SUPREME COURT OF QUEENSLAND

CITATION:	*TRFCK Pty Ltd & Ors v O'Brien Holdings (Townsville) Pty Ltd & Ors* [2012] QSC 203
PARTIES:	**TRFCK PTY LTD** (first plaintiff) and **TREVOR ROSS RODDICK** (second plaintiff) and **CKRT PTY LTD** (third plaintiff) and **BELKER ART PTY LTD** (fourth plaintiff) **v** **O'BRIEN HOLDINGS (TOWNSVILLE) PTY LTD** **ACN 003 461 952** (first defendant) and **TERRY O'BRIEN** (second defendant) and **DLA PHILLIPS FOX (A FIRM)** (third defendant) and **CRIDLANDS PTY LTD** **ACN 009 651 594** (fourth defendant)
FILE NO:	5611 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	2 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2012
JUDGE:	Daubney J
ORDERS:	**1. The plaintiff has leave to file the amended statement of claim.** **2. The costs of and incidental to this application are reserved.** **3. The parties are directed to bring in the necessary orders.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDESSESORS – PLEADING – STATEMENT OF CLAIM – where the first defendant owned a hotel property and business – where the second defendant was the sole director and shareholder of the first defendant – where the second defendant negotiated with the second plaintiff with the view of the first plaintiff acquiring an interest in the hotel – where the second plaintiff was the managing director of the first plaintiff – where the second defendant retained the third defendant to act on behalf of the first and second defendants with respect to the hotel acquisition – where the third defendant engaged the fourth defendant to act as its Darwin agent – where the plaintiffs contend that the third and fourth defendants breached legal and statutory duties in the course of the hotel acquisition – where the plaintiffs contend that the third and fourth defendants should have advised the first plaintiff that it was not bound to complete the sale and purchase contract – where the plaintiff suffered loss following the acquisition of the hotel – where the plaintiffs original statement of claim was struck out – where the plaintiffs seek leave to file an amended statement of claim – where the application is not opposed by the first and second defendants – where the third and fourth defendants contend that leave ought not be granted as the amended statement of claim is fundamentally defective – whether leave to file an amended statement of claim should be granted

Trade Practices Act 1974 (Cth), s52

Constantidins v Kehagiadis [2011] NSWSC l974
HTW Valuers v Astonland Pty Ltd (2004) 217 CLR 640; [2004] HCA 54
Potts v Miller (1940) 64 CLR 282; [1940] HCA 43

COUNSEL: J B Sweeney for the first to fourth plaintiffs
R S Ashton for the fourth defendant
B T Cohen (Sol) for the third defendant
G N Humphries (Sol) for the first and second defendants

SOLICITORS: McGillivray's Solicitors for the first to fourth plaintiffs
Sparke Helmore for the fourth defendant
Brian Bartley and Associates for the third defendant
Connolly Suthers for the first and second defendants

[1] This is an application for leave to file an amended statement of claim, consequent upon an order by Applegarth J on 19 September 2011 striking out the plaintiffs' original pleading.

[2] The present application was not opposed by the first and second defendants. Each of the third and fourth defendants, however, argued that leave ought not be granted.

Background

[3] To understand the bases for opposition, it is necessary to give some detail of the factual background, as alleged in the proposed amended statement of claim ("ASOC").

[4] As at March 2005, the first defendant owned certain property at Borroloola in the Northern Territory, on which was constructed a hotel and accommodation complex known as the "Borroloola Inn" ("the Hotel"). The first defendant held a liquor licence for the Hotel; that licence contained a number of conditions relating to liquor sales and takeaway sales.

[5] The second defendant was the sole director and shareholder of the first defendant.

[6] In early 2005, the second plaintiff (the managing director of the first plaintiff) commenced negotiating with the second defendant with a view to the first plaintiff acquiring an interest in the Hotel premises.

[7] In March 2005:

(a) The first defendant retained the law firm Dillons Lawyers ("Dillons") to represent its interests;

(b) The second defendant, on his own behalf and on behalf of the first defendant, retained the third defendant "to act as their solicitors with respect to the Hotel acquisition" (ASOC, para 75).

[8] In June 2005, the third defendant engaged the fourth defendant, a firm of solicitors in the Northern Territory, to act as its Darwin agent.

