SUPREME COURT OF QUEENSLAND

CITATION:	*Slack & Anor v HRL Limited & Ors* [2012] QSC 387
PARTIES:	**DOUGLAS SLACK and DAWN EDITH SLACK** (Plaintiffs) **v** **ACIRL PTY LTD ACN 000 513 888** (First Defendant) And **AUSTRALIAN LABORATORY SERVICES PTY LTD ACN 009 136 029** (Second Defendant) And **HRL LIMITED ACN 061 930 756** (Third Defendant)
FILE NO/S:	S196 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	5 December 2012
DELIVERED AT:	Rockhampton
HEARING DATE:	23 November 2012
JUDGE:	McMeekin J
ORDERS:	1. Paragraphs 18, 21 and 22 of the Amended Statement of Claim are struck out; 2. The plaintiffs have leave to deliver a Further Amended Statement of Claim on or before 4pm on 21 December 2012; 3. The application is adjourned to a date to be fixed to be brought on on four days notice in writing by any party to the others; 4. That the parties make any submissions on costs that they might be advised on or before 4pm on 12 December 2012 and in the event that no submissions are received that the parties' costs of and incidental to the application be their costs in the cause.
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT

– SUMMARY JUDGMENT – where application for summary judgment or alternatively striking out parts of pleading – whether cause of action known to law disclosed

Uniform Civil Procedure Rules 1999 rr 150, 154, 171, 214, 293

Blake v Lanyon (1795) 6 TR 221

British Motor Trade Association v Salvadori [1949] 1 Ch 556

Bruce J Small No 1 Pty Ltd & Anor v Minister For Natural Resources & Anor [1999] QSC 038

Charlie Carter Pty Ltd v The Shop, Distributive & Allied Employees' Association of Western Australia (1987) 13 FCR 413

De Francesco v Barnum (1890) 63 LT 514

Deputy Commissioner of Taxation v Salcedo [2005] QCA 227

Emerald Construction Co Ltd v Lowthian [1966] 1 WLR 691

Fightvision Pty Ltd v Onisforou (1999) 47 NSWLR 473

Independent Oil Industries Ltd v The Shell Co of Australia Ltd (1937) 37 SR (NSW) 394

Northern Territory v Mengel (1995) 69 ALJR 527

Premier Building and Consulting Pty Ltd (recs apptd) v Spotless Group Ltd No 12 [2007] VSC 377

Shiphard v Motor Accident Commission (1997) 70 SASR 240

Short v City Bank (1912) 12 SR (NSW) 186

Trade Practices Commission v David Jones (Australia) Pty Ltd (1985) 7 FCR 109

COUNSEL: A Arnold for the Plaintiff

S Robertson for the Third Defendant

SOLICITORS: Purcell & Associates for the Plaintiff

Maddocks for the Third Defendant

McMEEKIN J:

[1] The third defendant applies for summary judgment pursuant to r 293 *Uniform Civil Procedure Rules* 1999 (UCPR) or alternatively that parts of the plaintiffs' pleading be struck out pursuant to r 171(1)(a) UCPR.

[2] The plaintiffs' cause of action is based on an alleged intentional interference by the third defendant with their contractual relations with the first defendant. The plaintiffs seek that a mandatory injunction issue against the third defendant "to provide sufficient

security for the performance of the terms of the lease in such form or in such amount as the court deems appropriate" or alternatively that the third defendant pay damages "for breach of duty" in the sum of $1,785,500.

[3] The third defendant contends that on the facts pleaded no cause of action known to law is disclosed.

The Factual Background

[4] In 1992 the plaintiffs as lessors entered into a registered lease with the first defendant as lessees of certain land ("the Lease"). The first defendant is a corporation. By the time of the relevant events the third defendant had acquired all the shares in the first defendant.

[5] Clause 6 of the Lease dealt with assignments and provided that the first defendant "may only assign … the Lease …with the Landlord's consent which must not be unreasonably withheld." Clause 6.3 provided that if there was "a change in the principal shareholding …altering the effective control" of the corporate lessee then such change "is an assignment of this Lease and must be dealt with in accordance with this Lease." Clause 9.1 provided that the obtaining of such consent was an essential term of the lease. Clause 9.2 provided that the first defendant was in default under the terms of the lease if it breached an essential term.

[6] Thus the effect of the terms was to treat such a change in control of the first defendant as an effective assignment of the Lease (and that is how I propose to refer to that change in ownership), requiring that the landlord's consent be first obtained and, if it was not, it had the result that the first defendant was in default under the Lease.

[7] In October 2007 the third defendant entered into a Share Sale Deed pursuant to which its entire shareholding in the first defendant was to be transferred to the second defendant for a consideration of $76,750,000.

[8] By cll 22 and 23 of the Constitution of the first defendant registration of the transfer of shares in the first defendant cannot occur without the consent of the directors of the first defendant. The Constitution further provides in cl 21(3) that "a transferor of shares remains the holder of the shares transferred until the transfer is registered and the name of the transferee is entered in the register of members in respect of the shares".

