

# SUPREME COURT OF QUEENSLAND

CITATION: *Moore v Devanjul Pty Ltd & Ors* [2012] QSC 66

PARTIES: STANLEY WILLIAM GORDON MOORE  
(Plaintiff)

v

DEVANJUL PTY LTD  
A.C.N. 117 644 0087 AS TRUSTEE  
(First Defendant)

AND

VANESSA RUTH BERTHELSEN  
(Second Defendant)

AND

DEREK BURNETT BERTHELSEN  
(Third Defendant)

AND

DAVID EDGAR WILSON  
(Fourth Defendant)

AND

VANESSA RUTH BERTHELSEN AS TRUSTEE of the  
JADVEK BERTHELSEN FAMILY TRUST  
(Fifth Defendant)

FILE NO/S: 21/2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Bundaberg

DELIVERED ON: 22 March 2012

DELIVERED AT: Rockhampton

HEARING DATE: 9 March 2012

JUDGE: McMeekin J

ORDER: 1. The Application is adjourned to the sittings of the Circuit Court in Bundaberg commencing 8 May

2102.

## 2. No order as to costs

**CATCHWORDS:** PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT - where application to amend Claim and Statement of Claim - where errors in pleadings - whether paragraphs of pleadings should be struck out - where Uniform Civil Procedure Rules 1999 have not been complied with

*Uniform Civil Procedure Rules 1999 (Qld) rr18, 22, 150, 155 Corporations Act 2001 (C’th) ss197, 601AH*

**COUNSEL:** R Clutterbuck for the applicant

Second Defendant in person

No appearance by the third and fourth defendants

**SOLICITORS:** Carswell & Company for the applicant

Second Defendant in person

- [1] **McMeekin J:** This is an application to amend the Claim and Statement of Claim in these proceedings.
- [2] As the Claim presently stands it shows the plaintiff as one Stanley Gordon William Moore. He claims damages in the sum of \$200,000 together with exemplary damages, interest and costs against each of five defendants. There is no further identification of the cause of action in the Claim. While the Claim is admirably brief and plainly identifies the remedy sought it does not identify the “nature of the claim made” as I think r 22 of the *Uniform Civil Procedure Rules 1999 (Qld)* (“UCPR”) intended. While not entirely clear I think the claim is for damages for breach of the covenants in a lease, trespass, and conversion of property.
- [3] In the course of submissions it became apparent that the plaintiff is misdescribed – he sues not in his personal capacity but rather as trustee of the Moore Investment Trust. That he acted as trustee is pleaded in paragraph 1 of the Statement of Claim. Rule 18 UCPR requires that the representative capacity be stated on the originating process. It is not. The proposed amendments do not correct the error .
- [4] There are further problems with the Claim. The first defendant is identified as “Devanjul Pty Ltd as Trustee”. What the company might be trustee of is not explained in the heading and indeed not entirely clear from the facts pleaded either. It is alleged in paragraph 1(b) of the Statement of Claim that the company is “capable of being sued both in its own name and as trustee for the Jadvek Berthelsen Family Trust” yet nowhere is it alleged that it was, at any material time, the trustee of that trust.
- [5] Similarly the fifth defendant is described in the Claim as “Vanessa Ruth Berthelsen as Trustee” but again as trustee of what is not explained.