[9] On 22 March 2005, Dillons sent the third defendant a proposed form of agreement for the sale of the Hotel property. This form of agreement provided for a sale of the real property for $1,850,000 and for settlement to be contemporaneous with completion of a transaction by which a third party, Cashcow Pty Ltd ("Cashcow") would become the tenant of the Hotel. A Mr Taylor and a Ms Khan were the principals of Cashcow.

[10] On 6 April 2005, Dillons sent the third defendant a proposed form of the lease to Cashcow. This draft incorporated a particular long form of guarantee and indemnity ("long form guarantee") which was clearly contemplated to be executed by each of Mr Taylor and Ms Khan to secure the performance of Cashcow under the lease.

[11] On 27 April 2005, the third defendant sent Dillons an offer to purchase, signed by the second plaintiff on behalf of the first plaintiff. That offer was subject to the lease to Cashcow.

[12] Negotiations ceased, but were re-enlivened after the second plaintiff met with Mr Broderick (his solicitor at the third defendant) and gave him certain instructions as to the terms on which the first plaintiff would be prepared to purchase the Hotel premises. These instructions are pleaded in the ASOC (para 84) as follows:

> "(a) that Mr Broderick received a copy of the lease in the terms which had been negotiated between Dillons and Phillips Fox, signed by Cashcow and Ms Kahn and Mr Taylor as guarantors;
>
> (b) the contract had a provision where O'Brien Holdings affirmed that:
>
> (i) the trading figures which had been provided were accurate;
>
> (ii) the building and improvements were lawful and that all planning and development permissions had been obtained;
>
> (iii) O Brien had not given Cashcow any incentives other than as shown in the lease (collectively 'the warranted facts');
>
> (c) in relation to planning and development permissions, Mr. Broderick 'made sure that everything was fully compliant'."

[13] Mr Broderick then prepared a revised offer, on which he gave advice to the second plaintiff and which the second plaintiff then approved and signed. Mr Broderick then sent the revised offer to Dillons, and on 26 May 2005 Dillons notified Mr Broderick that the revised offer had been accepted.

[14] On 3 June 2005, the third defendant asked Dillons to provide a "fully executed copy of the lease [to Cashcow], including directors' guarantees". On 4 June 2005, Dillons provided the third defendant with a copy of the signed lease, but the long form guarantee in the lease had not been signed by either of Mr Taylor or Ms Khan.

[15] On about 8 June 2005, another firm of solicitors (Dickins Solicitors), which was acting for Mr Taylor and Ms Khan, provided Dillons with forms of guarantees (albeit not the long form guarantee) purportedly signed by Mr Taylor and Ms Khan. Dillons, however, did not provide these guarantees to the third defendant before settlement of the sale of the Hotel property was effected. The ASOC alleges:

> "[99] As no time between 8 June 2005 and settlement of the sale and purchase agreement did Phillips Fox or Cridlands become aware of the purported existence of the Dickens guarantee.
>
> [100] As no time between 8 June 2005 and settlement of the sale and purchase agreement did Phillips Fox or Cridlands make any further request to Dillons for provision of the guarantee referred to at clause 11.2(iii) of the sale and purchase agreement."

[16] The ASOC further alleges, inter alia, that on the date of settlement (1 July 2005), neither the third defendant nor the fourth defendant advised the second plaintiff that Khan and Taylor had not provided the executed guarantees.

[17] Separate factual allegations are made in the ASOC concerning building and other regulatory searches undertaken by the fourth defendant before settlement, and searches which the plaintiffs contend should have been, but were not, undertaken. In brief, it is said that:

(a) certain planning searches which were performed should have been understood by the fourth defendant to reveal that the accommodation blocks (referred to as "dongas") did not comply with relevant development approvals, thereby raising questions as to the lawfulness of the use of the property;

(b) certain planning searches which were performed should have been understood by the fourth defendant to reveal a lack of record of compliance for renovations to the hotel, thereby raising questions as to the lawfulness of the use of the property;

(c) a search under s 65 of the *Planning Act* (NT) (which was neither recommended nor sought by the fourth defendant) would have shown whether all development permits had been complied with;

(d) no advice was given by the fourth defendant as to the significance of the searches referred to in (a) and (b).

