

SUPREME COURT OF QUEENSLAND

CITATION: *Kilmac Investments Pty Ltd v NHLS & Co Pty Ltd & ors*
[2013] QSC 17

PARTIES: **KILMAC INVESTMENTS PTY LTD ACN 018 219 781**
(Applicant)

AND

NHLS & CO LTD (IN LIQUIDATION) ACN 010 670 925
(First Respondent)

MARILOSA PTY LIMITED ACN 010 317 512
(Second Respondent)

AGNIM PTY LTD ACN 010 146 675
(Third Respondent)

**H.L. ADMINISTRATION SERVICES PTY LTD ACN
010745347**
(Forth Respondent)

H.L. AGENCIES PTY LTD ACN 009 967 597
(Fifth Respondent)

RODNEY AUSTIN SAMUT
(Sixth Respondent)

MICHAEL JAMES HAYNE
(Seventh Respondent)

IAN GILBERT ANDERSON MARR
(Eighth Respondent)

PAUL LAMBERT BAYNES
(Ninth Respondent)

DAVID JACKSON
(Tenth Respondent)

KEVIN PHILLIP BLINCO
(Eleventh Respondent)

FILE NO/S: SC 9451 of 2006

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 18 February 2013

DELIVERED AT: Brisbane

HEARING DATE: 11 February 2013

JUDGE: Jackson J

ORDERS:

It is ordered that:

- 1. the applicant is granted leave under s 471B of the *Corporations Act 2001 (Cth)* to proceed against the first respondent in liquidation;**
- 2. the applicant is granted leave under *UCPR 389(2)* to take a further step in the proceeding against the first respondent;**
- 3. the application for leave under *UCPR 389(2)* to take a further step in the proceeding against the second and fourth to eleventh respondents is dismissed;**
- 4. the costs of the application for leave under s 471B to proceed against the first respondent are reserved; and**
- 5. the applicant pay the respondents' costs of the application under *UCPR 389(2)* for leave to take a step in the proceeding.**

CATCHWORDS:

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – Whether leave should be given to take a step in the proceeding after delay of more than 2 years

Corporations Act 2001 (Cth), s 231, s 461, s 471B
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 389
Trade Practics Act 1974 (Cth), s 52, s 75B, s 82, s 87

COUNSEL:

RA Nichols for the Applicant
 R Samut solicitor for the Second, Sixth and Eighth Respondent
 B Porter for the Fourth, Seventh, Ninth to Eleventh Respondent
 No appearance for the Fifth Respondent

SOLICITORS:

Creagh Weightman Lawyers for the Applicant
 Barry Nilson for the Second, Sixth and Eighth Respondent
 Tucker Cowen for the Fourth, Seventh, Ninth to Eleventh Respondent
 No appearance for the Fifth Respondent

[1] **JACKSON J:** The applicant in the originating proceeding (“Kilmac”) applies for leave under *UCPR 389(2)* to take a further step in the proceeding against all respondents after a delay of over 2 years. The first respondent (“NHLS & Co”) is in liquidation. Kilmac also applies for leave to proceed against it under s 471B of the *Corporations Act 2001 (Cth)* (“CA”).