- [6] When the matter was last before me and the parties both self represented I pointed out these problems and gave the plaintiff's side leave to amend the Claim and Statement of Claim to add "Jadvek Berthelsen Family Trust" after the fifth defendant's name, as that was my then understanding of the intent of the plaintiff and Ms Berthelsen did not oppose that course. My order seems to have gone unheeded by the plaintiff as the proposed amended pleading and the heading of all documents continue the error. It may be that those now acting for the plaintiff, who were not then involved, were unaware of the previous orders.
- [7] The apparent intent of the Statement of Claim is to allege that the Moore Investment Trust became the lessee of an area of land on which it conducted a waterslide business. While entitled to quiet enjoyment of the premises it is alleged that the second and third defendants entered into the premises, broke locks, damaged or took the plaintiff's property, changed locks and effectively destroyed the plaintiff's ability to carry on its business. It is claimed that they were acting on their own behalf, with the consent of the fourth defendant, and on behalf of the trustee of the Jadvek Berthelsen Family Trust, then Devanjul Pty Ltd. Each of the three natural persons sued were, it is said, directors and shareholders of the first defendant, Devanjul Pty Ltd.
- [8] The only defendant to appear on the application was Ms Berthelsen. She appeared unrepresented. Her husband, who I understand to be the third defendant, sat with her at the Bar table but made no formal appearance. Ms Berthelsen is sued in her personal capacity as second defendant as well as a trustee, presumably of the Jadvek Berthelsen Family Trust, as fifth defendant. She too wished to advance an application but had given no notice of it and it was adjourned to my next sittings in Bundaberg, where the claim emanates from. At least one of the points that she wished to make by her application was that the Claim should be dismissed as disclosing no cause of action. Her point was that the named plaintiff had never had any contractual relationship with the defendants. Apparently Ms Berthelsen is right – to the extent that the claim is based on obligations owed under a lease the proper plaintiff is the trustee of the Moore Investment Trust. It may be that Mr Moore personally has some right of action but it is not entirely clear from the pleading whether the property allegedly damaged or taken was Mr Moore's personally or that of the trust, given the continued reference to "the plaintiff" who is so far identified only as Mr Moore personally.
- [9] Those are not the only problems with the pleading. Paragraph 11 pleads that the first defendant has transferred property the subject of the lease to the fifth defendant. It goes on to assert a motive ("to avoid judgments made by the District Court of Queensland") and puzzlingly to add: "The transfer was merely noting the retirement of the first defendant as trustee of the Jadvek Berthelsen Trust and the appointment of the fifth defendant as the trustee of that trust". In other words there was no transfer of property as such at all – the fifth defendant simply replaced the first defendant as trustee. It would seem then that the pleading itself is inherently contradictory. As well the motive for any change of trustee seems to me to be immaterial to any cause of action pleaded. In my view the paragraph ought to be struck out as embarrassing.
- [10] Finally the pleading of damages seems to me to fall well short of the requirements of r 155 UCPR. There is simply a bald claim for \$200,000 without reference to how the amount has been arrived at. While paragraph 12 of the pleading makes clear that

the plaintiff is claiming for loss of profits as well as property damage nothing is known about what values are attributed to what property and how the claimed loss of profits is calculated. In my view the pleading plainly contravenes r 155(2)(a) and (c) and is embarrassing.

- [11] None of these problems are addressed by the proposed amendments. For that reason alone I will not allow the application at least in terms. I turn then to the proposed amendments.
- [12] Since the proceedings commenced the first defendant has become deregistered. The effect of the proposed amendments is to have the company reinstated pursuant to s 601AH of the *Corporations Act 2001* (C'th) and to add new and separate causes of action against the existing natural defendants that “any such funds adjudged due and owing to the first defendant by the wrongful act of the second, third and/or fourth defendants be reinstated and/or otherwise held by the first defendant in trust for the plaintiff”. Further declarations are sought that the natural defendants have “wrongfully distributed trust property held in trust by the first defendant such as to avoid obligations to creditors” and consequential orders are sought for “equitable compensation payable to the plaintiff to or through the first defendant or otherwise”. As against Ms Berthelsen in her capacity as trustee a declaration is sought that she “has wrongly distributed trust property pursuant to s 113 *Trusts Act* ...such as to avoid obligations to creditors” and again equitable compensation “payable to the plaintiff through the first defendant, through the fifth defendant or otherwise”.
- [13] A number of comments might be made about the efficacy of the pleading. The most cogent criticism is that the only amendment proposed is to the prayer for relief. There is no anterior pleading of any fact to support the claims. I would expect, at least, an allegation that property had been divested from the relevant trust, or, to use the terminology of the amendment, “wrongfully distributed”. Particulars would be required of the allegation of why any such distribution was wrongful – see r 150(1)(a), (f), (g), and (k) UCPR. Identification of the source of the duty not to distribute trust funds would probably be necessary, whether it be by way of statute or arising under the general law as a result of pleaded facts. As well the proposed claim presumes funds are due and owing to the first defendant by the natural defendants. There is no pleading of any fact showing that to be so.
- [14] Mr Clutterbuck of counsel who appeared for the plaintiff submitted that the source of the duty lay in s 197 *Corporations Act 2001* (C'th). So far as is relevant s 197 provides:

**“Division 3—Duty to discharge certain trust liabilities**

197 Directors liable for debts and other obligations incurred by corporation as trustee

(1) A person who is a director of a corporation when it incurs a liability while acting, or purporting to act, as trustee, is liable to discharge the whole or a part of the liability if the corporation:

(a) has not discharged, and cannot discharge, the liability or that part of it; and

(b) is not entitled to be fully indemnified against the liability out of trust assets solely because of one or more of the following:

- (i) a breach of trust by the corporation;
- (ii) the corporation's acting outside the scope of its powers as trustee;
- (iii) a term of the trust denying, or limiting, the corporation's right to be indemnified against the liability.

The person is liable both individually and jointly with the corporation and anyone else who is liable under this subsection.

*Note: The person will not be liable under this subsection merely because there are insufficient trust assets out of which the corporation can be indemnified.*

(2) The person is not liable under subsection (1) if the person would be entitled to have been fully indemnified by 1 of the other directors against the liability had all the directors of the corporation been trustees when the liability was incurred.

.....”

- [15] It can be immediately seen that the provision imposes on directors a personal duty to discharge the liability of a trustee corporation provided two preconditions are met – that the corporation cannot and has not discharged the obligation and importantly that the director “is not entitled to be fully indemnified against the liability out of trust assets”. There is no reference to the legislative provision in the amended Statement of Claim that is proposed and in my view if it is to be relied on it would need to be pleaded to prevent surprise. But if there was specific reference there would need to be a pleading that this essential condition was met.
- [16] Reference was also made to an implied duty on directors not to reduce the company's capital to the detriment of creditors. Whether or not such a duty exists I cannot see that it applies to the plaintiff here as there is no pleading that the plaintiff is a creditor of the first defendant.
- [17] There seems no good reason why the proposed amendments to take advantage of s 601AH *Corporations Act* 2001 (C'th) should not be permitted, assuming again that anterior facts are eventually pleaded to support the order sought. The facts appear to be agreed. Ms Berthelsen did not oppose the amendment to that extent as I understood her.
- [18] Despite that, the proposed pleading is defective in so many ways that it seems to me that the whole of it needs to be examined and reworked to reflect the case now sought to be advanced.
- [19] Finally I note that those in control of the Jadvek Berthelsen Family Trust, and that would appear to be Ms Berthelsen and interests allied to her, have yet again changed the identity of the trustee of that trust. Ms Berthelsen was not prepared to tell me who the trustee of that trust now might be. In my view her obligation to disclose relevant documents would extend to disclosing documents relating to such changes. If no disclosure is given then I would give consideration, on application, to compelling specific disclosure to ensure that the Court has before it the relevant parties to deal with the dispute and make effective orders.
- [20] As I have mentioned Ms Berthelsen's application presently stands adjourned to the Bundaberg sittings in May. In it she seeks various orders including orders that the

Claim and Statement of Claim be struck out. As that issue is to be litigated then I will not make orders now striking out the paragraphs of the pleading that seem to me to be plainly deficient. If the pleadings remain as they are then, at least, certain paragraphs will be struck out.

- [21] For the present time the plaintiff's application is adjourned to the Bundaberg sittings of the Court. A date for hearing will be set at a callover in the near future. Hopefully in the meantime Mr Moore's legal advisors will give consideration to the proper pleading of his case. There will be no order as to costs.