[18] As noted, settlement of the purchase of the hotel occurred on 1 July 2005. Cashcow operated the hotel business until October 2006, when Taylor and Khan effectively abandoned the Hotel. In December 2006, the liquor licence for the Hotel (which had been held by Cashcow) was cancelled. The first plaintiff then took possession of the Hotel and operated it as a motel business while attempting to retrieve the liquor licence. In the course of so doing, the first plaintiff discovered that the dongas and other renovations were not compliant, and this had to be rectified to obtain the liquor licence.

[19] In January 2008, the National Australia Bank appointed receivers to the first plaintiff. In late 2008, the receivers sold the hotel property (with a restaurant licence) for $320,000.

[20] The total damages claimed to have been suffered by the plaintiffs exceed $2,600,000.

The proposed cases against the third and fourth defendants

[21] The first of the cases proposed to be advanced against each of the third and fourth defendants arises out of the alleged failure on the part of both defendant firms to obtain the necessary guarantees or to advise on the consequences of not having the guarantees. The ASOC alleges:

"[103] A solicitor exercising the care, skill and diligence of a reasonably competent solicitor in the position of both Ms Reeves and Mr. Broderick would have, before proceeding to settlement:

(a) advised Mr. Roddick that the guarantees referred to at clause 11.2(iii) of the sale and purchase agreement had not been provided;

(b) advised Mr. Roddick that in those circumstances TRFCK was not bound to settle;

(c) inquired as to what Mr. Roddick wished to do.

[104] By Cridlands and Phillips Fox staying silent as alleged, and not providing the positive advice as alleged ('the guarantee conduct'):

a) Phillips Fox was negligent and breached the retainer;

b) Cridlands was negligent and breached the agency retainer.

[105] Because Cridlands was Phillips Fox's agent, Phillips Fox:

a) is vicariously liable for Cridlands negligence;

b) thereby breached the retainer.

[106] By the guarantee conduct, Cridlands and Phillips Fox each impliedly represented to Mr. Roddick that Ms Khan and Mr. Taylor had provided the guarantees referred to at clause 11.2(iii) of the sale and purchase agreement ('the guarantee representation').

[107] As a result of the guarantee conduct and the guarantee representation Mr. Roddick:

a) mistakenly concluded that Ms Khan and Mr. Taylor had provided the guarantees referred to at clause 11.2(iii) of the sale and purchase agreement ('the guarantee assumption');

b) was not altered to the fact that TRFCK was not bound to complete the sale and purchase agreement."

[22] It is further alleged that the conduct of each of the third and fourth defendants in inducing the alleged "guarantee assumption" contravened s 52 of the *Trade Practices Act* 1974.

[23] The second of the cases proposed to be advanced against each of the third and fourth defendants arises out of the alleged failure to advise with respect to the planning searches. In that regard, the ASOC alleges:

"[123] In breach of duty to TRFCK and Mr. Roddick, and in breach of the agency retainer, in the period between 8 June and 1 July 2005, Cridlands provided Phillips Fox and Mr Roddick with no advice as to the significance of the Lot 407 notation or the Lot 772 notation.

[124] Because Cridlands was Phillips Fox's agent, Phillips Fox:

a) is vicariously liable for Cridlands negligence;

b) thereby breached the conveyancing retainer.

[125] Further or in the alternative, in breach of duty to TRFCK and Mr. Roddick, and in breach of the retainer, in the period between 8 June and 1 July 2005 Phillips Fox provided Mr Roddick with no advice as to the significance or otherwise of the Lot 407 notation or the Lot 771 notation.

[126] The silence of Ms Reeves and Mr. Broderick concerning any matters of concern regarding planning and development issues ('the compliance conduct') mistakenly led Mr. Roddick to conclude that that all necessary planning and development permits pertaining to Lots 409 and 771 and particularly the six dongas had been obtained ("the mistaken compliance assumption").

[127] Because it induced the mistaken compliance assumption, the compliance conduct was misleading or deceptive or likely to mislead or deceive.

[128] Further, in the premises of the matters referred to above, Cridlands by its silence impliedly represented to Mr. Roddick on 1 July 2005 that it had carried out all standard searches appropriate to protect TRFCK's interests as purchaser and Mr Roddick's interest as guarantee under the sale and purchase contract ('the searches representation').

[129] The searches representation was misleading or deceptive, or likely to mislead or deceive, because the searches Cridlands and Phillips Fox had carried out had revealed areas of concern, and because Cridlands had not carried out a search under section 65 of the *Planning Act* to allay those concerns.

