

SUPREME COURT OF QUEENSLAND

CITATION: *William John Fletcher and Katherine Elizabeth Barnet as liquidators of Octaviar Administration Pty Ltd (in liquidation) & Anor v Fortress Credit Corporation (Australia) II Pty Limited & Ors* [2013] QSC 104

PARTIES: **WILLIAM JOHN FLETCHER AND KATHERINE ELIZABETH BARNET AS LIQUIDATORS OF OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION)**
ACN 101 069 390
(first plaintiff/respondent)
and
OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION)
ACN 101 069 390
(second plaintiff/respondent)
v
FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LIMITED
ACN 114 624 958
(first defendant/third party)
and
FORTRESS INVESTMENT GROUP (AUSTRALIA) PTY LIMITED
ACN 111 940 713
(second defendant/third party)
and
DAVID MARK ANDERSON
(third defendant/applicant)
and
CRAIG ROBERT WHITE
(fourth defendant/applicant)
and
FCCD (AUSTRALIA) PTY LIMITED
ACN 134 182 380
(fifth defendant/third party)
and
FCCO (AUSTRALIA) PTY LIMITED
ACN 134 182 415
(sixth defendant/third party)
and
FCCO (AUSTRALIA II PTY LIMITED
ACN 151 669 402
(seventh defendant/third party)
and
FCCD (AUSTRALIA) NOMINEE PTY LIMITED
ACN 134 182 657
(eighth defendant/third party)

and
**FORTRESS CREDIT CORP (AUSTRALIA) PTY
 LIMITED**
 ACN 112 133 178
 (ninth defendant/third party)

FILE NO/S: BS 3135 of 2012
 DIVISION: Trial Division
 PROCEEDING: Application
 ORIGINATING COURT: Supreme Court of Queensland
 DELIVERED ON: 1 May 2013
 DELIVERED AT: Brisbane
 HEARING DATE: 4 April 2013
 JUDGE: Boddice J
 ORDER: I shall hear the parties as to the formal orders, and as to costs.
 CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the applicants contend that multiple paragraphs of the plaintiff’s further amended second statement of claim are deficient – where the paragraphs relate to the causation, loss and knowledge in respect of claims that the applicants breached their statutory and fiduciary duties – where the applicants contend the plaintiffs should plead what would have happened had the applicants not breached their duties – where the applicants apply to strike out the paragraphs of the pleading pursuant to UCPR r 171 – whether the court should exercise its power to strike out the pleadings

Corporations Act 2001 (Cth)

Uniform Civil Procedure Rules 1999 (Qld), r 150, r 171

Bennett v Minister of Community Welfare (1992) 176 CLR 408; [1992] HCA 27, cited

Dey v Victorian Railways Commissioners (1949) 78 CLR 62, cited

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69, cited

Gore v Montague Mining Pty Ltd [2000] FCA 1214, distinguished

McKellar v Container Terminals Management Services Limited 165 ALR 409; [1999] FCA 1101, cited

Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd [2004] QSC 457, followed

Thiess Pty Ltd v FFE Minerals Australia Pty Ltd [2007] QSC

209, cited

Virgtel Limited v Zabusky [2008] QSC 213, cited

COUNSEL: L F Kelly SC, with J K Taylor, for the plaintiffs/respondents
D Walter (*sol*) for the first, second, fifth, sixth, seventh,
eighth and ninth defendants/third parties
B T Porter for the third defendant/applicant
B T Cohen (*sol*) for the fourth defendant/applicant

SOLICITORS: Henry Davis York for the plaintiffs/respondents
Baker & Mackenzie for the first, second, fifth, sixth, seventh,
eighth and ninth defendants/third parties
Dibbs Barker for the third defendant/applicant
Bartley Cohen for the fourth defendant/applicant