[9] Clause 5.4 of the Share Sale Agreement between the third defendant and the second defendant provided that "[t]he [third defendant] must procure that before or at Closing a meeting of the directors of the [first defendant] …is convened and resolve, subject to Closing: (a) to approve registration of the [second defendant] as the holder of the Sale Shares…". By cl 8.1 the third defendant represented and warranted that it had "full corporate power and lawful authority to…perform or cause its obligations under this deed to be performed".

[10] Part 2 of Schedule 4 to the Share Sale Deed makes express reference to the Lease under the heading "Business Property'. By cl 12.2(f) of Schedule 1 to the Share Sale Deed (setting out the seller's warranties) the third defendant warranted: "[t]o the best of the [third defendant's] knowledge and belief after due enquiry the Sale Group is in compliance with any agreement …affecting or relating to any land comprised in any Business Property…".

[11] It is common ground that the consent of the plaintiffs to the effective assignment of the Lease was not first obtained. It was not of course for the plaintiffs to consent or not to a change in the shareholding of the first defendant. Their right was to give or withhold their consent to the continuation of the lease with the first defendant, and consequent on that a right to negotiate what those terms might be.

[12] The plaintiffs say that they were unaware of the change in ownership of the shares in the first defendant until some years after the event.

[13] The plaintiffs argue that had they been alerted to the change in the control of the first defendant they would have required as a condition of their consent to the effective assignment of the Lease a deed to be entered into by the third defendant which would have placed the third defendant under a contractual obligation to make good any breaches of the lease by the first defendant. The argument at one point extended to an obligation to make good any such breaches whether before or after the change in control. They claim a similar right was lost in relation to the second defendant.

[14] The first defendant cleaned coal on the demised land. It is now alleged that as a result of the first defendant's activities the demised land and its surrounds has become contaminated and requires remediation at a cost of $1,785,500. The first defendant refuses to remedy the problem. This, it is said, is in breach of the terms of the lease. While it was not recognised in 2007 the plaintiffs do now contend that there had been, or may have been, a breach of the Lease by the first defendant, by this contamination and failure to remediate, by the time of the effective assignment of the Lease.

The Pleading

[15] The plaintiffs plead the effect of the terms of cl 6 of the Lease that I have mentioned above, that the consent of the plaintiffs was therefore required to any "deemed assignment", that the share transfer from the third to the second defendant took place and was such a deemed assignment, that the registration of that transfer occurred at the request of the second or third defendant or both, that that registration occurred without the knowledge or consent of the plaintiffs, and then:

> "18. The Third Defendant either well knew of the existence of the lease, and the relevant term referred to in paragraph 14 [an intended reference presumably to paragraph 15 of the pleading and cl 6 of the Lease], or acted with reckless disregard to the terms of occupancy of a principal asset of the First Defendant.
>
> PARTICULARS
>
> (a) In the course of the due diligence process in sale of the shares the third defendant either did or should have disclosed or caused to be disclosed the lease to the second defendant. The plaintiff reserves the right to provide further particulars following disclosure in relation to the sale process.
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> (b) There is a history of shared executive officers and directors between the third defendant and the first defendant which makes it likely that the third defendant had or should have had knowledge of the existence of the lease and its terms.

(c) The provisions of the lease referred to in paragraph 15 are a common term in commercial leases which the third defendant and its legal advisors should have had regard to and made enquiry.

…

21. In selling the shares and requesting and allowing the first defendant to consent to and register the transfer of the shares to the second defendant without the consent of the plaintiff the third defendant induced the first defendant to breach the lease and has intentionally interfered with the contractual relations between the plaintiff and the first defendant.

22. Because of the interference the plaintiff has suffered loss and damage in that –

(a) the first defendant, despite demand, refuses to remediate or repair the land;

…

(b) the plaintiff, because of the actions of the defendants, has no security for the performance of the terms of the lease by the first defendant from the second defendant, or the third defendant;

(c) the plaintiff is now seized of land that is wasted and commercially unusable."

The Complaint

[16] The third defendant complains that there is no pleading of two essential elements of the tort – the intentional inducement of the breach of contract and the suffering of damage.

[17] It is critical of the pleading in para 21 ("the third defendant induced the first defendant to breach the lease and has intentionally interfered with the contractual relations between the plaintiff and the first defendant") arguing that it pleads as a conclusion the intentional interference which does not follow from what has gone before and without any factual basis for that conclusion.

[18] The third defendant says that all that the pleading says, and all that the evidence the plaintiffs can point to shows, is that the third defendant omitted to have the first defendant obtain the consent of the plaintiffs before settlement of the share sale agreement. No case, it is said, supports the proposition that an omission to act can constitute an intentional interference with contractual relations.

[19] Even if it fails in those arguments the third defendant complains that the pleading in para 18 that the third defendant "acted with reckless disregard to the terms of occupancy of a principal asset of the First Defendant" is to plead an irrelevancy and is therefore embarrassing and the words should be struck out.