[130] Further, in the premises of the matters referred to above, Cridlands by its silence impliedly represented to Mr. Roddick on 1 July 2005 that all necessary planning and development permits pertaining to the current use of Lots 409 and 771 had been obtained, and in that regard, all buildings on Lots 409 and 771 complied with all applicable laws ('the compliance representation').

[131] The compliance representation was misleading or deceptive or likely to mislead or deceive as there was no reasonable basis for making it."

[24] The third case proposed to be advanced against each of the third and fourth defendants is, in effect, that they breached the legal and statutory duties they owed the plaintiffs by allowing the first plaintiff to settle the acquisition of the Hotel. The ASOC alleges:

"[134] Had the said negligence, breach of contract and contraventions of the TPA not occurred, Phillips Fox and Cridlands would have undertaken a search under section 65 of the Planning Act, as a

result of which the significance of the Lot 407 and 701 notations would have been revealed i.e. that the NT Department of Planning had no record:

a) that the six dongas complied with relevant development approvals, and thus that it could not be stated that the use of Lot 407 was lawful;

b) of compliance with DP95/10326 for the purpose of hotel renovations and that permit was no longer current in 2005, and thus that it could not be stated that the use of Lot 771 was lawful.

[135] A solicitor in the position of Cridlands and Phillips Fox would, by late June 2005, have known of the issues with the guarantee and the issues in relation to suspected planning non-compliance, and would have advised Mr Roddick that TRFCK was not bound to complete the sale and purchase contract, and why, and would have sought further instructions.

[136] In breach of duty:

a) Phillips Fox and Cridlands failed to carry out the further searches or provide any of that advice or seek the instructions;

b) Cridlands, at settlement, caused or permitted TRFCK to complete the sale and purchase agreement;

c) Phillips Fox permitted Cridlands to do so.

[137] By failing to advise to the contrary ("the completion conduct") Cridlands and Phillips Fox impliedly represented to Mr. Roddick on 1 July 2005 that TRFCK was bound to complete the sale and purchase contract on 1 July 2005 ("the completion representation")."

[25] In respect of the issues of reliance and causation, the ASOC pleads:

"[142] TRFCK suffered loss by the said misleading conduct of Phillips Fox and Cridlands, and the negligence and breach of contract of Phillips Fox and Cridlands.

[143] The said loss and damage suffered by, or by reason of, or caused by, the matters pleaded hereunder.

[144] The said misleading conduct;

a) meant that Mr Roddick was not alerted to the significance of the Lot 407 notation or the Lot 771 notation;

b) meant that Mr Roddick was not, before completion, altered to the falsity of at least some of the warranted facts (the truth of which were very important to him) or alerted to the fact that the untruth of same afforded a ground for rescission or non-completion of the sale and purchase agreement;

c) led Mr. Roddick to mistakenly continue to believe:

(i) that Ms Khan and Mr. Taylor had provided the guarantees referred to at clause 11.2(iii) of the sale and purchase agreement; and

(ii) that that all necessary planning and development permits pertaining to Lots 409 and 771 had been obtained ('the compliance assumption') ;

(iii) that TRFCK was bound to complete the sale and purchase contract on 1 July 2005.

[145] Had Phillips Fox and Cridlands taken the steps they ought to have taken, and given the advice they ought to have given, and not stayed silent as they did, and not engaged in the said misleading conduct:

a) the following would have been conveyed to, or have become apparent to, Mr. Roddick before completion:

(i) that neither Ms Khan or Mr. Taylor had provided the guarantees referred to at clause 11.2(iii) of the sale and purchase agreement;

(ii) that the significance of the Lot 407 notation and the Lot 771 notation was that in the Department of Planning of the NT there was no record of compliance with permit 95/ 0326, and that this permit was no longer current, and that to maintain current planning approval for Lots 409 and 771, TRFCK might have to make application for a new development permit;

b) in those altered circumstances, Mr. Roddick would have instructed Phillips Fox and Cridlands not to complete, and to terminate, the sale and purchase agreement and the losses referred to below would have been averted.