- [2] NHLS & Co does not appear in answer to those applications but correspondence from the liquidator has been tendered stating that neither application is opposed by it. There will accordingly be orders to that effect against NHLS & Co.
- [3] The third respondent, Agnim Pty Ltd, has been de-registered, so no order may be made against it.
- [4] The other respondents (“the opposing respondents”) oppose the order sought under *UCPR* 389(2) for leave to take a further step in the proceeding as against them.
- [5] On 21 November 2004, Kilmac entered into a written agreement with NHLS & Co, and the second to fifth respondents, under which it subscribed for 421,000 shares in the capital of NHLS & Co. The shares were allotted as partly paid to \$200,000 with a further call of \$200,000 payable on 21 November 2006. The shares were issued to Kilmac on the same day. The other shareholders at that time were the second to fifth respondents, who also collectively held 421,000 shares.
- [6] Kilmac alleges that as well as entering into the share purchase agreement and paying the sum of \$200,000 for the Kilmac shares, from about late November 2004 onwards it performed day to day management of a project described as the “Axcent” project, for which it was to be paid a fee of \$250 per hour plus GST.
- [7] On 9 December 2006, Kilmac’s shares were forfeited.
- [8] Kilmac presently alleges that it did those things in reliance upon pre-contractual express representations or representations by silence made by NHLS & Co which were misleading or deceptive or likely to mislead or deceive. It claims damages under ss 82 or 87 of the *Trade Practices Act 1974* (Cth) (“TPA”) for contravention of s 52 of that Act.
- [9] The causes of action in question were long since statute barred. The events out of which the causes of action occurred prior to November 2004 and the alleged losses were first suffered in a period commencing in September 2004 or November 2004, according to the present points of claim. Unless leave to proceed is granted, the proceeding will be at an effective end against any respondent.
- [10] On 28 November 2006, the proceeding started as an originating application for relief against NHLS & Co for oppression under s 231 of the CA or for its winding up on the just and equitable ground under s 461(1)(k) of the CA. The second to fifth respondents were also parties to the proceeding at that stage, as members of NHLS & Co. Kilmac sought relief against them in relation to the affairs of NHLS & Co.
- [11] On the hearing of this application, little evidence was tendered by the parties as to the initial progress of the proceeding. A summary is as follows:

Date	Step
21 December 2006	Kilmac filed points of claim
6 March 2007	First to fifth respondents filed points of defence
14 September 2007	Kilmac filed an amended points of claim
15 October 2007	Sixth to eleventh respondents were joined as parties to the proceeding

4 April 2008	Kilmac filed an amended originating application
30 April 2008	All respondents filed an amended points of defence

- [12] The addition of the seventh to ninth respondents as parties to the proceeding effected the joinder of the members of the firm of solicitors who had acted for Kilmac in connection with Kilmac's entry into the share purchase agreement and the acquisition of shares in NHLS & Co. The amended points of claim against them (and other respondents) alleged that express representations were made to Kilmac by NHLS & Co that the paid up capital of NHLS & Co was \$421,000, that the initial shares (those of the other shareholders) were fully paid up in cash within the meaning of s 9 of the CA and that NHLS & Co had the "requisite" NTA (net tangible assets) or that the NTA of NHLS & Co were \$578,829. It also alleged that silence of NHLS & Co (and others) in relation to the cash at bank and total current assets stated in a draft business plan amounted to a representation that those statements were true, which were described as representations by silence.
- [13] The express representations and representations by silence were alleged to constitute misleading or deceptive conduct in contravention of s 52 of the TPA, because the initial shares were not fully paid up (save for \$28,000), were deemed or taken to be paid up only by means of promissory notes given by the members to NHLS & Co, because the "requisite" NTA requirement was not satisfied and because the NTA were not \$578,829.
- [14] The sixth to eleventh respondents were alleged to have been knowingly concerned in or party to NHLS & Co's contraventions of s 52 (and therefore persons involved in the contraventions under s 75B of the TPA).
- [15] Kilmac alleged that in reliance on the express representations and the representations by silence it entered into the share subscription agreement, paid the amount of \$200,000, and from about late November 2004 to about May 2005 performed the day to day management of the "Axcent" project, which it would not have done but for the representations.
- [16] Damages were claimed against each of the respondents under s 82 or s 87 of the TPA, as against NHLS & Co as contravenor and as against the other respondents as persons involved in the contraventions. However, there was no allegation of the amount of the loss or that the amount of any loss was suffered by the contravening conduct.
- [17] As to the representations alleged to have been made by NHLS & Co, the amended points of defence admitted that it represented that the paid up capital was \$421,000, denied that it represented that the initial shares were fully paid up in cash, admitted that it represented that it had the "requisite" NTA, denied that it represented that it had NTA in the amount of \$578,829 and denied the representations by silence.
- [18] The respondents denied that NHLS & Co's conduct was misleading or deceptive.
- [19] The second to eleventh respondents also denied that they were knowingly concerned in or party to any contravention of s 52.
- [20] In May 2008, Kilmac started another proceeding, this time by claim, BS 4380 of 2008 ("the Nicholsons' proceeding"). The defendants were the members of