The Tort of Intentional Interference with Contractual Relations

[20] One of the difficulties facing the third defendant in arguing that no cause of action is made out is that it is by no means clear that the law is settled in relation to economic

torts of this type. The necessary degree of certainty that the plaintiffs cannot succeed simply cannot be shown when that is the state of the law.

[21] The third defendant submits that to establish the tort of intentional interference with contractual relations the plaintiffs must show four elements - there must be a breach of contract; the defendant must have procured or induced the breach; the breach must have been induced or procured with the intention of injuring the plaintiff or at least in circumstances that it must have been obvious to the defendant that the reasonable consequence of what he procured or induced would be to injure the plaintiff; and there must be injury thereby caused to the plaintiff. That formulation reflects what was said by Street J in *Short v City Bank*[1] and approved on appeal by the High Court.[2]

[22] Here the argument centres on what the plaintiffs are required to plead and prove in relation to the intentional element of the tort. The third defendant contends that it is incumbent on the plaintiffs to plead and prove "that the third defendant intended to procure or induce the doing of what it knew would be a breach of contract" citing *Short v City Bank*.[3] But it is far from clear that is so. The judgment cited is that of Isaacs J who, whilst he agreed with Barton and O'Connor JJ in the result, did so in separate reasons. It is not at all clear that Isaacs J's insistence on actual knowledge of the contract and the terms of it represent the law. I make the same observation of the analysis by Jordan CJ in *Independent Oil Industries Ltd v The Shell Co of Australia Ltd*[4], another authority relied on by the third defendants.

[23] That the elements of the tort are not settled was expressly recognised in the joint judgment in *Northern Territory v Mengel*[5]:

> "Moreover, developments involving the so-called 'economic torts' (which the cause of action described in *Beaudesert* is sometimes said to be)[6] have largely proceeded on the basis that liability depends on the intentional infliction of harm. However, the 'economic torts' emerged only in the second half of the last century[7] and, even now, the law in that regard is far from settled. The first development of significance was the recognition, in *Lumley v Gye*,[8] of the tort of intentional interference with contractual rights. Subsequent developments in the United Kingdom have, to some extent, impinged upon the intentional element of that tort. Liability does not depend on whether there is a predominant intention to injure[9] and it has been held that constructive knowledge of the terms of a contract is sufficient, so that a defendant may be

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1 (1912) 12 SR (NSW) 186 at 202

2 (1912) 15 CLR 148 at 155-156 per Barton and O'Connor JJ

3 (1912) 15 CLR 148 at 160 – I have quoted from para 14(a) of the third defendant's written submission

4 (1937) 37 SR (NSW) 394 at 414

5 (1995) 69 ALJR 527 at 537-8 – I have included as footnotes here the authorities cited

6 See, eg Balkin and Davis, op cit at p625 et seq; Luntz and Hambly, *Torts Cases and Commentary* (3rd ed, 1992) at p812 et seq; Morison and Sappideen, *Torts Commentary and Materials* (8th ed, 1993) at p166 et seq

7 Note, however, that the action *per quod servitium amisit*, the earliest record of which is in the printed reports of 1293, is sometimes classified as an economic tort. See Balkin and Davis, op cit at p673 et seq; Jones, *"Per Quod Servitium Amisit"* (1958) 74 Law Quarterly Review 39 at 40, n 6.

8 (1853) 2 El & Bl 216 at 229-230, per Crompton J; at 233-234, per Erle J; at 238, per Wightman J [118 ER 749 at 754, 756, 757]

9 See, eg *Lonrho Plc v Fayed* [1990] 2 QB 479 at 488-489, per Dillon LJ; at 491-492, per Ralph Gibson LJ; at 494, per Woolf LJ and the cases cited therein

> liable if he or she recklessly disregards the means of ascertaining those terms.[10] But it is still accurate to describe the tort as one that depends on an intention to harm for that is necessarily involved if a person knowingly interferes with the enjoyment by another of a positive legal right, whether such knowledge is actual or constructive."

[24] Given that statement of the law it would seem that it is not necessary that the plaintiffs show that the third defendant had actual knowledge of the relevant terms of the contract binding the first defendant and so not necessary to show that the third defendant deliberately interfered with the contractual rights given by those terms. Pleading and proving constructive knowledge of the relevant terms of a contract would, it seems, be sufficient. That combined with a plea of actual interference with the positive legal rights conferred by those terms may be sufficient to raise for determination whether the third defendant has acted recklessly in disregarding "the means of ascertaining those terms". All the circumstances would need to be considered to determine that question. It would be necessary for the plaintiffs to plead those circumstances that they rely on for the inference of recklessness to be drawn.

