

SUPREME COURT OF QUEENSLAND

CITATION: *Murdoch v Lake* [2012] QSC 307

PARTIES: **MALCOLM ALEXANDER STEPHEN MURDOCH**
(Plaintiff)

v

STEPHEN MAURICE LINTON LAKE
(Defendant)

FILE NO/S: 9994 of 2010

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 9 October 2012

DELIVERED AT: Brisbane

HEARING DATE: 3 May 2012

JUDGE: Douglas J

ORDER: [1] Strike out paragraph 22 of the further amended statement of claim but give leave to the plaintiff to re-plead;

[2] Refuse the request for further and better particulars of paragraphs 9 and 10 of the further amended statement of claim;

[3] Order the provision of the following further and better particulars by the plaintiff:

1. As to paragraph 19 of the statement of claim, provide particulars of all facts, matters and circumstances relied upon by the plaintiff as:
 - (a) rendering the alleged failure to disclose misleading or deceptive or likely to mislead or deceive within the meaning of s 52 of the *Trade Practices Act 1974* (Cth);
 - (b) further, or in the alternative, forming part of the conduct, or forming part of the relevant context of the conduct, alleged to have been misleading or deceptive or likely to mislead or deceive within the meaning of s 52 of the said Act.
2. As to paragraph 20 of the statement of claim, provide particulars:
 - (a) identifying the facts, matters and circumstances relied upon by the

- plaintiff as sought in respect of paragraph 19 of the statement of claim;
- (b) identifying that the defendant knew of those facts, matters and circumstances for the purposes of the allegations in paragraph 20 of the statement of claim; and
- (c) of any conduct by the defendant engaged in in respect of those facts, matters and circumstances for the purposes of paragraphs 19 and 20 of the statement of claim.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – PARTICULARS – where the defendant seeks further and better particulars of paragraphs 9, 10, 19 and 20 of the further amended statement of claim – where the defendant also applies to strike out a new paragraph, paragraph 22, recently added to the further amended statement of claim – whether the court ought make an order for the provision of further and better particulars in respect of paragraphs 9, 10, 19 and 20 – whether paragraph 22 ought be struck out

TRADE PRACTICES – MISLEADING OR DECEPTIVE CONDUCT – GENERALLY – where the plaintiff alleges that there was a secret understanding between the defendant and the board members of GBST Holdings Pty Ltd, other than the plaintiff, that GBST would pursue an initial public offering – where the defendant denies there was such an understanding – where the plaintiff alleges that the failure to disclose the understanding was misleading or deceptive conduct – where the plaintiff claims damages on the basis that he would have refused to enter into the deed of settlement, remained a shareholder of GBST and benefitted from the initial public offering

Trade Practices Act 1974 (Cth), s 52

Barclay Mowlem Construction Ltd v Dampier Port Authority (2006) 3 WAR 82, cited

Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31, cited

Fabcot Pty Ltd v Port Macquarie - Hastings Council [2011] NSWCA 167, cited

Kimberley NZI Finance Ltd v Toero Pty Ltd (1989) ATPR (Digest) ¶46-054, referred

Lyons v Kern Konstructions (Townsville) Pty Ltd (1983) 47 ALR 114, cited

Traderight (NSW) Pty Ltd v Bank of Queensland Ltd [2011] NSWSC 972, referred

COUNSEL: M Hodge for the applicant/defendant
 D A Savage SC with P W Hackett for the respondent/plaintiff

SOLICITORS: HopgoodGanim Lawyers for the applicant/defendant
 Morgan Conley Solicitors for the respondent/plaintiff

- [1] The defendant seeks particulars of four paragraphs of the statement of claim and also applies to strike out paragraph 22, a new paragraph recently added to that pleading.

Background

- [2] The defendant was the chief executive officer of GBST Holdings Pty Ltd (“GBST”). The plaintiff was a director and shareholder of GBST. The plaintiff brought proceedings against GBST and others in 2003 in the Supreme Court of Queensland (BS5402/03) alleging, amongst other things, oppression and unfair dismissal. The 2003 proceeding was settled by deed of settlement on 20 September 2004. In 2005, GBST listed as a public company.
- [3] In this proceeding, the plaintiff alleges that there was a secret understanding, arrived at before 20 September 2004, between the defendant and the board members of GBST, other than the plaintiff, that GBST would pursue an Initial Public Offering. The defendant has denied that there was such an understanding.
- [4] The plaintiff alleges that the failure to disclose the understanding was misleading or deceptive conduct on the part of GBST and a corporate shareholder of GBST, Crown Financial Pty Ltd (“Crown”). The plaintiff also alleges that the defendant was knowingly concerned in this misleading or deceptive conduct.
- [5] The plaintiff claims damages on the basis that, if told of this understanding, he would have refused to enter into the deed of settlement, remained a shareholder of GBST and benefited from the IPO.
- [6] Particulars are sought of paragraphs 9, 10, 19 and 20 of the further amended statement of claim which read as follows:

“9. Prior to 20 September 2004 the defendant as CEO and board members of GBST (not including the plaintiff) had an understanding to cause GBST to pay a dividend to shareholders and thereafter pursue an Initial Public Offering (the ‘understanding’)

Particulars

The understanding was oral and made between Sundell (on behalf of himself as a director of GBST and Crown as a

shareholder of GBST), the defendant (on behalf of himself as an officer of GBST and as a shareholder of GBST) and Puttick (on behalf of himself as a director of GBST and as a shareholder and representative of the Puttick Family Trust also a shareholder of GBST) in face to face meetings, by telephone and written communications none of which were disclosed to the plaintiff.