Nicholsons Solicitors, who are the same individuals as the seventh, eighth and ninth respondents to the current proceeding. The two proceedings had overlapping subject matter, to the extent of Kilmac's claims against its former solicitors for loss suffered by reason of entering into the transaction under which Kilmac acquired shares in the capital of NHLS & Co in 2004. However, in the present proceeding the causes of action against them were confined to damages under ss 82 and 87 of the TPA as persons involved in contraventions of s 52 of that Act. In the Nicholsons' proceeding, the claim was for damages for breach of contract of retainer as solicitors, or negligence, or breach of fiduciary obligation.

- [21] On 3 October 2008, Kilmac was ordered to give security for costs in the present proceeding, in default of which the proceeding was stayed.
- [22] On 28 August 2009, Kilmac provided the security and the stay of the proceeding was lifted.
- [23] However, thereafter, no further step was attempted in the present proceeding until October 2012. Kilmac says that a decision was made to prosecute the Nicholsons' proceeding and "to focus attention solely on the Nicholsons' proceeding in order to conserve costs which may have had the effect of resolving the present proceeding in any event." Precisely what that meant was not explained. However, it is apparent that although the causes of action in the two proceedings were different and there were additional defendants to the damages claim in the present proceeding, the claim for damages in the Nicholsons' proceeding included the amount of \$200,000 for lost capital invested and a claim for the loss of a valuable commercial opportunity by way of alternative investment if Kilmac had not entered into the transaction with the first to fifth respondents. Thus, I infer it was considered that Kilmac considered that it might recover all the available damages in the Nicholsons' proceeding.
- [24] There is also a suggestion in Kilmac's solicitor's affidavit of "financial constraints" and a statement that the success in the Nicholsons' proceeding "has now enabled [Kilmac] to pursue the balance of the damages sought against the respondents in this present proceeding".
- [25] However, the respondents were not forewarned of the damages claim now sought to be advanced by Kilmac in the present proceeding until amendments were sought to be made to the points of claim in October 2012. In other words, it was not until after the Nicholsons' proceeding was concluded that Kilmac brought forward its present claim for damages in the present proceeding, as against either the seventh to ninth respondents, or the other respondents.
- [26] In February 2012, the Nicholsons' proceeding was tried and judgment was entered upon admissions at trial. Judgment was entered in a sum reflecting the claim for damages for the loss of the part-paid price for the Kilmac shares of \$200,000. The claim for damages for loss of commercial opportunity was abandoned by Kilmac, by making an amendment deleting that claim for loss shortly before judgment was entered.
- [27] On 19 October 2012, Kilmac filed the further amended points of claim in the present proceeding, without having obtained leave to proceed. That pleading deletes the claims previously made for relief under s 233 of the CA. That is not

surprising. NHLS & Co shortly afterwards went into liquidation. It also deleted the allegations in Parts C to K of the amended points of claim. Part L, alleging misleading or deceptive conduct, as summarised above, was maintained. But the relief sought was amended to refer to a newly attached calculation of damages, particularised in the attached annexure as “the cost time (sic) spent by the Applicant calculated at the rate of \$250 per hour + GST” and interest”. The total stated was \$385, 275.