[25] The third defendant cites the decision of Muir J (as his Honour then was) in *Bruce J Small No 1 Pty Ltd & Anor v Minister For Natural Resources & Anor*[11] as supporting the submission that an essential element of the tort is "the existence on the part of the defendant of an intention to interfere with performance of a contract to which the plaintiff is a party or to procure a breach of it."[12] While Muir J did say that he plainly did not mean to assert that the alternative path of constructive knowledge and reckless disregarding of rights is not open. So much is clear from his decision, which concerned the necessity to plead constructive knowledge, and his Honour's discussion in the very next paragraph of his reasons of the passage from *Mengel* that I have referred to. His Honour also discusses the decisions from the United Kingdom which "impinged upon the intentional element of [the] tort" as it was put in the joint judgment in *Mengel*. His Honour could hardly be supposed to have meant that that impingement and the relevance of constructive knowledge be ignored. His Honour's concluding remarks have some relevance here:

> "**[27]** I have discussed relevant principles of law in order to show that they are not without difficulty and complexity. It is thus of even more than usual importance that the pleadings perform their role of defining the issues and thereby informing the parties in advance of the case they have to meet and so enable them to take steps to deal with it.
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> **[28]** Unless intention is pleaded the applicants will not know whether it is alleged that they or either of them had an actual as opposed to a constructive intent. It will be unlikely that the statement of claim and the defence will identify the precise issues on which the outcome of the action will depend."

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10 *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 at 700-701, per Lord Denning MR [[1966] 1 All ER 1013 at 1017]

11 [1999] QSC 038

12 At [16] and citing Clerk & Lindsfell on Torts 16th Ed para15-02; 45 Halsbury's Laws of England 4th Ed para1518; *Independent Oil Industries Ltd v The Shell Co of Aust. Ltd* (supra); *Torquay Hotel Co Ltd v Cousins* (supra) and *Merkur Island Shipping Corporation v Laughton* (1983) 2 AC 570 and *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (1995) 58 FCR 26 at 44

[26] As will be seen I think that a similar criticism can be made of the pleading here. I will come to that in a moment.

[27] In the premises then the law is not straight forward. The third defendant might argue that reckless indifference to the harming of another's legal rights has only a limited application, limited perhaps to the factual situation in cases such as *Emerald Construction Co Ltd v Lowthian*[13] mentioned in *Mengel* and without apparent disapproval.

[28] Given the statement in *Mengel* to which I have referred and the statements by Denning MR and Diplock LJ in *Emerald Construction Co Ltd v Lowthian*[14] on which that statement in *Mengel* is based I am not prepared to hold, on an application of this type, that the plaintiffs cannot succeed in such a case. Those statements by Denning MR and Diplock LJ were as follows, first by Denning MR:[15]

> "For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not. Some would go further and hold that it is unlawful for a third person deliberately and directly to interfere with the execution of a contract, even though he does not cause any breach. The point was left open by Lord Reid in *J T Stratford & Son Ltd v Lindley*."

[29] And Diplock LJ's formulation of principle:[16]

> "The element of intent needed to constitute the tort of unlawful procurement of a breach of contract is, in my view, sufficiently established if it be proved that the defendants intended the party procured to bring the contract to an end by breach of it if there were no way of bringing it to an end lawfully. A defendant who acts with such intent runs the risk that if the contract is broken as a result of the party acting in the manner in which he is procured to act by the defendant, the defendant will be liable in damages to the other party to the contract.
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> On the evidence as it now stands I think that the inference is irresistible that such was the defendants' intention. The one thing on which they were determined was that the plaintiffs' work under their 'labour only' sub contract with the main contractors should cease. Whether this involved a breach of contract by the main contractors was a matter of indifference to them."

[30] The approach for which *Emerald Construction Co* stands, adapted to the situation here, is that it is sufficient for the plaintiffs to show that the third defendant had an intent to achieve an end, namely the effective assignment of the Lease to the second defendant, knowing there to be a contract in place between the first defendant and the plaintiffs, but not knowing what the terms of that contract might be, and it procured the first defendant to register the share transfer recklessly not caring whether in achieving that end it interfered with the enjoyment by the plaintiffs of a positive legal right given by that contract.

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13 [1966] 1 WLR 691; 1966 1 All ER 1013
14 [1966] 1 WLR 691; 1966 1 All ER 1013
15 At p701(WLR); p1017 (All ER)
16 At p704 (WLR); p1019 (All ER)

[31] Whether that approach should be adopted here involves a decision on a developing area of the law and must be made at trial in the light of all the facts that impinge on the issue.

Summary Judgment

[32] The essential question is whether there needs to be a trial of the action. That question is to be approached with suitable caution and there must be shown the necessary degree of certainty to deprive the plaintiffs of their trial: *Deputy Commissioner of Taxation v Salcedo* [2005] QCA 227; *Shiphard v Motor Accident Commission* (1997) 70 SASR 240 at 250 per Bleby J.

[33] It follows from what I have said already that I do not consider the third defendant is entitled to summary judgment. Given that reckless indifference or wilful blindness to the truth may be sufficient to support a finding of the necessary intention (see eg *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473, 512)[17] then upon proof that the third defendant had some reason to think that the lease contract existed these possible paths to judgment are available to the plaintiffs and must be the subject of a trial.