- [1] The third and fourth defendants each make application to strike out paragraphs of the plaintiffs' further amended second statement of claim ("the pleading"). They allege those paragraphs fail to plead necessary material facts to sustain the allegations, insofar as they relate to the third and fourth defendants. In the alternative, the third and fourth defendants seek further particulars.
- [2] The plaintiffs resist the applications. They contend the relevant paragraphs plead the material facts necessary to support the allegations, and properly and adequately apprise the third and fourth defendants of the cases they have to meet at trial.
- [3] Prior to the hearing of the applications, the plaintiffs, without admission of any obligation to do so, provided additional particulars in respect of the plea that the second defendant was, at the relevant times, insolvent. As a consequence, the third and fourth defendants no longer pressed their applications insofar as they relate to that aspect of the pleading. However, the third and fourth defendants contend that that late development is relevant to the costs of the application.

Background

- [4] The first plaintiffs are the liquidators of the second plaintiff. It was placed in liquidation on 31 July 2009. It had been in voluntary administration from 3 October 2008. The administrators were Messrs Greig and Harwood.
- [5] The present proceedings concern a transaction undertaken in February 2008 whereby 65% of the shares in a group of companies ("the Stella Group") was sold to an outside entity. The Stella Group was formerly part of a group of companies known as the Octaviar Group. That group included the second plaintiff. The ultimate holding company for the Octaviar Group was a listed entity, Octaviar Limited. The sale of shares was undertaken by a holding company Stella Holdings Pty Ltd, which was a subsidiary of Octaviar Limited.
- [6] Prior to that sale of shares, the first defendant had lent substantial funds to an entity in the Octaviar Group, Octaviar Castle Pty Ltd ("Castle"). Repayment of those funds was secured by a guarantee and charge given by Octaviar Limited. The second defendant, and the fifth to ninth defendants, are companies related to the first defendant.
- [7] The third and fourth defendants were directors of the second plaintiff, and senior executives in the Octaviar Group, at the time of the sale. The third defendant was a director of the second plaintiff from 30 June 2005, and Chief Financial Officer of

Octaviar Limited. The fourth defendant was a director of the second plaintiff from 31 August 2005 to 2 May 2008. He also held the position of Deputy Chief Executive Officer of Octaviar Limited between 1 February 2007 and 20 January 2008, and Chief Executive Officer between 20 January 2008 and 2 May 2008.

The claim

- [8] The pleading is a voluminous document containing multiple causes of action against the various defendants. Whilst it is difficult to briefly summarise the extensive allegations made in the pleading, the central aspect of the case advanced by the plaintiffs is that in order for the Share Sale Agreement of 65% of Stella Holdings to be completed, all inter-company loans from members of the Octaviar Group to members of the Stella Group had to be released and forgiven. To that end, documents were executed by the third and fourth defendants.
- [9] The plaintiffs contend the effect of those documents was that the second plaintiff, the only company with any substantial loans to the Stella Group, gave up its right to recover these funds without receiving any valuable or enforceable rights in return. Further, the first defendant received repayment of its loans to Castle directly from the proceeds of the sale when it had no entitlement to those funds.
- [10] The plaintiffs allege that \$189,897,919.00 of the sale proceeds from the sale of 65% of Stella Holdings was paid to the first defendant on 29 February 2008. Further, sums of \$19,746,713.63 and \$304,331.05 were transferred by the administrators of the second plaintiff to the receivers and managers of Octaviar Limited on or about 23 December 2008, and 4 February 2009, with those sums subsequently being transferred by the receivers to an account in the first defendant's name.
- [11] It is alleged the first defendant was not entitled to receive these payments. The first defendant was not a creditor of the second plaintiff. Whilst it was a creditor of a related entity, payment of those funds were guaranteed by Octaviar Limited, not the second plaintiff. It is alleged the payments made to the first defendant ought properly to have flowed to the second plaintiff, which was insolvent at the time, and which would have been able to use those funds for the benefit of its creditors.

