder of Summerhill she is entitled to information in relation to the changes to the directorships and shares which are alleged. It would also seem to me that all the information and documentation Ms Robertson needs to plead to the issue of fraud is in fact particularly within the knowledge and control of Mr and Mrs Ure. Apparently the accountants who act for Summerhill have been unable to provide the particulars sought. I consider that the documentary material and information sought in relation to these changes should be provided to Ms Robertson by Mr Ure and Mrs Ure.

⁶ At p151

⁷ [1893] 2 QB 183

[63] I also consider that there should be full disclosure of the Summerhill accounts in order for Ms Robertson to understand the nature of the transactions which have occurred. I consider however that some clear directions are needed to limit the extent of the disclosure required.

[64] It is also clear that discovery should not be made available for the purposes of ‘fishing’. As Lord Esher MR said in *Hennessy v Wright*:⁸

“The moment it appears that questions are asked and answers insisted upon in order to enable a party to see if he can find a case, either of complaint or defence, of which at present he knows nothing, and which will be a different case from that which he know makes, the rule against ‘fishing’ applies.”

[65] Accordingly I consider that there should be orders that

- (i) that paragraph 26 (b) and 27 of the Counterclaim should be struck out.
- (ii) the plaintiff by Counterclaim has leave to replead.
- (iii) the defendants by Counterclaim are to provide disclosure in relation to the company records of Summerhill and the financial transactions with respect to Summerhill at least since January 2003.

[66] I will hear from Counsel as to the form of the Orders and as to Costs.

⁸

(1888) 24 QBD 445