[34] Before turning to the pleading I observe that in any case it seemed to me to be a bold claim by the third defendant that it could be entitled to summary judgment in the circumstances revealed. The submission made was that the plaintiffs have not "and could not properly" plead that the third defendant had the requisite intention. In my view neither assertion is right but I will deal only with the latter at this point.

[35] The use of the word "properly" was not explained. The unstated premise behind its use is, I think, that the third defendant asserts that the plaintiffs cannot know what went on between the third defendant and the first defendant and cannot point to any evidence directly indicating any intention. It follows that the plaintiffs cannot plead the requisite intention. If that is the premise then I reject it.

[36] There are two factual issues at the heart of the dispute here. One is the extent to which the third defendant controlled the first defendant. The other is the knowledge that the third defendant possessed of the contract between the first defendant and the plaintiffs.

[37] As to the first point while there is no presumption that one is the tool of the other merely because the holding company is the sole shareholder of the subsidiary the extent of the power to control and the exercise of that control are plainly triable issues. The judgment of Byrne J in *Premier Building and Consulting Pty Ltd (recs apptd) v Spotless Group Ltd No 12* [2007] VSC 377; (2007) 64 ACSR 114, contains a useful discussion of the authorities relating to the position of holding company and subsidiary in the context of considering whether there was an agency relationship between them.

[38] The plaintiffs face certain difficulties in both pleading and proof. They were not party, presumably, to what went on between the principal and the subsidiary. Nor can they assert what it is that the officers of the third defendant did or did not know. Things might change with disclosure and interrogatories but, at this stage, to a degree, the plaintiffs must rely on inferences to be drawn from the facts that they can establish or

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[17] The third defendant cited *Allstate Life Insurance v ANZ Banking Group* (1995) 58 FCR 26 at 44-45 as against that proposition but the case does not stand for the contrary proposition at all. Rather in the context of the facts there pleaded the Court held that the plea was not open.

are in a position to allege. But intent is to be measured objectively and the plaintiffs are entitled to rely on what has been called a principle of the law that "people are presumed to intend the reasonable consequences of their acts."[18]

[39] In my view the substratum of facts is present from which inferences might well be drawn to establish the plaintiffs' case. Whether they should be drawn is obviously not a question that arises for consideration now.

[40] First, there was a potential advantage to the third defendant in not alerting, or having the first defendant alert, the plaintiffs to the change in ownership of the shares, *vis* the avoidance of any necessity to negotiate any contract with the plaintiffs obliging it to remedy any existing default under the Lease. The second defendant expected to obtain ownership of the first defendant with the Lease in place. There is at least the potential that it would have been inconvenient to the third defendant to be held up with negotiations related to the performance of the first defendant of its obligations. It was plainly to its financial advantage not to have any personal liability for any breach of such obligations in place.

[41] Second, at material times the first defendant was the wholly owned subsidiary of the third defendant. As mentioned above a central issue is the measure of control that the holding company has over the board of the subsidiary and whether here that has the result that the subsidiary did the bidding of its principal. Where the principal is engaged in a $76.75M transaction one might readily draw an inference that very close attention would be paid by the third defendant to the obligations and actions of its subsidiary.

[42] Third, the terms of the contract that the third defendant entered into suggest the exercise of that control. The third defendant promised to "procure that before or at Closing a meeting of the directors of the [first defendant] …is convened and resolve, subject to Closing: (a) to approve registration of the [second defendant] as the holder of the Sale Shares…". That is to be read in the context of its representation and warranty that it had "full corporate power and lawful authority to…perform or cause its obligations under this deed to be performed". The inference that the third defendant was directing what occurred and the subsidiary doing the bidding of its master is plainly open. Certainly the third defendant was sufficiently confident of its capacity to direct and control the first defendant to bind itself to that promise in exchange for the consideration mentioned.

[43] Fourth, evidently such a meeting of the directors of the first defendant did occur and the necessary resolution was passed as the shares have been so registered. There is the coincidence of the antecedent promise to procure the meeting and the resolution and their subsequent occurrence. The inference is open that the third defendant gave the necessary direction to the first defendant.

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[18] *Greig v Insole* [1978] 1 WLR 302 at 337-338 per Slade J citing Lord Halsbury LC in *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 at 244. In *Bruce J Small No 1 v Minister For Natural Resources & Anor* [1999] QSC 038 Muir J pointed out that approach had support in other authorities: *J T Stratford & Son Ltd v Lindley* (1965) AC 269 at 296 per Pearson LJ; *White v Riley* [1921] 1 Ch 1; *South Wales Miners Federation v Glamorgan Coal Co* [1905] AC 239 at 250 per Lord James; *Independent Oil Industries Ltd v The Shell Co of Australia Ltd* [1937] SRNSW 394 at 415 per Jordan CJ; *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch 548 at 580 and *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR Ch D 1013 at 1019 per Diplock LJ

[44] Fifth, the first defendant did not obtain the consent of the plaintiffs to the effective assignment of the Lease. It is to be further assumed that the failure to obtain that consent constituted a breach of an essential term of the Lease and placed the first defendant in default. That seems to follow from the terms of the Lease.