The allegations against the third and fourth defendants

- [12] Relevantly, for present purposes, the plaintiffs allege the third and fourth defendants executed a number of documents as part of the sale of Stella Holdings. These documents are alleged to have been executed on 29 February 2008, in breach of the third and fourth defendants' duties. The relevant documents are the Stella Proceeds Deed, a Deed of Release and an Allocation Letter.
- [13] The thrust of the allegations against the third and fourth defendants is that in executing those documents, they, as officers of both the second plaintiff and Octaviar Limited, acted in a position of conflict and in breach of their statutory and fiduciary duties to the second plaintiff.
- [14] It is alleged that the effect of the documents executed by the third and fourth defendants, in breach of their statutory and fiduciary duties, was that they incorrectly stated the entities which were responsible for repayment of monies which had been advanced by the first defendant to Castle. It is further alleged that the third and fourth defendants knew of this inconsistency or failed to make proper and reasonable enquiries to ascertain the true position prior to executing those documents.

- [15] It is alleged that a consequence of the execution of those documents was that the interests of Octaviar Limited were advanced (by reducing its liability to the first defendant) and the interests of the first defendant were also advanced (by profiting from receipt of the proceeds). It is alleged these documents were essential to authorise the payment of a substantial part of the proceeds of sale of the Stella Group to the first defendant.

The applications

- [16] The applications do not seek to strike out all of the claims against the third and fourth defendants. The applications relate only to the inadequacy of the plaintiffs' pleading of causation, loss and knowledge in respect of claims that the third and fourth defendants breached their statutory and fiduciary duties.
- [17] The fourth defendant also contends the plaintiffs' pleadings are deficient in respect of the allegations made against him in relation to the payments made by the administrators of the second plaintiff on 23 December 2008 and 4 February 2009.
- [18] The third and fourth defendants contend that paragraphs 88 and 106 of the pleading contain allegations of breaches of duty under s 180, s 181 and s 182 of the *Corporations Act 2001* (Cth), of a breach of a duty to exercise reasonable care and diligence, of breaches of fiduciary duty to act in good faith and in the interest of the company as a whole and for a proper purpose, of breaches of fiduciary duty not to act in a position of conflict, and of improper use of their position in breach of their fiduciary duties. In respect of each of these alleged breaches, multiple acts are relied upon as it is alleged the execution of the three documents by the third and fourth defendants on 29 February 2008 comprise a breach of each alleged duty.
- [19] The third and fourth defendants contend such a plea should be struck out as it contains a series of possible combinations of acts and/or combinations of breaches of duty. This imprecision of pleading is compounded by reliance upon substantial particulars which are said to support numerous sub-breaches.
- [20] The third and fourth defendants further contend that the pleading is deficient in that paragraphs 93 and 106 allege loss without pleading the material facts necessary to establish a causal link between the alleged loss and each of the alleged breaches. They contend the plaintiffs are required to plead what would have happened had the third and fourth defendants not breached their duties.
- [21] Finally, the third and fourth defendants contend that whilst knowledge must be specifically pleaded pursuant to r 150 of the *Uniform Civil Procedure Rules 1999* (Qld), paragraph 86A of the pleading pleads nine separate allegations of knowledge of specific facts, without identifying in respect of each individual allegation, the material facts from which that knowledge is to be inferred. Further, the paragraph pleads numerous allegations by way of particulars resulting in over 80 individual allegations which are not specially linked to any of the nine allegations of knowledge in the pleading.
- [22] The fourth defendant's additional complaint is that paragraphs 92 and 92A of the pleading allege a breach of duty by the fourth defendant in respect of the payments made by the administrator in December 2008 and February 2009 in circumstances where these payments were made as a result of information allegedly supplied by the third defendant, at a time when the fourth defendant was no longer a Director. There is no allegation that the fourth defendant was aware of the statements alleged to have been made by the third defendant.

- [23] In support of his contention that such a pleading discloses no cause of action and ought to be struck out, the fourth defendant notes that the pleaded case in respect of this allegation initially alleged only that the third defendant caused those payments or had breached any duty in relation to them but sought to claim relief against the fourth defendant in relation to those payments.