[146] Because Mr Roddick was in the continuing, but mistaken, belief as to the truth of the contract representations, he took no steps to prevent the following acts ('the completion transactions') occurring on 1 July 2005:

a) TRFCK borrowed the sum of $1,295,000 from the National Australia Bank ('NAB') and became liable to repay the NAB that sum together with interest payments of $12,510 per month fixed for the first 5 years ('NAB loan facility');

b) TRFCK granted the NAB a registered mortgage over the Hotel premises and a fixed and floating charge over the assets of

TRFCK to secure the amounts owing under the NAB loan facility;

c) A company related to TRFCK, called CRKT Pty Ltd lent TRFCK the sum of $586,217 and TRFCK became liable to repay CKRT that sum;

d) At about 3.00 pm, at the settlement of the sale and purchase contract, Cridlands participated in the settlement and by that means caused TRFCK to use the said borrowed funds to pay to O'Brien Holdings, or at its direction, the balance of the borrowed funds to pay to O'Brien Holdings, or at its direction, the balance of the purchase price of $1,850,000, in exchange for a transfer of the Hotel premises;

e) O'Brien Holdings transferred the liquor licence pertaining to the Hotel premises to Cashcow;

f) TRFCK entered into a lease to Cashcow for a period of five years commencing 1 July 2005 at an annual rental of $250,000 per annum ('the Hotel lease').

[147] The completion transactions led to the creation of a relationship between TRFCK as landlord and Cashcow as tenant, on the terms of the unguaranteed lease, in circumstances where TRFCK was not, and Cashcow was, the licensee, and Terina Khan the nominee, with Cashcow in occupation of the hotel premises as licensee.

[148] On 1 July 2005, what was acquired by TRFCK at a price of $1,850,000 plus $99,500 in stamp duty consisted firstly of its rights under the Hotel lease (in effect to payment of $4800 per week plus outgoings, by the tenant Cashcow) and secondly the value of the freehold in the hotel premises, at such time as the Hotel lease came to an end ('reversionary interest')."

Opposition by the third and fourth defendants

[26] It is convenient to deal first with the grounds of opposition raised on behalf of the fourth defendant, as these were adopted and relied on by the third defendant.

[27] In respect of the guarantee case, it was submitted that the case against the fourth defendant was fundamentally defective because:

(a) there was no term in the fourth defendant's agency agreement requiring it to collect the guarantees and no such term is pleaded;

(b) the pleading discloses no foundation for the existence of a duty on the fourth defendant to collect the guarantees;

(c) there was no term in the agency agreement requiring the fourth defendant to give any advice to any of the plaintiffs, and none is pleaded;

(d) the pleading discloses no foundation for the existence of a duty upon the fourth defendant to give advice to any of the plaintiffs.

[28] As noted above, the scope of the duties alleged to have been owed are said to be those contained in the alleged implied term of the fourth defendant's retainer that it would exercise the care, skill and diligence of reasonably competent solicitors "acting as town agent in carrying out due diligence inquiries, providing advice in relation to NT laws, and acting generally in relation to the conveyance in accordance with [the third defendant's] instructions".

[29] It is true, as pointed out by the fourth defendant, that it is not expressly pleaded that these duties were owed by the fourth defendant to the plaintiffs, but what is pleaded is that the third defendant is vicariously liable for the negligence of the fourth defendant.

[30] The crux of this objection, however, was that the ASOC does not plead either specific terms of the retainer or specific duties which were breached by the failure to collect, or advise on the non-receipt of, the guarantees. It was submitted:

> "42. How can it be a breach of any term of the written agreement between Cridlands and Phillips Fox for Cridlands to have failed to give advice to Phillips Fox's client? Quite aside from the absence of any term of the retainer obliging them to give such advice, it is typically what solicitors' town agents do *not* do i.e. take over the principal's client and presume to give advice to the client."