[45] Sixth, the third defendant knew of the existence of the Lease. The Lease is expressly referred to in a Schedule to the third defendant's Share Sale Agreement.

[46] Seventh, the third defendant knew of many of the terms of the Lease. The Schedule refers to the Lease in detail – the address of the premises leased, the names of the lessors, the annual rental, that the rental was payable monthly, the review period and that there were CPI increases, the lease expiry date and the fact that there were no options are all mentioned. The inference is that the third defendant, by its responsible officers, studied the Lease closely.

[47] Eighth, normally honest businessmen do not warrant that to the best of their knowledge a subsidiary is in compliance "with any agreement …affecting or relating to any land comprised in any Business Property…", without making appropriate enquiries.

[48] Ninth, terms of the type here – that on a change of ownership of a corporate tenant the parties treat that change as an effective assignment - are commonly found in commercial leases, at least so the plaintiffs assert.

[49] What inferences are open? In my view the plaintiffs are entitled to argue that the Court can draw from these circumstances the following inferences:

(a) that the first defendant acted at all times at the direction of the third defendant;
(b) that the third defendant knew of the relevant terms of the lease;
(c) that a direction was given to the first defendant that the plaintiffs not be informed of the change in ownership in order to advantage the third defendant;
(d) that the third defendant knew that in so directing the first defendant it was depriving the plaintiffs of the enjoyment of a positive legal right; and
(e) the third defendant therefore had the necessary intention to harm.

[50] It may be that at trial a Court would not draw all those inferences, but the third defendant argues that a Court could not draw them and that is a step too far.

[51] An alternative case, assuming the approach in *Emerald Construction Co* is applicable, is that instead of arguing for an inference that the third defendant knew of the relevant terms of the Lease, argue for an inference to be drawn that it had constructive knowledge of them and disregarded discovering those terms recklessly not caring whether, in achieving the desired end, it interfered with the enjoyment by the plaintiffs of a positive legal right given by that contract in directing the first defendant's actions.

[52] The third defendant asserts that all that the plaintiffs can show is an omission to act – here an omission to have the first defendant obtain the consent of the plaintiffs to the effective assignment of the Lease before registering the transfer of shares - and in no case has it been held that an omission to act can amount to the procurement of a breach of a contract.

[53] It is no doubt right to say that inferences cannot be drawn where all that is shown is mere inactivity associated with a lack of knowledge of the relevant contract. That cannot amount to the commission of the tort. But it is not plain to me that the necessary inferences cannot be drawn to establish the tort where there is an omission, combined with a power of control, and associated with knowledge, at least to some degree, of the contract.

[54] It is interesting to observe that in the early cases of *Blake v Lanyon*[19] and *De Francesco v Barnum*[20] it was held that the defendants were liable for failing to dismiss certain persons from their service upon notice that they were contracted to the plaintiffs. It was not the act of employing that gave rise to the defendants' liability but the omission to discharge once they had notice. Of course such an omission can be put in positive terms – a decision to continue to employ with knowledge of the prior engagement. So it can be here – a decision not to require that the first defendant honour its contractual obligation to the plaintiffs before resolving to register the share transfer with knowledge of the Lease.

[55] In *British Motor Trade Association v Salvadori* [1949] 1 Ch 556 at 565 Roxburgh J recognised that these cases treated "something akin to mere passivity as a tort" and queried whether Lord Macnaghten had, in his preference for the words "interfere" and "interference" in his description of the principle in *Quinn v Leathem* [1901] AC 495 at 510, predicated "active association of some kind with the breach". In *Mengel* the phrase used was "knowingly interferes with the enjoyment by another of a positive legal right" which may also predicate some active association with the breach. But the precise issue does not seem to have been determined.

[56] So it may be that the boundaries of the tort will extend further than the third defendant assumes. For present purposes I observe that the submission seems to assume that the plaintiffs cannot know what went on between the third defendant and the first defendant and that it follows that they are necessarily limited to a case of omission and not positive direction. I do not see why. All will depend upon the trial judge's views of the probabilities and the inferences that can reasonably be drawn. But to assert that a trial judge could not draw the third inference that I have referred to above in the context of the facts I have listed is simply wrong. Nor can I see why an inference of reckless indifference or wilful blindness could not be drawn. That will depend, in part, on the extent of the third defendant's knowledge of the terms of the contract.

[57] Another answer is that the plaintiffs do not rely simply on an omission. While there is some ambiguity in the pleading on one reading the plaintiffs have pleaded that the third defendant requested that the first defendant register the share transfer without the consent of the plaintiffs (para 21 of the Amended Statement of Claim) knowing of the relevant term (para 18). For all I know the plaintiffs are in a position to assert that such a request was made. Like the third defendant I suspect that the plaintiffs know of no such request in which case a different pleading would be required. Usually I would expect that a request for particulars would flush out the plaintiffs' true position. At this stage no such request has apparently been made. The third defendant is critical of para 21 and I think with some justification. But I cannot see why I am required to assume that the facts underlying the plea cannot be made out.

