SUPREME COURT OF QUEENSLAND

CITATION:	*Bli Bli #1 Pty Ltd & Anor v Kimlin Investments Pty Ltd & Ors* [2011] QSC 416
PARTIES:	**BLI BLI #1 PTY LTD** (first plaintiff) and **BLI BLI #2 PTY LTD** (second plaintiff) **v** **KIMLIN INVESTMENTS PTY LTD (as trustee for the Kimlin Family Trust)** (first defendant) and **PUGS PTY LTD (as trustee for the Brett Cook Family Trust)** (second defendant) and **ROSS COOK AND BRETT COOK PTY LTD (as trustee for the Ross Cook and Brett Cook Unit Trust)** (third defendant) and **ROSS KINGSTON COOK** (fourth defendant) and **BRETT KINGSTON COOK** (fifth defendant)
FILE NO/S:	BS5077/07
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	23 December 2011
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	13 October 2011
JUDGE:	Douglas J
ORDER:	**Dismiss the plaintiffs' application and make an order pursuant to Rule 188 of the *Uniform Civil Procedure Rules* 1999 (Qld) that the defendants have leave to withdraw:** **(1) any admission of the allegations at paragraphs 8(c), 10, 11, 12, 13, 14, 15, 16, 17, 18, 21A, 24, 25B,**

26(a), 26(b), 28A(b), 37A and 38, of the plaintiffs' fourth amended statement of claim filed on 19 June 2009 and to replead in the form contained in the amended defence to the fourth amended statement of claim filed 28 September 2011;

(2) the admission at paragraph 14(aa) of the amended defence filed 27 April 2011 and to replead in the form contained in the amended defence to the fourth amended statement of claim filed 28 September 2011.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEEDINGS – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – where defendants seeking to withdraw admissions in amended defence relating to grant of options to joint venturers and assignment of an interest in each option to plaintiffs – where application by plaintiffs to strike out corresponding amendments made to amended defence without leave – where defendants admitted existence of joint venture – where defence amended to raise new defence of uncertainty of description of joint venture land – where matter not yet set down for trial – where numerous amendments to pleadings on both sides – whether leave ought be refused to raise new defence – whether defendants ought be permitted to withdraw admissions to litigate whether options were assignable

ESTOPPEL – GENERALLY – where defendants seeking to plead for first time that trustee of Rubin Family Discretionary Trust diluted interest in joint venture and ceased to be joint venturer as no contribution made to funding of joint venture – where matter now yet ready for trial – whether defendants estopped from mounting new allegations in pleadings

Uniform Civil Procedure Rules 1999, r 188

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175 cited
Bli Bli # 1 Pty Ltd v Kimlin Investments Pty Ltd [2010] QCA 136 cited
Commonwealth v Verwayen (1990) 170 CLR 394 distinguished
MLC Life Ltd v Navani Pty Ltd, Supreme Court of Queensland, No. 3721 of 1989, Dowsett J, 22 March 1994, BC9401425, unreported cited
Ridolfi v Rigato Farms Pty Ltd [2001] 2 Qd R 455 referred

COUNSEL: KA Barlow SC for the plaintiffs
DR Cooper SC and Mr Charles Wilson for the defendants

SOLICITORS: Tucker and Cowen for the plaintiffs
Attwood Marshall for the defendants

[1] **Douglas J**: This is an application by the defendants to withdraw a number of admissions in their amended defence made expressly or deemed to have been made by operation of the *Uniform Civil Procedure Rules* 1999. The plaintiffs have also applied to strike out corresponding amendments that had been incorporated in the amended defence without leave and argued that the defendants were estopped from pleading certain matters contained in their amended defence.

[2] A further application by the defendants to strike out allegations in the amended reply did not proceed because the plaintiffs conceded that the reply needed to be redrawn and indicated that some of the concerns of the defendants in respect of the reply would be considered by them when that task was undertaken in the light of my decision.

Background

[3] The dispute between the parties stems from an agreement alleged to have occurred in January 2005 which was described as a joint venture where the plaintiffs were not originally contracting parties but claimed to have become so later by an assignment of options to them. The joint venture is said to have been established originally between the defendants, identified as the Cook interests, and a Mr Ben Rubin as trustee of the Rubin Family Discretionary Trust. The joint venture was to acquire 5 hectares contained in lot 4 of a registered plan of land at Bli Bli from a Mr Keith Cooney for use as an industrial estate and later to lease a further 20 hectares of land collectively contained in the northern parts of lot 4 and an adjoining lot 1 on another registered plan also from Mr Cooney for use as a quarry.

[4] Mr Cooney is alleged to have granted the original co-venturers, two options, one to purchase and the other to lease the relevant areas of land in January and May 2005 respectively. The Rubin interest in the option to purchase the 5 hectares on the lot 4 land was alleged to have been assigned to the first plaintiff in April 2005 while the Rubin interest in the option to lease the other 20 hectares on lots 4 and 1 was alleged to have been assigned to the second plaintiff in June 2005.