10. The material terms of the understanding were, that:
- (a) GBST would pay a dividend to extinguish in whole or part shareholder loans.
 - (b) GBST would pursue an Initial Public offering.

...

19. The failure to disclose the understanding by GBST and Crown, and the matters pleaded in 2(g), 2(h) and 3(e) of the statement of claim, was misleading and deceptive or likely to mislead and deceive the plaintiff into entering in the deed of settlement on the basis ~~term~~ that GBST had a valuation of \$29.7M and that the plaintiff's shareholding was 17.2% rather than 21.2%, in contravention of section 52 of the TPA.

...

20. By reason of the defendant's failure to disclose the understanding and the matters pleaded in 2(g) and 2(h) and 3(e) of the statement of claim, he was knowingly concerned in, or was party to, the contravention of section 52 of the TPA within the meaning of those expressions used in section 75B of the TPA."

- [7] The plaintiff had been a director of GBST and the owner of ordinary shares in that company. The defendant, Mr Lake, as well as being the chief executive officer of GBST, was alleged in paragraph 2 of the pleading to be also the owner of ordinary shares in it as well as the owner and beneficial owner of two classes of convertible preference shares. He was also a defendant to the earlier litigation in this Court, the matter that resolved in 2004.

Particulars sought

Paragraph 9

- [8] The applicant/defendant has accepted, at this stage, that it will not obtain responses to particulars it sought of "face to face meetings", "telephone communications" and "written communications" referred to in the particulars already supplied to paragraph 9 but persists in seeking "any fact from which ... the state of mind of the

defendant and ‘board members of GBST (not including the plaintiff)’ said to have constituted the alleged understanding is claimed to be an inference” and “any fact from which the existence of the understanding is claimed to be an inference.”

- [9] That request is resisted on the basis that the statement of claim does not allege the state of mind of the defendant and board members of GBST or that the existence of the understanding is to be inferred. Mr Savage SC for the plaintiff was also anxious to make the point that these particulars were being sought of an allegation that is already pleaded clearly as an understanding which was not disclosed to the plaintiff at a stage of the action before disclosure of the parties’ documents had occurred.¹ His argument is that the defendant already knows the case he has to meet, and has delivered a defence in which he denies the existence of the alleged understanding.
- [10] In my view it does not advance the litigation at this stage to require this form of particularisation of the allegations and, if one were to be technical, there is no precise allegation of a state of mind of the defendant apart from the understanding alleged in the body of paragraph 9 of the pleading. I would refuse the request contained in paragraph 9(d) of the request for further and better particulars dated 5 April 2012.

Paragraph 10

- [11] This request sought particulars of the dates when GBST would pay a dividend and on which it would pursue an initial public offering.
- [12] Again, given the premise on which the request is based, the allegation that the understanding was not disclosed to the plaintiff, the request is curiously unhelpful before disclosure occurs and, as the plaintiff complains, does not seek particulars of matters alleged in paragraph 10 in circumstances where paragraph 11 of the pleading goes on to assert that the understanding was secret and not disclosed to the plaintiff. In this context, Mr Savage relied upon decisions discussing whether it is appropriate to order the provision of particulars before disclosure and inspection in cases such as this.² In my view this request is also premature and should not be the subject of an order at this stage.

Paragraph 19

- [13] The particulars sought of paragraph 19 were of the facts, matters and circumstances relied on by the plaintiff as rendering the alleged failure to disclose misleading or deceptive or likely to mislead or deceive or forming part of the conduct or part of the relevant context of the conduct alleged to have been misleading or deceptive or likely to mislead or deceive within the meaning of s 52 of the *Trade Practices Act 1974* (Cth). This request was based on the decisions about misleading or deceptive

¹ See *Barclay Mowlem Construction Ltd v Dampier Port Authority* (2006) 3 WAR 82 at [7].

² *Lyons v Kern Konstructions (Townsville) Pty Ltd* (1983) 47 ALR 114, 128-130.

conduct by silence and decisions such as *Kimberley NZI Finance Ltd v Torero Pty Ltd*³ where French J (as his Honour then was) said:

“However, unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that that fact does not exist.”

[14] In *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd*,⁴ Ball J also said:

“Silence can, of course, amount to misleading and deceptive conduct ... but if that is what is alleged, it is necessary to plead the facts which, taken together with the silence, amount to the misleading conduct and to plead that that conduct is misleading or deceptive or likely to mislead or deceive.”