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19 (1795) 6 TR 221

20 (1890) 63 LT 514

The Adequacy of the Pleading

[58] Thus I am satisfied that there is no basis to award summary judgment to the third defendant. I am, however, critical of the plaintiffs' pleading. I refer to the remarks of Muir J in *Bruce J Small No 1 Pty Ltd* that I have quoted above.[21] The need to plead with clarity in this complex area is essential.

[59] As a preliminary observation it needs to be recognised that the plaintiffs' pleading was done without the plaintiffs' counsel having available the Share Sale Agreement. That was disclosed only a few days prior to the hearing and well after the third defendant (and for that matter the second defendant) were obliged to disclose the document in accordance with their duty of disclosure: see r 214(2)(e) UCPR. Apparently the parties are yet to comply with their duty of disclosure.

[60] There are I think three interrelated problems. One is that the plaintiffs are required to plead the state of mind of the third defendant both in its knowledge and intent. That being so particular pleading rules apply. In my view there has been a failure to comply with rr 150(1)(k) and 150(2) UCPR which provide that where intention is to be alleged (or indeed any condition of mind including knowledge or notice) it must be expressly pleaded and the facts relied on for drawing an inference of that intention (or knowledge) must also be expressly pleaded.

[61] A second problem is that the plaintiffs do not make a clear distinction between a case of constructive knowledge and reckless acting and a case of actual knowledge and deliberate acting. The plaintiffs are quite entitled to plead inconsistent cases but in doing so must ensure that they are pleaded clearly in the alternative: r 154 UCPR. The plaintiffs might point to paragraph 18 of the pleading but the pleading there confabulates the issue of the knowledge of the third defendant with the issue of the characterisation of the third defendant's conduct as reckless.

[62] The particulars to paragraph 18 of the Amended Statement of Claim exemplify the problem. Paragraph (a) goes to actual knowledge of the terms of the Lease. Paragraph (b) goes to both actual and constructive knowledge. Paragraph (c) goes to constructive knowledge and I think recklessness of conduct. But there is no antecedent pleading that the third defendant should be held to have constructive knowledge of the terms of the Lease. I suspect that the pleading in paragraph 18(a) will be amended in the light of the terms of the Share Sale Agreement which are now available. But in my view the whole pleading obscures rather than clarifies what is being alleged.

[63] The third defendant is entitled to know, if it be the case, both that a case of actual knowledge of the terms of the Lease and constructive knowledge of those terms is pursued (which I assume to be so) and importantly the facts that the plaintiffs will rely on to establish each case.

[64] The third problem concerns the pleading of the all important element of intention. The criticism that the third defendant makes of paragraph 21 of the Amended Statement of Claim is in my view a valid one. Whilst intention is mentioned in paragraph 21, it is pleaded as an apparent conclusion following the recitation of facts which do not lead to that conclusion. A bare conclusion is ordinarily not a proper allegation: see *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109; *Charlie*

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21 See para [25]

Carter Pty Ltd v The Shop, Distributive & Allied Employees' Association of Western Australia (1987) 13 FCR 413. And there is an ambiguity in the use of the phrase "requesting and allowing" which I think is embarrassing within the meaning of r 171 UCPR.

[65] If it is the plaintiffs' intention to plead that the third defendant intentionally procured the first defendant not to obtain the consent of the plaintiffs to the effective assignment of the Lease then that must be expressly pleaded and if facts are relied on from which the inference of intentionally procuring is to be drawn they need to be plainly particularised.

[66] If it is the plaintiffs' intention to plead that the third defendant should be held to have had constructive knowledge of the relevant terms of the Lease and with that knowledge procured the first defendant to register the share transfer recklessly indifferent to whether there was a breach or not then that must be plainly pleaded and with appropriate particulars.

[67] Other criticisms of the pleading can be made. I would expect that the plaintiffs would plead a breach of the essential term of the Lease that was allegedly procured by the third defendant more clearly than it has been. While it might be implicit in paragraph 21, if it is the intention to assert that the third defendant knew the consent of the plaintiff was not obtained, then such an important allegation should be expressly pleaded. If that state of knowledge depends upon an inference being drawn from other facts, which, if it is to be asserted, I strongly suspect it does, then again those other facts need to be pleaded. The pleading of damage, which I discuss below, is, to an extent, illogical, at least as against the third defendant. I suspect the intent was to plead different forms of damage against each of the defendants but if so that result has not been achieved. And some thought might be given to a realistic prayer for relief.

[68] Paragraphs 18, 21 and 22 of the Amended Statement of Claim should be struck out with leave to re-plead.