- [28] On 6 December 2012, Kilmac filed the present application, at that time seeking judgment. The application for that order was misconceived. On the initial return of the application on 14 December 2012, it was adjourned to 11 February 2013. At the hearing before me on 11 February 2013, the application was amended to seek leave to proceed under *UCPR* 389(2) (and under s 471B of the CA as against NHLS & Co) in accordance with an intimation given by Kilmac on 12 December 2012 that such an application would be made.
- [29] There is no doubt that leave to proceed under *UCPR* 389(2) is required. The provision of security in September 2009 was the last step before Kilmac sought to re-enliven the proceeding, commencing with the filing of the further amended points of claim on 19 October 2012, and leaving aside the dealings between the parties and the court in responding to the case-flow management procedure.
- [30] The events with which the case is principally concerned occurred more than 8 years ago. However, the proceeding was started 6 years ago, so the parties may be expected to have been aware of the need to obtain and preserve relevant evidence since then. As well, the seventh to ninth respondents were involved in a trial covering the same factual sub-stratum as to liability, in early 2012. Nevertheless, the passage of time now is great, and the inevitable difficulties of recollection in giving oral evidence as to the relevant events may be significant. There is no specific evidence of the respondents as to any particular difficulty that they face. But the cases recognise that when it comes to a witness’s recollection, it may be difficult to know what evidence might have been available at an earlier time but is not now available.
- [31] The opposing respondents rely, broadly speaking, on the factors identified in *Tyler v Custom Credit Corporation Ltd*¹, and in particular that:
- (a) there has been substantial delay by Kilmac in bringing the proceeding and in pursuing it;
 - (b) there is no evidence to establish Kilmac’s prospects of success;
 - (c) if leave is refused, the proceeding will be at an end because the limitation periods have expired;
 - (d) the proceeding has not progressed beyond pleadings;
 - (e) there is no satisfactory explanation by Kilmac for the delay; and
 - (f) there is inchoate prejudice in seeking a trial relating to events from many years earlier.
- [32] As well, the seventh to ninth respondents rely on the failure of Kilmac to make the claim in the Nicholsons’ proceeding that it now seeks to make against them, particularly in circumstances where Kilmac made a claim in that proceeding for

¹ [2000] QCA 178 at [2]

damages for the loss of a valuable commercial opportunity which it ultimately abandoned.

- [33] The other respondents in the present proceeding are the members of NHLS & Co (now the second, fourth and fifth respondents, given that the third respondent is de-registered), the sixth respondent, Mr Samut, who was a property consultant, and the tenth and eleventh respondents, who were the members of the accounting firm Hart Larwill. As against them, no step was taken in this proceeding between the giving of security and Kilmac's initial attempt to reactivate the proceeding on 19 October 2012.
- [34] In order to show its prospects of success in the present proceeding, Kilmac relied on its success in the Nicholsons' proceeding. Having regard to the pleadings in that case, on which judgment was entered, it does not seem to me that the judgment or the pleadings say a great deal about the strength of the present case against the opposing respondents. It is not necessary to analyse those pleadings in great detail. As NHLS & Co does not oppose the grant of leave, the case against it as alleged contravenor may proceed. However, the causes of action against the other respondents as persons involved in the contravention all contain, as an element, that each was knowingly concerned in or a party to a contravention of s 52. The admissions in the Nicholsons' proceeding do not, in my opinion, speak to that necessary element of each of those claims. Paragraph 85 of the amended points of claim in the present proceeding, which alleged awareness of relevant facts, was denied in the amended points of defence and it does not seem to me that the seventh to ninth respondents' pleadings in the Nicholsons' proceeding contradict that.
- [35] The fourth, seventh and ninth to eleventh respondents relied upon the further contention that there was no evidence that the work alleged to have been done on the "Axcent" project was done and therefore no evidence that Kilmac suffered the loss alleged. As previously mentioned, the amended points of claim as proposed to be amended by the further amended points of claim do not specifically allege the loss. Kilmac tendered a proposed paragraph 32A, to be added to the pleading, alleging that it undertook the work for a fee for which it has not been paid. There is no evidence supporting that pleading, however, except for its solicitor's affidavit that "Kilmac claims damages... in respect of the cost of works undertaken by Kilmac, in reliance upon alleged representations, during the period September 2004 to June 2005."
- [36] There is also a question as to the recoverability of the loss alleged. Kilmac alleges that but for the express representations and the representations by silence "it would not have performed the day to day management of the 'Axcent' project from about September 2004 to about June 2005". Kilmac does not allege that had it not entered into the share sale agreement and done that management work it would have earned the fees it expected for that work from some other transaction. In other words, it does not allege either that the performance of that work caused a loss of some other valuable commercial opportunity. The case seems to be that because it performed the work, Kilmac suffered loss. But the loss is measured by a fee it expected to earn, which may not be recoverable as damages under s 82 or s 87 of the TPA. However, it is not necessary to decide that question.
- [37] There seems to be no basis to think that any delay since April 2008 has been caused by the respondents. It was Kilmac who delayed in providing the security until that

process was completed in August 2009 or September 2009 and thereafter apparently Kilmac's sole decision to leave this proceeding in abeyance while it prosecuted the Nicholsons' proceeding.