[31] The difficulty with this submission is that, on the material before me, there are clearly factual issues to be determined with respect to the ambit of the fourth defendant's retainer, and therefore the ambit of the duties owed. In that regard:

(a) it is asserted that the second plaintiff told Ms Reeves (the relevant solicitor in the fourth defendant firm) on 9 June 2005 that he did not want the first plaintiff to be bound to complete the Hotel acquisition unless Mr Taylor and Ms Khan had both signed long form guarantees;

(b) there was direct contact between Ms Reeves of the fourth defendant and the second defendant in the days prior to settlement, in the course of which she wrote an email to the second defendant on 28 June 2005 in which she:

- forwarded a "going concern" deed for GST purposes which that solicitor had prepared, and asked the second defendant to sign and return the document;

- stated that "hopefully this is the last thing that needs to be done before settlement on Friday";

- confirmed that she would be liaising with the plaintiffs' bank to organise the settlement proceeds;

(c) the fourth defendant had, on 8 June 2005, been supplied by the third defendant with copies of the contract of sale, the draft lease and copies of title searches;

(d) by 14 June 2005, the fourth defendant had not only perused the lease, but had given advice on its terms; so much is clear from the fourth defendant's letter to the third defendant dated 14 June 2005 in which the fourth defendant gave advice as to desirable provisions to be inserted in the lease with respect to the liquor licence.

[32] The factual situation with respect to the extent of the fourth defendant's retainer and the scope of the tasks properly to be performed under that retainer are therefore not as cut and dried as the fourth defendant would presently have it. Whether the matters complained of by the plaintiff are found to fall within the ambit of the obligations arising from the term that the fourth defendant acted generally "in relation to the conveyance" in accordance with the instructions of the third defendant are, in my view, matters which will turn on the evidence about, and findings with respect to, the nature and extent of the legal work undertaken by the fourth defendant and the nature, content and circumstances of communications directly between the fourth defendant and the second plaintiff. I do not consider that these proposed claims against the fourth defendant are so manifestly groundless or so clearly untenable that they could not possibly succeed, nor that the cases sought to be advanced are so unarguable as to warrant a refusal of leave to file the ASOC.[1]

[33] Counsel for the fourth defendant further submitted that these impugned allegations in the ASOC must fail because:

(a) guarantees were in any event provided by the identified guarantors;

(b) the plaintiffs were not, as a matter of law, entitled in any event to refuse to complete and to terminate the contract;

(c) in the absence of any duty, contractual or tortious, to collect the guarantees or advise the plaintiffs, they could not have had a reasonable expectation that they would receive advise from the fourth defendants;

(d) as a matter of proper inference from the pleaded facts, the purchaser of the Hotel would have produced guarantees in the form preferred by the plaintiffs if they had been requested, but those guarantees would not have enabled the plaintiff to achieve any better outcome.

[34] Dealing with each of these points in turn:

(a) there is clearly a factual dispute as to what guarantees were provided and to whom;

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1 *Constantidins v Kehagiadis* [2011] NSWSC l974.

(b) whether the contract required particular forms of guarantee to be provided prior to settlement will require the terms of the contract to be construed in the context of the facts as found at trial;

(c) the question of the existence of any duty on the part of the fourth defendant to collect the guarantees or advise the plaintiffs about the guarantees is, as I have found above, a question for trial; whether or not the plaintiffs had a reasonable expectation that they would receive such advice from the fourth defendant, particularly in light of the fact that the second plaintiff and the relevant solicitor at the fourth defendant were undoubtedly in direct contact to some degree, at least, is also clearly a matter which can only be determined at trial;

(d) the basis for asserting that the "proper inference" is that the long form guarantees would have been produced before settlement is not made clear; an inference can only proceed from facts as found. The inference contended for is not the only possible inference available. Whether it is the "proper" inference will be a matter of argument at trial.

[35] The last of these submissions also raised an argument on behalf of the fourth defendants to the effect that the pleading did not properly address the question of causation. It was submitted:

> "What is not explained and cannot be explained is what would then have occurred. In what way would the long form guarantees have saved TRFCK and the other plaintiffs from the events that occurred? In what way would the short form guarantees have been any less adequate to that purpose?"

[36] The case in fact pleaded against the third and fourth defendants is that if, relevantly, the fourth defendant had taken steps the plaintiffs contends ought to have been taken, and given the advice the plaintiffs contend ought have been given, the second plaintiff would have instructed the third and fourth defendants not to complete the contract, and would have instructed them to terminate the sale and purchase agreement, as a consequence of which the losses claimed in the ASOC would have been averted.