[5] Initially the defendants admitted that a joint venture existed but have amended the defence to assert that the agreement was void for uncertainty because the parties did not describe the joint venture land sufficiently. The land to be purchased had been described as "proposed lot 3" shown as part of an existing lot 4 on a registered plan. The proposed lot 3 is alleged by the plaintiffs to be shown, hand drawn, on a copy of a plan of the existing subdivision but was not described more precisely than appears by that drawing. Mr Brett Cook says that the original co-venturers did not define the bounds of the land that they would acquire.

[6] The land to be leased was shown as a hatched area on another depiction of lots 4 and 1 and described as "Area to assess for proposed quarry" and, again, not described by metes and bounds. Mr Brett Cook says that at no stage did the parties define the metes and bounds of that land.

[7] The defendants also wish to withdraw their admissions of other allegations made in pars 12, 13, 15, 16, 17 and 21A(a) of the statement of claim relating to the grant of

the options to the joint venturers and the assignment of an interest in each option to the plaintiffs. The wish to withdraw those admissions is based, in the first place, on the same argument, the alleged uncertainty of the description of the joint venture land.

[8] Alternatively, the defendants wish to argue that the interests of the initial co-venturers were not assignable because the contract was personal among the initial co-venturers so that the plaintiffs could not take such assignments of the options. In that context Mr Brett Cook has sworn that he was friends socially with Mr Rubin at the time and that he and his father would not have entered into a joint venture with Mr Rubin were it not for the fact that he was a friend of Mr Brett Cook and someone with whom he and his father had had business dealings previously.

[9] There are other particular issues raised by the proposed amendments but the bulk of the argument revolved around those issues, the certainty of the description of the joint venture land and whether the interests in the grant of the options were not assignable because they were personal to the original contracting parties and whether the defendants should be permitted, in the circumstances, to go back on their original admissions.

[10] The defence now also seeks to plead for the first time in pars 11A(d) to (i) and 14(ab) that Mr Rubin diluted his interest in the joint venture and then ceased to be a joint venturer with the defendants because he did not contribute to the funding of the joint venture. The plaintiffs argue that the defendants should now be estopped from making such a case, largely because of their present inability to speak to Mr Rubin.

[11] He was willing to speak to the plaintiffs' solicitors some years ago but is now not willing to speak to them and has not responded to their requests for information. The solicitors conferred with him some years ago but do not know where he lives now although they may not yet have made a determined attempt to find out. Philip McMurdo J has also refused an application by the plaintiffs for leave to interrogate him.

[12] The action has not been set down for trial, an event which is likely to be still some time into the future. It is on the supervised case list. The pleadings have been amended on each side previously on a significant number of occasions. It has been to the Court of Appeal already after a previous interlocutory decision relating to the striking out of allegations in the statement of claim.[1]

Discussion

[13] The plaintiffs criticise the adequacy of the reasons offered by the defendants for wishing to withdraw their admissions of the joint venture and the assignability of the options by reference to the decision in *Ridolfi v Rigato Farms Pty Ltd.*[2] The reasons contained in Mr Brett Cook's affidavit relating to the failure to define the relevant parcels of land in the agreement and to the nature of his relationship with Mr Rubin do assist in explaining why those particular amendments are sought. One suspects that the realisation of the relevance of those facts may also owe something to counsel re-thinking the defence on becoming aware of the potential legal

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1 *Bli Bli # 1 Pty Ltd v Kimlin Investments Pty Ltd* [2010] QCA 136.

2 [2001] 2 Qd R 455, 459, [20]-[21].

significance of those instructions. Although the explanation is not expansive it does set out the relevant context in which the issues are raised.

[14] Mr Brett Cook also addresses a number of other issues in his affidavit by describing them as draftsmen's errors or oversights. For example, he explains the wish to withdraw an admission that notice of an assignment had been given in respect of par 18 of the statement of claim in par 11B of the defence by saying that he had conducted a search of company records and found no record of the receipt of a notice of assignment in those records. Those reasons were criticised as not being supported by any material from those who drafted the pleadings to support those assertions. By the same token there is no suggestion that the original admission has affected the availability of relevant evidence on that issue to the plaintiffs. In the circumstances it seems legitimate for me to conclude that the admission was made by error or oversight.

[15] The reasons offered by the defendants for the amendments they wish to make to the defence focus on what they characterise as questions of law relating to the certainty of the joint venture and their assignments of the options. They also characterise the inability to assign the options because of their being personal to the original co-venturers as a question of law but, in my view, that issue has some potential to give rise to mixed questions of fact and law and will be likely to depend on whether the parties agreed to permit an assignment of a co-venturer's interest[3]. That such an agreement occurred is part of the plaintiffs' case, pleaded in par 21A of the statement of claim.

[16] The certainty issue about the description of the land does seem to me to be one which can arise legitimately on the facts already pleaded and particularised although it was not pleaded as such originally. There is no reason to deny the defendants the opportunity to raise that issue at this stage, which is still remote from a trial, even if they and their lawyers have conducted the proceedings so far without recourse to such an argument. It is principally a legal issue which appears to depend largely on the contractual effects of the plans particularised as describing the joint venture land and the land to be leased.[4] In saying that the issue may arise legitimately I am not to be taken as expressing any view about the strength of the argument.