Relevant principles

- [24] The power to strike out a pleading, either pursuant to r 171 of the *Uniform Civil Procedure Rules*, or in the inherent jurisdiction of the court, is to be exercised sparingly and only in rare cases.¹
- [25] In considering applications to strike out a pleading it is relevant to have regard to the purpose of a pleading, which is to ensure the parties know the case they have to meet.² A plaintiff's obligation to plead a case properly and sufficiently includes an obligation to plead causation.
- [26] The obligation in respect of causation was summarised by Chesterman J (as his Honour then was) in *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd*³:

“[15] The parties are agreed upon the relevant principles. In any cause of action in respect of which causation is an essential element it is necessary to plead the material facts which are said to give rise to the causal connection. In particular it is necessary to plead the facts which lead to a reasonable inference that the acts complained of (here the relevant non-disclosure) and the alleged later event (here the making of the dragline agreement) stand to each other in the relation of cause and effect. Douglas J put it this way in *LBS Holdings Pty Ltd v The Body Corporate for Condor Community Title Scheme 13200 & Ors* [2004] QSC 229 (at para [3]):

‘... The principle relied on is that facts must be set out which lead to a reasonable inference that the acts complained of and the loss claimed stand to each other in the relation of cause and effect and that the plaintiff must plead the necessary facts showing that causal link ...’

His Honour referred to *Dow Hager Lawrance v Lord Norreys & Ors* (1890) 15 App Cas 210 at 221 and *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd & Ors* (1987) 14 FCR 215 at 221-222. In the first of those cases Lord Watson had said:

‘There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments. Facts and circumstances must in that case be set forth, and in every genuine claim are capable of being stated, leading to a reasonable inference that the fraud and injuries complained of stood to each other in the relation of cause and effect’.”

¹ *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 128-129.

² See, generally, *Thiess Pty Ltd v FFE Minerals Australia Pty Ltd* [2007] QSC 2009 at [38].

³ [2004] QSC 457 at [15].

- [27] Those obligations include an obligation to plead material facts to make out the fulfilment of any statutory cause of action.⁴ In cases of breach of fiduciary duty, the obligation includes pleading material facts to demonstrate that the claimed loss was suffered by reason of the breaches of fiduciary duty.⁵
- [28] The obligation to plead so as to properly apprise the defendant of the case to be met also requires that the pleading contains sufficient clarity to identify the link between the material facts and the causes of action alleged, and the allegations of knowledge.⁶

Discussion

- [29] The pleading is an extensive document, containing multiple causes of action against multiple defendants. Those allegations are the subject of extensive particularisation. In such a pleading, it is necessary, when considering any application to strike out only parts of the pleading, to have regard to the context of the pleading as a whole.
- [30] Having considered the pleading as a whole, and the particular paragraphs the subject of the third defendant's application, I am satisfied there is no proper basis to exercise a discretion to strike out those paragraphs of the pleading which are the subject of complaint by the third defendant.
- [31] Whilst multiple breaches are alleged against the third defendant, and multiple acts are relied upon, it is clear from the pleading that the multiple acts are relied upon in respect of each breach. There is no ambiguity as to the case to be met by the third defendant. The allegations have been pleaded with sufficient clarity to apprise the third defendant of the case that is to be met.
- [32] Further, it cannot be said that the allegations are of such a nature that they are doomed to fail or fail to disclose a cause of action. If established at trial they would support a finding that the third or fourth defendants breached some or all of the pleaded duties.
- [33] The pleading is also not properly to be the subject of striking out on the grounds that it is otherwise prejudicial to a fair and proper determination of the issues in dispute between the parties. The extensive particularisation must be viewed in the context of allegations of multiple breaches of duty.
- [34] As to causation, there is no proper basis to conclude that a failure by the plaintiffs to plead what would have happened if the third defendant had not breached his duties renders the pleading so deficient as to be properly the subject of a strike out application. The plaintiffs have pleaded the loss, and the causal link for that loss. That is sufficient to apprise the defendants of the case to be met.
- [35] The present case is not akin to a solicitor's negligence case.⁷ The relevant causes of action plead that the third and fourth defendants undertook positive acts (signing of the documents) in breach of specific statutory and fiduciary duties, as a direct consequence of which the payments were made to the first defendant. In those circumstances, the question of causation can be determined by reference to what, in fact, happened as opposed to what would or would not have happened.⁸

⁴ *McKellar v Container Terminals Management Services Limited* 165 ALR 409 at 419 [26]

⁵ *Southern Cross* at [20], [22].