[37] The case proposed to be advanced by the plaintiff will necessarily involve the consideration of hypotheticals. The matters adverted to by the fourth defendant in the present argument will undoubtedly be raised as matters of defence, and considered in the mix of that hypothetical. At least to the extent that the ASOC discloses a case in which the allegation is that the fourth defendant failed to disclose and advise on matters which, in the circumstances, should have been disclosed, causation "can be found if disclosure would have caused inaction or action other than that which was taken".[2]

[38] The fourth defendant also pointed to the plaintiffs' plea that Taylor and Khan had behaved criminally, irresponsibly and anti-socially, and had dissipated and/or

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2 *Smith v Noss* [2006] NSWCA 37, per Giles JA at [25].

hidden the funds. It was submitted that in these circumstances "it is surely idle to contend that guarantees in any form would have allowed the plaintiffs to achieve any better outcome". This submission refers to matters which may properly be raised in defence to the claim and which will fall to be considered on the facts as found at trial. It would, however, be inappropriate to make a summary determination in the absence of the opportunity for the plaintiffs to present its evidence it support of its claim.

[39] The fourth defendant's second ground of opposition concerned the case sought to be advanced by the plaintiff with respect to the planning searches. It was submitted on behalf of the fourth defendant that the allegations must fail because:

(a) there was no term of the retainer which required the fourth defendant to carry out a s 65 *Planning Act* search nor to give advice to the plaintiffs;

(b) it is pleaded in the ASOC that the third defendant carried out the same searches as did the fourth defendant, and consequently "any failure to state their obvious content to [the third defendant] must therefore be irrelevant";

(c) it is pleaded that a s 65 *Planning Act* search would merely reveal that the relevant department had no record confirming compliance, but both the third defendant and the plaintiff were already on notices to that and compliance was therefore uncertain;

(d) It is pleaded that the second plaintiff had decided that, because he was not satisfied about planning and building compliance, he would require a warranty in the contract about those things from the purchaser and would rely upon that as his protection.

[40] As to the first of these arguments, it seems to me that the position is similar to that in respect to the ambit of the retainer, as discussed above. Whether, in this case, this particular agent's obligations to provide advice in relation to Northern Territory laws and act generally in relation to the conveyance extended to the specific matters of breach alleged by the plaintiff will necessarily require a determination of the facts at trial.

[41] As to the second argument, the fact that the third defendant had carried out the same searches does not, of itself, excuse any proven breach of duty on the part of the fourth defendant. Either, or neither, or both of the third and fourth defendants may have breached duties to the plaintiffs – whether either of them did will be a matter for trial.

[42] By the third and fourth points, the fourth defendant raises issues with respect to reliance and causation. It is argued that, because the matters which are pleaded were within the knowledge or contemplation of the second plaintiff, these matters render it impossible for the plaintiffs to prove reliance and causation. For example, it is submitted that the pleading asserts, in effect, that the second plaintiff had sought to protect himself against a known risk by building into the relevant contract a warranty, the breach of which would enable him to claim damages, and further

pleads that, on the strength of that warranty, he had decided not to take further steps to discover the true state of affairs in relation to the dongas and planning compliance generally. It is argued:

> "This is entirely inconsistent with the contention that he only proceeded to settlement because he thought Cridlands had done a s 65 Planning Act search which, by his own pleading, he admits could have achieved no more than a confirmation of what was already known or believed – that there was no record of relevant compliance."

[43] In fact, that is not the case which is pleaded. The pleaded case is that the fourth defendant should have, but failed to, give certain advice on these matters to the second plaintiff, that the fact that this advice was not given before completion led the second plaintiff "to mistakenly continue to believe" that all necessary planning and development permits had been obtained and, consequently, that the first plaintiff was bound to complete the purchase.

[44] The matters raised by the defendant are factual matters which may, if proven, persuade a judge to make a finding of lack of reliance or absence of causation. But such findings will clearly need to be made on evidence at trial.

[45] The third argument advanced on behalf of the fourth defendant was that the plaintiffs' case that the conduct of the third and fourth defendants relevantly amounted to a representation that the plaintiff was bound to complete the contract and that this led the first plaintiff to settle when it was not obliged to do so and that it would not have done so if correctly advised. The fourth defendant contends that these allegations must fail because of their dependence upon the first and second allegations. It is clear enough, however, that if I am of the view (as I am) that the first and second allegations are matters raising triable issues, then the same applies in respect of the third allegation.

[46] Accordingly, whilst the fourth defendant has pointed to matters which may well constitute defences to the claims proposed to be brought by the plaintiffs as articulated in the ASOC, they seem to me to raise triable issues which are not amenable to the sort of summary determination contended for by the fourth defendant on the present application.