[17] It is not a case where it can be said justifiably that the defendants can no longer take the point because of their previous conduct of the proceedings. In *Commonwealth v Verwayen*[5], unlike here, the Commonwealth had said that its policy was not to plead a limitations defence and then reneged on that stance. Rather, this is a course taken by the defendants that is still relatively common, if regrettable, in litigation where a party amends a pleading to raise a new defence.[6] The stage of the litigation and its history of many amendments to the pleadings does not persuade me that I should refuse leave to the defendants to raise this issue at this stage. It is not as if they

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3 See, eg, *Halsbury's Laws of Australia* at [120-1485]: "Whilst a partner cannot assign their interests without the consent of their co-partners, the participants in a joint venture usually decide upon assignment of their interest when specified conditions and procedures are met."

4 See *MLC Life Ltd v Navani Pty Ltd*, Supreme Court of Queensland, No. 3721 of 1989, Dowsett J, 22 March 1994, BC9401425, unreported.

5 (1990) 170 CLR 394.

6 See the discussion in *Commonwealth v Verwayen* (1990) 170 CLR 394 at 447-448 per Deane J.

were seeking to do it during the trial. Although it is a case that has been supervised and has already been to the Court of Appeal it is not yet ready for trial.[7]

[18] The argument that the options were not assignable raises questions that are more likely to be complicated by the fact that Mr Rubin was once cooperative with the plaintiffs and is so no longer. That attitude by him, however, should not dictate whether it is legitimate for the defendants now to raise this issue.

[19] In my view the solution to the problem is affected to some extent by the amendment made to the defence to plead that Mr Rubin ceased to be a joint venturer because he did not contribute to the funding of the joint venture and the argument by the plaintiffs that the defendants are now estopped from mounting such a case. The situation does not give rise to an estoppel properly so called for reasons I have just canvassed. There had been no representation by the defendants that they would never mount such a case. Nor is any reliance to their detriment shown by the plaintiffs so as to assist in establishing an estoppel. The only real issue is whether the defendants should be permitted to mount such a case even though they have not pleaded it earlier. Given the stage of the proceedings it is my view that they should not be prevented from making those allegations.

[20] That conclusion also colours my attitude to the issue whether the defendants should be permitted to withdraw their admissions so as to litigate whether the options were assignable. The defendants' right to mount a legitimate defence should not depend on whether an individual witness will make himself available to confer with the plaintiffs' lawyers before a trial. Witnesses are compellable to attend trials for that very reason and there is no evidence that Mr Rubin's whereabouts are undiscoverable through the normal avenues of inquiry that may be made.

[21] The criticism by the plaintiffs of the defendants' failure to put in issue whether notice of the assignments have been given previously has some point. If it is the case, however, that there was no such notice given and that point was missed by the defendants by an oversight, there is no good reason shown in my view why the defendants should now be denied the chance to litigate the issue, having regard to the fact that the matter is still not ready for trial. There is no suggestion, for example, that evidence on this issue has been lost because the admission had been made.

[22] It is also true that the defendants have withdrawn their admission of par 38 of the statement of claim relating to the receipt of benefits arising from the development of the joint venture land in par 32 of their defence but only to the extent that they deny having received any such benefits to date. That amendment was criticised as not having been the subject of an explanation but the amendment to the pleading on its face seems to provide an adequate explanation. One can see it as an amendment aimed at the current accuracy of the pleading rather than one that will prejudice the plaintiffs in their conduct of the trial. I would also allow that amendment to stand.

[23] The change in the pleading in par 5A of the amended defence was adequately explained by Mr Brett Cook as were the other changes which were generally dependent on the issues discussed above.

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7 Compare *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

Orders

[24] Accordingly, subject to submissions about the form of the order and costs, I propose to dismiss the plaintiffs' application and to make an order largely in the terms of the defendants' amended application as follows:

(1) an order pursuant to the *Uniform Civil Procedure Rules* 1999 r 188 that the defendants have leave to withdraw any admission of the allegations at paragraphs 8(c), 10, 11, 12, 13, 14, 15, 16, 17, 18, 21A, 24, 25B, 26(a), 26(b), 28A(b), 37A and 38, of the plaintiffs' fourth amended statement of claim filed on 19 June 2009 and to replead in the form contained in the amended defence to the fourth amended statement of claim filed 28 September 2011;

(2) an order pursuant to the *Uniform Civil Procedure Rules* r 188 that the defendants have leave to withdraw the admission at paragraph 14(aa) of the amended defence filed 27 April 2011 and to replead in the form contained in the amended defence to the fourth amended statement of claim filed 28 September 2011.

[25] I have underlined pars 15, 16 and 37A of the first order I propose to make. An order in respect of pars 15 and 16 was not sought in the amended application but they seemed to have been covered in the submissions made to me. The amended application also sought an order in respect of par 31A of the fourth amended statement of claim. There is no such paragraph although there is a par 37A which seems to have been the intended subject of the order.