See also *Fabcot Pty Ltd v Port Macquarie-Hastings Council*.⁵

[15] This request does seem to me to have some substance. It is not necessarily obvious that parties engaged in litigation of the type that arose in 2003 owe a duty to each other to reveal their future intentions in respect of the company over which they are arguing, nor that there would necessarily be an expectation that there should be such a disclosure. Mr Hodge, for the defendant, pointed out that the existing amendments that have been made to paragraph 19 did not make it clear why it was that the defendant should not have remained silent or what the circumstances were that should have required him to disclose the understanding. He also submitted that paragraph 19 as it stands, in making allegations about the valuation of GBST and the percentage of the plaintiff’s shareholding, was not clear, a criticism that seems valid.

[16] Mr Savage relied upon the context in which the paragraph of the pleading existed, including the plaintiff’s status as a director and shareholder of GBST along with the defendant and others but it seems to me that it is incumbent on his client to plead properly, if it is the case, which of those background facts were relevant to the obligation the defendant is said to have had to disclose the understanding or why it was misleading and deceptive for him not to do that.

[17] Accordingly, I would make an order in terms of paragraph 11 of the request for further and better particulars dated 5 April 2012.

³ (1989) ATPR (Digest) ¶46-054 at [53,195]. See also *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 41.

⁴ [2011] NSWSC 972 at [33].

⁵ [2011] NSWCA 167 at [209].

Paragraph 20

- [18] Here, again, the complaint in respect of paragraph 20 is that the plaintiff has not properly identified the matters making out misleading or deceptive conduct by silence nor those matters that could give rise to involvement in a contravention pursuant to s 75B of the Act.
- [19] The plaintiff has, however, responded to the defendant's request and it is not completely clear to me which of the responses he claims is inadequate. The request now seems to be for particulars identifying:
- (a) the relevant context for the purposes of paragraph 19 of the statement of claim in which silence can amount to misleading or deceptive conduct;
 - (b) that the defendant knew of the relevant context for paragraph 20 of the statement of claim;
 - (c) that the defendant engaged in some conduct as part of this relevant context.
- [20] It seems to me that the plaintiff should provide such particulars in conjunction with a re-pleading or the provision of further and better particulars of paragraph 19.

Paragraph 22

- [21] Paragraph 22 reads as follows:

“22. In the alternative, the plaintiff has suffered loss and damage in the sum of \$12,603,338.00 being the recalculation of paragraphs 21(c), (d), (da), (e) and (f) on the basis that the CPSB had not been issued:

Particulars

- (a) At the time of the prospectus the plaintiff would have owned 8,057,122 shares.
 - (b) Accordingly, the value of the plaintiff's shares would have been: 1,325,577 shares times \$1.00 per share plus 6,731,545 shares times \$2.37 per share equals \$17,279,338. The difference from the payment made under the settlement deed being \$17,279,338 less \$5,100,000 equals \$12,179,338.
 - (c) The plaintiff's share of the 14 January 2005 dividend would have been 21.2% times \$2,000,000 equals \$424,000.”
- [22] “CPSB” in that paragraph of the pleading appears to be a reference to the allegation in paragraph 2(g) of the pleading that the defendant was “the beneficial owner of Convertible Preference Shares Class B in GBST”. On its face there is little to link

the allegation that the plaintiff has suffered loss and damage on the basis that the convertible preference shares class B in GBST had not been issued with the particulars provided or any other allegation in the existing pleading.

[23] Mr Savage contended that the pleading could be understood, in effect, by incorporating by reference the pleadings in the previous action. It does not satisfy me, however, that it is clear for the purposes of a trial of this action. Even if the parties may be able to understand the allegations in that context it would mean little to a trial judge who is still, presumably, meant to be able to come to grips with what the litigation is about by reading the pleadings.

[24] As it stands the pleading is unsupported. If it can be clarified by reference to the previous litigation that should be done. Accordingly, it seems to me that paragraph 22 should be struck out but that liberty to re-plead should be given.

Conclusion and orders

[25] I would, therefore, strike out paragraph 22 of the further amended statement of claim but give leave to re-plead it, refuse the request for further and better particulars of paragraphs 9 and 10 of the further amended statement of claim but order the plaintiff to provide the following further and better particulars:

1. As to paragraph 19 of the statement of claim, particulars of all facts, matters and circumstances relied upon by the plaintiff as:
 - (a) rendering the alleged failure to disclose misleading or deceptive or likely to mislead or deceive within the meaning of s 52 of the *Trade Practices Act 1974* (Cth);
 - (b) further, or in the alternative, forming part of the conduct, or forming part of the relevant context of the conduct, alleged to have been misleading or deceptive or likely to mislead or deceive within the meaning of s 52 of the said Act.
2. As to paragraph 20 of the statement of claim, I would also order the provision of particulars:
 - (a) identifying the facts, matters and circumstances relied upon by the plaintiff as sought in respect of paragraph 19 of the statement of claim;
 - (b) identifying that the defendant knew of those facts, matters and circumstances for the purposes of the allegations in paragraph 20 of the statement of claim; and
 - (c) of any conduct by the defendant engaged in in respect of those facts, matters and circumstances for the purposes of paragraphs 19 and 20 of the statement of claim.

[26] I shall hear the parties further as to the form of the orders and costs.