[47] To the extent that the third defendant advanced cognate arguments, the same conclusion follows.

[48] As a separate argument, the third defendant attacks the method of calculation of damages proposed in the ASOC. That approach can be summarised as follows:

(a) The first plaintiff contends that what it acquired for the purchase price of $1,850,000 (plus stamp duty) at the time of settlement consisted of:

(i) its rights under the lease of the Hotel to Cashcow, and

(ii) the value of the reversionary interest in the Hotel premises.

[49] The plaintiffs then plead a range of matters on which they would rely to support the proposition that as at 1 July 2005 "there was an inherent probability that the loss of most of [the first plaintiff's] investment [in the Hotel] was inevitable". The matters referred to include, by way of example, the fact that the relationship between the first plaintiff as landlord and Cashcow as tenant was unsupported by guarantees in circumstances where the first plaintiff was not the licensee (i.e. the holder of the liquor licence) in occupation of the premises, and a range of facts and circumstances concerning the characters of Khan and Taylor and the way they ran the Hotel business, which led cumulatively to the cancellation of the liquor licence which, in turn, "destroyed the income earning capacity of the Hotel premises", and the subsequent financial demise of the Hotel. The first plaintiff, as I have said, points to these matters to support the proposition that the true value of what was acquired on 1 July 2005 was much less than the $1,850,000 which it paid. Specifically, it says that:

(a) the rights acquired under the Hotel lease were actually worth about $310,000, and

(b) the value of the reversionary interest was actually about $320,000.

The plaintiff contends, therefore, that on 1 July 2005 the first plaintiff suffered an immediate loss of about $1,195,000 plus the amount it paid in stamp duty and purchase costs when it settled on the acquisition of the Hotel.

[50] The third defendant argues that this approach is flawed because what the first plaintiff is seeking to do is calculate its damages by reference to events which, as at 1 July 2005, had not yet occurred or were unknown to and unknowable by the third defendant. The third defendant says that in those circumstances, it is impossible, and impermissible, for such matters to be taken into account in making an assessment of true value in hindsight.

[51] It is clear, in point of principle, that the Court, when assessing the true value of an asset sold, may take into account events which occurred after the date of sale for the purposes of ascertaining its true value. In *HTW Valuers v Astonland Pty Ltd*[3], the High Court observed:

> "40 Finally, although the court is entitled to take into account events after the date of acquisition, it must distinguish among possible causes of the decline in value of what has been bought. 'If the cause is inherent in the thing itself, then its existence should be taken into account in arriving at the real value of the shares or other things at the time of the purchase. If the cause be 'independent', 'extrinsic', 'supervening' or 'accidental', then the additional loss is not the consequence of the inducement.'"[4]

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3 (2004) 217 CLR 640.

4 *Potts v Miller* (1940) 64 CLR 282 at 298, per Dixon J; see also *Gould v Baggelas* (1985) 157 CLR 215 at 220, per Gibbs CJ.

[52] The difficulty with the argument sought to be advanced on behalf of the third defendant on a summary basis is that it is simply not possible, in the absence of evidence, to make an assessment as to whether some or all of the matters sought to be relied on by the plaintiffs are matters which can properly be taken into account, or whether they should properly be characterised as "independent, extrinsic, supervening or accidental", and therefore not possible causes of the claimed decline in value. This is particularly so in respect of the matters concerning the liquor licence. Whether rental levels were doomed from the outset or whether, in the circumstances of this transaction, there was at the date of settlement an inherent vulnerability of the liquor licence to cancellation are matters of fact for determination at trial. The matters identified by the third defendant can be pleaded in defence of the claim. It may be that the third defendant is successful in that argument, on the evidence accepted by the trial judge. But it is clearly inappropriate for me to make a summary determination in respect of these matters without the benefit of the necessary findings.

Conclusion

[53] None of the arguments advanced by the third defendant or the fourth defendant persuade me that the cases sought to be advanced against them by the plaintiffs in the ASOC are so inarguable as to preclude the necessary leave from being granted.

[54] Accordingly, there will be an order granting leave to file the ASOC.

[55] The costs of and incidental to the present application ought properly be reserved.

[56] I direct the parties to bring in the necessary draft order.