Damage

[69] The tort is actionable only on proof of damage.[22] The third defendant submits that there is no logical connection between the loss complained of and any alleged act of the third defendant and so no such proof can be forthcoming.

[70] The plaintiffs plead three categories of loss in paragraph 22 which I have earlier quoted. Two can have no possible relationship to any act or default of the third defendant – the refusal of the first defendant to remediate the land and that the plaintiffs are now seized of land that is wasted and commercially unusable. The third category however does relate to the third defendant. The plaintiffs plead:

(a) They could have, as a condition of their consent, demanded security from the second and third defendants to ensure the performance by the first defendant of its obligations under the Lease (para 15(d) of the Amended Statement of Claim);

(b) That as a result of a failure to alert them to the share transfer by seeking their timely consent they have no security for the performance of the terms of the Lease by the first defendant from the

22 *Greig v Insole* [1978] 1 WLR 302 at 332

second defendant, or the third defendant (para 22(b) of the Amended Statement of Claim).

[71] In my view interference with a legal right of this type is sufficient damage for the purposes of establishing the tort. Roxburgh J's judgment in *British Motor Traders*[23] is authority for the proposition that it is not necessary to be able to show the precise loss alleged. The judgment in *Mengel*[24] spoke of interference with a "positive legal right" and that is alleged here.

[72] The third defendant argues that it is absurd to suggest that it would have been possible to demand security from the third defendant. It submits that there is nothing in the Lease to support that conclusion.

[73] I do not agree. What the Lease provided in cl 6.1 was that the consent of the plaintiffs to the effective assignment would not be unreasonably withheld. Conversely their consent could be reasonably withheld. The issue then is what conditions the plaintiffs could reasonably have insisted on if alerted in a timely way to the proposed share transfer. That, it seems to me, must be a matter for evidence.

[74] I do not think that what might be held to be reasonable necessarily depends on the express conferring of rights on the plaintiffs by the Lease. Clause 6.2 expressly provides that consent must be given in certain circumstances but that does not preclude other conditions not mentioned in cl 6.2 from being reasonable ones.

[75] It is worth noting too that the plaintiffs' case is that a consequence of the failure to seek its consent is that it was deprived of obtaining security in some form from the second as well as the third defendant. It is not just the reasonableness of the demand on the third defendant to provide security that is in issue.

[76] One difficulty here is that construction of the relevant terms in the Lease is not straight forward. Clause 6.2 deals with the situation of an outgoing tenant not an outgoing shareholder. Clause 6.2(b) expressly provides for security to be given by "Then (*sic* presumably the) Tenant" and the "new tenant". Quite how cl 6.2 is to be read when adapted to the effective assignment situation provided for in cl 6.3 is far from plain. The third defendant's submission assumes that the failure to refer to the outgoing shareholder at all in the clause means that no equivalent condition could be reasonably demanded of it. I cannot see why I am required to make that assumption. The plaintiffs' case essentially is that cll 6.1 and 6.3 should be read as importing an implied right to place obligations akin to those mentioned in cl 6.2 on the outgoing and incoming shareholders. No authority was cited for the proposition that as a matter of law that argument is not open. Nor was any argument advanced as to what meaning and effect cl 6.3 was to have if the plaintiffs' approach was wrong.

[77] To expect that the persons having control of the first defendant, effectively the outgoing tenant, be required to provide some form of security in relation to existing breaches of the Lease does not strike me as absurd.

[78] Where I do agree with the third defendant is that the evidence so far proffered by the plaintiffs in an effort to establish what the practise is in such cases (the precedent deed

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23 [1949] 1 Ch 556

24 (1995) 69 ALJR 527 at 537-8

of assignment of lease[25]) falls well short of demonstrating the proposition. The precedent deed deals with the outgoing tenant situation. The case of an outgoing controlling shareholder with the corporate tenant continuing is very different to the case of an outgoing tenant.

[79] The point that can be drawn from the evidence is that upon an effective assignment consideration would have been given to the position of the outgoing and incoming shareholders. It is commonplace to insist in the ordinary case that the assignment does not have the effect of releasing the previous tenant from their existing obligations under the Lease. So it might follow that an outgoing controlling shareholder could be reasonably asked to accept some equivalent contractual obligation. And it might well follow too that such a demand could be made of an incoming shareholder.

[80] There is sufficient shown to establish that there needs to be a trial of the issue.

The Orders

[81] The orders are:

(a) paragraphs 18, 21 and 22 of the Amended Statement of Claim are struck out;

(b) the plaintiffs have leave to deliver a Further Amended Statement of Claim on or before 4pm on 21 December 2012;

(c) the application is adjourned to a date to be fixed to be brought on on four days notice in writing by any party to the others.

[82] Given that both parties have had some success I propose that the parties' costs be their costs in the cause. However I have not heard from the parties on costs so they will have leave to make such further submissions on costs as they might be advised within seven days hereof and failing the receipt of any such submissions that the order be as I propose.

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[25] Ex DS 6 to the affidavit of Douglas Slack filed 16 November 2012