⁶ *Virgtel Limited v Zabusky* [2008] QSC 213 at [16].

⁷ See *Gore v Montague Mining Pty Ltd* [2000] FCA 1214 at [44].

⁸ *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at [420].

[36] These conclusions are equally applicable to the fourth defendant's application, insofar as it replicates the submissions of the third defendant.

[37] As to the fourth defendant's complaint in respect of the payments made to the first defendant, on the authority of the administrator of the first plaintiff, in order to understand this aspect of the application, it is useful to set out paragraphs 92 and 92A of the pleading:

"92. In the circumstances pleaded at paragraphs 89 to 91A above, in causing OA to make the December 2008 Payment and the February 2009 Payment, Mr Anderson and Mr White acted in further breach of the duties pleaded in paragraph 85 above.

Particulars

- (a) As to the breach of the duty pleaded at paragraph 85a., Mr Anderson provided information to the Administrators which caused the Administrators of OA to transfer, in addition to the Fortress Payment, \$19,746,713.63 and then a further \$304,331.05 to Fortress (via OL) in the following circumstances, which Mr Anderson knew or ought to have known:
- (i) OL was not entitled to the Stella Proceeds, and was therefore not entitled to the monies which became the December 2008 and February 2009 Payments;
 - (ii) in the alternative to (i), OL was not entitled to an allocation of the Stella Proceeds in any amount which would have entitled it to receive the monies which became the December 2008 Payment and the February 2009 Payment;
 - (i) the allocation of the Stella Proceeds, which was prepared or settled by Mr Anderson, was done on the basis of inter-company loan balances which were incorrect, or alternatively which were the subject of conflicting information;
 - (ii) the monies were not held on trust for OL;
 - (iii) Fortress was not a creditor of OA;
 - (iv) OA had its own substantial creditors;
 - (v) OA was insolvent or became insolvent by the transactions; and
 - (vi) OA had released the OA Stella Loans for no valuable consideration;
- (b) As to the breach of the duty pleaded at paragraph 85 b., Mr Anderson provided information to the Administrators in his capacity as a director of OA, which caused the Administrators of OA to transfer \$19,746,713.63 and then a further \$304,331.05 to Fortress (via OL) in the following circumstances, which Mr Anderson knew or ought to have known:
- (i) OL was not entitled to the Stella Proceeds, or alternatively it was not entitled to an allocation of the Stella Proceeds in any amount which would entitle it

- to the monies which became the December 2008 and February 2009 Payments;
- (ii) the allocation of the Stella Proceeds, which was prepared or settled by Mr Anderson, was done on the basis of inter-company loan balances which were incorrect, or alternatively which were the subject of conflicting information;
 - (iii) the monies were not held on trust for OL;
 - (iv) Fortress was not a creditor of OA;
 - (v) OA had its own substantial creditors;
 - (vi) OA was insolvent or would become insolvent by the transactions;
 - (vii) OA had released the OA Stella Loans for no valuable consideration;
- (c) As to the breach of the duty pleaded at paragraph 85 c., in causing the December 2008 and February 2009 Payments in the circumstances alleged, Mr Anderson provided information to the Administrators in his capacity as a director of OA, which caused the Administrators of OA to transfer \$19,746,713.63 and then a further \$304,331.05 to Fortress (via OL) in the following circumstances, which Mr Anderson knew or ought to have known:
- (i) OL was not entitled to the Stella Proceeds, or alternatively it was not entitled to an allocation of the Stella Proceeds in any amount which would entitle it to the monies which became the December 2008 and February 2009 Payments;
 - (ii) the allocation of the Stella Proceeds, which was prepared or settled by Mr Anderson, was done on the basis of the inter-company loan balances which were incorrect, or alternatively which were the subject of conflicting information;
 - (iii) the monies were not held on trust for OL;
 - (iv) Fortress was not a creditor of OA;
 - (v) Fortress benefitted from the payments;
 - (vi) OA had its own substantial creditors;
 - (vii) OA was insolvent or would become insolvent by the transactions;
 - (viii) the making of the payments was detrimental to OA and its creditors; and
 - (ix) OA had released the OA Stella Loans for no valuable consideration;
- (d) Mr White breached the duties pleaded at paragraph 85 by executing the Allocation Letter, which provided a plausible basis for and thereby purportedly allowed Mr Anderson to make the statement pleaded at 89 above, which was in effect a further allocation of the Stella Proceeds, in the following