- [38] If leave to proceed were granted, the proceeding would re-commence at the pleadings stage. Kilmac submits that the most recent pleading merely deletes matters which no longer need to be pursued. In my view, that is an over-simplification.
- [39] First, the new claim of loss measured by the value of the work performed on the "Axcent" project would have to be investigated. That is likely to require disclosure and other preparation. Kilmac submits that the fact of the work being performed was alleged in paragraph 88(c) of the amended points of claim and that the amended points of defence did not adequately deny that allegation. It seems obvious that paragraph 88(c) did not allege the quantum of loss for any work that was done or that any amount of loss was caused by the alleged contravening conduct. Whether or not there would otherwise be a deemed admission that some work was done, in my view a greater defect exists in the failure of the amended points of claim to allege the fact or amount of loss or damage or that loss or damage was suffered "by" the alleged contravening conduct in a way that shows the causation element required for a pleading of damages under s 82 or s 87 of the TPA.
- [40] Secondly, the allegation of awareness in paragraph 85 of the amended points of claim was not supported by any particulars of the kind that might be expected under *UCPR* 150(2). Given that the allegation that the second to eleventh respondents were knowingly concerned in NHLS & Co's alleged contraventions of s 52 is an allegation of consciousness or awareness of misleading or deceptive representations, it might be expected that the pleadings in that respect will have to be further particularised, and appropriate investigations as to relevant persons awareness or knowledge by reference to the facts particularised before the case could be made ready for trial.
- [41] So far as the seventh to ninth respondents are concerned, there seems to be substance in the contention that Kilmac could have, but didn't think to (or chose not to) claim the damages it now claims in this proceeding in the Nicholsons' proceeding. There is an available inference, in the absence of any explanation for why Kilmac has chosen to do so, that the damages now sought to be claimed in the present proceeding are an afterthought. In a joint case-flow management report in the present proceeding dated 20 April 2012, Kilmac's solicitors stated that following the trial of the Nicholsons' proceeding Kilmac "subsequently received payment of a sum which included the sum sought in this proceeding" and that Kilmac then proposed that this proceeding "be discontinued by consent with each party bearing their own costs".
- [42] The only explanation for the present action after such extraordinary delay in the present proceeding is the suggestion of "financial constraints" and that success in the Nicholson's proceeding "has now enabled [Kilmac] to pursue the balance of the damages sought in the present proceeding" as discussed above. In the circumstances of this case, I do not consider that explanation to be sufficiently fulsome or persuasive. It does not touch on what the constraints were, or how it came to be that the "balance of the damages" were first notified to the respondents

in October 2012, or why those damages were not claimed against the seventh to ninth respondents in the Nicholsons' proceedings.

- [43] Moreover, I do not accept that Kilmac's success in the Nicholsons' proceeding sufficiently discharges the onus it bears to show that it has reasonably arguable prospects of success against the opposing respondents in the present proceeding, as discussed above, so as to warrant the grant of leave to proceed in the light of that extraordinary delay.
- [44] Lastly, although there is no specific evidence of prejudice to the opposing respondents in the fair trial of the proceeding by reason of Kilmac's extraordinary delay, there must be a real chance that the trial of the proceeding on the question of knowing involvement in a contravention of s 52 of the TPA by reason of the express representations or representations by silence will be affected by that delay. Such a period is inconsistent with the requirements of the rules, starting with *UCPR 5*, including that a stay operates unless leave is granted under *UCPR 389* after a delay of 2 years, and backed up by the case-flow management process under Practice Direction 17 of 2012 and its predecessor, Practice Direction 4 of 2002.
- [45] For those reasons, in my view the application must be dismissed against the opposing respondents.