circumstances, which Mr White knew or ought to have known:

- (i) OL was not entitled to the Stella Proceeds, or alternatively it was not entitled to an allocation of the Stella Proceeds in any amount which would entitle it to the monies which became the December 2008 and February 2009 Payments;
- (ii) the monies were not held on trust for OL;
- (iii) Fortress was not a creditor of OA;
- (iv) OA had its own substantial creditors;
- (v) OA was insolvent or would become insolvent by the transactions; and
- (vi) OA had released the OA Stella Loans for no valuable consideration, and had not been repaid the OA Stella Loans;

92A. In the alternative, Mr White aided the breach of duties by Mr Anderson as pleaded at paragraph 92 above, and is therefore liable under section 79(a) of the *Corporations Act*.

Particulars

The Plaintiffs repeat and rely upon the particulars to paragraph 92 above.”

- [38] The fourth defendant contended that paragraph 92 was not sustainable, insofar as he was concerned, as the only breach pleaded against him was that he executed the Allocation Letter which “provided a plausible basis” for the statements alleged to have been made by the third defendant to the administrators of the second plaintiff. However, the terms of this Allocation Letter provided no grounds for an assertion that it provided a “plausible basis” for the third defendant to assert that the administrators ought to transfer the monies in question to the first defendant. The letter merely recorded that it had been agreed to subsequently decide on the allocation of funds. There was no allegation that the fourth defendant was involved in any subsequent determination of an allocation of funds.
- [39] A consideration of the terms of the Allocation Letter, in the context of the circumstances in which it is alleged that that letter and the other documents were executed by the third and fourth defendants does not support a conclusion that the allegation in paragraph 92(d) of the pleading that the Allocation Letter provided “a plausible basis” for the alleged statements made by the third defendant are untenable. The case advanced by the plaintiffs relies on a number of circumstances. The Allocation Letter is to be read in the context of those circumstances. There is no basis to exercise the discretion to strike out the pleading on the ground the allegation is unsustainable.
- [40] During the hearing, senior counsel for the plaintiffs expressly disavowed any allegation that the fourth defendant knew of the statements allegedly made by the third defendant to the administrators. Against that background, there is no reasonable basis to support the allegations in paragraph 92(d) that the fourth defendant knew or ought to have known certain things. Each of those things is obviously a reference to the effect of the statements alleged to have been made by the third defendant to the administrator.

- [41] Further, there is no reasonable basis to support the allegations contained in paragraph 92A of the pleading. Paragraph 92A pleads, in the alternative, that the fourth defendant aided the breaches of duty of the third defendant, as pleaded in paragraph 92. The only breaches of duty pleaded against the third defendant in paragraph 92 relate to the provision of information to the administrators which caused the administrators of the second plaintiff to transfer those additional monies to the first defendant in December 2008 and February 2009.
- [42] Subsequent to the hearing, the plaintiffs filed supplementary submissions seeking leave to amend paragraph 92, and to delete reliance upon paragraph 92A. Those proposed amendments address the deficiency in the pleading referred to above. Accordingly, there is no need to strike out those allegations.

Conclusion

- [43] The applications of the third defendant and fourth defendant are dismissed.
- [44] I shall hear the parties as to the formal orders, and as to costs.