SUPREME COURT OF QUEENSLAND

CITATION:	*Australia and New Zealand Banking Group Limited v Browning & Anor* [2014] QSC 202
PARTIES:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMTED ACN 005 357 522** (plaintiff) v **DAVID ALEXANDER BROWNING IN HIS OWN CAPACITY AND AS TRUSTEE FOR THE TESTAMENTARY TRUST CREATED BY THE WILL OF THE LATE KATE HUEY WEDGWOOD AND AS TRUSTEE FOR THE TEATAMENTARY TRUST CREATED BY THE WILL OF THE LATE ROBERT JAMES WEDGWOOD** (first defendant) and **ELIZABETH ELEANOR BROWNING IN HER OWN CAPACITY AND AS TRUSTEE FOR THE TESTAMENTARY TRUST CREATED BY THE WILL OF THE LATE KATE HUEY WEDGWOOD AND AS TRUSTEE FOR THE TEATAMENTARY TRUST CREATED BY THE WILL OF THE LATE ROBERT JAMES WEDGWOOD** and **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED ACN 005 357 522** (first defendant by counter-claim) and **GREGORY MICHAEL QUINN** (second defendant by counter-claim) and **DAVID JOHN LEIGH** (third defendant by counter-claim)
FILE NO/S:	BS7475/12
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	26 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	5 August 2014
JUDGE:	Alan Wilson J
ORDER:	**1. Paragraphs 42, 47(b), 52, 54-59 and 61 of the amended defence are to be struck out, with leave to**

re-plead;

2. **Paragraph 11 of the counter-claim is to be struck out, with leave to re-plead;**

3. **Paragraphs 5-8, 9A, 10A, 11, 15, 20, 22 and 23 of the counter-claim are to be struck out, with leave to re-plead;**

4. **The defendant is to file a further amended defence and counter-claim in compliance with these orders by 4:00pm on 5 September 2014;**

5. **The plaintiff/first defendant by counter-claim is to file and serve any reply and answer by 4:00pm on 12 September 2014;**

6. **The second and third defendants by counter-claim are to file and serve a defence and counter-claim (if any) by 4:00pm on 12 September 2014;**

7. **The plaintiff and the first, second and third defendants by counter-claim are to serve any request for particulars of the further amended defence and counter-claim by 4:00pm on 12 September 2014;**

8. **All parties are to provide disclosure by 4:00pm on 26 September 2014;**

9. **The first and second defendants are to file and serve proper particulars to any request for particulars by 4:00pm on 26 September 2014;**

10. **The first and second defendants are to file and serve any expert reports upon which they intend to rely at trial by 4:00pm on 10 October 2014;**

11. **The plaintiff and the first, second and third defendants by counter-claim are to file and serve any expert reports they intend to rely upon at trial by 4:00pm on 24 October 2014.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – GENERALLY – where the defendants have allegedly defaulted in loan repayments – where the plaintiff bank has repossessed properties and stock but seeks to recover monies still outstanding – where the defendants intend to defend the action and to bring a counter-claim against the receivers appointed by the plaintiff for damages –

where the plaintiff applies for a number of paragraphs in the defendant's defence and counter-claim to be struck out – where the plaintiff also applies for further and better particulars of some other paragraphs – whether such orders should be made

Australian Securities and Investment Commission Act 2001 (Cth)
Uniform Civil Procedure Rules 1999, r 149, r 155, r 171, r 444

Browning & Anor v Australia and New Zealand Banking Group Limited [2014] QCA 43, related
Haines v Australian Broadcasting Corporation (1995) 43 NSWLR 404, cited
Meredith v Palmcam Pty Ltd [2001] 1 Qd R 645. cited

COUNSEL: J Peden for the applicant, and the first, second and third defendants by counter-claim
P King for the first and second defendants, and plaintiffs by counter-claim

SOLICITORS: HWL Ebsworth for the applicant, and the first, second and third defendants by counter-claim
Reardon & Associates as town agents for John Brown for the first and second defendants, and plaintiffs by counter-claim

[1] **Alan Wilson J**: The Bank says that in 2010 it loaned Mr and Mrs Browning over $6,000,000; that, in breach of the terms of the loan, they failed to repay it; that, following default, the Bank lawfully took possession of two cattle properties and livestock, and had receivers appointed; that the receivers subsequently sold the property and livestock; but, that the Brownings still owe the Bank about $4,000,000, which they have wrongfully failed to repay.

[2] Mr and Mrs Browning seek to defend that action and to bring a counter-claim against both the Bank and the Receivers, Messrs Quinn & Leigh, for substantial damages.

[3] Pleadings in the matter have been problematic. Initially, the defendants failed to plead and a default judgment was entered but, later, set aside by the Court of Appeal. The Bank then filed an amended statement of claim.

[4] A defence and counter-claim was filed on 23 April 2014. The Bank brought an application to strike out parts of the defendants' pleading and on 12 June 2014 PD McMurdo J ordered that the defendants deliver a new pleading by 10 July. An amended defence and counter-claim was filed on that date.

[5] The plaintiff also objected to parts of it and, following a letter under UCPR r 444, brought the present application.

[6] It came before Atkinson J on 1 August 2014. She ordered that any further amended defence and counter-claim be filed and served by 10:00am on Monday 4 August. That occurred.

[7] The plaintiff maintains its attack upon some aspects of the pleading filed on 4 August. It is said, first, that parts of the new pleading fail to clearly state the reasons for certain non-admissions, or denials; secondly, that the defendants wrongfully seek in the pleading to attack the appointment of the receivers when an attempt to set aside that appointment failed in this Court, and has never been the subject of any appeal; and, thirdly, that the pleading fails to give proper particulars of the damages sought in the counter-claim.

Failure to plead material facts for a non-admission or denial

[8] In paragraph 2 and following in the plaintiff's amended statement of claim it is alleged that on 19 March 2010 the Bank offered the defendants, by letter, two facilities called an "*Overdraft*" and a "*Term Line*", on the conditions set out in the letter – called, in the pleading, the "*March Facility Agreement*". In paragraph 3 it is pleaded that the defendants accepted the terms in the letter, and the terms and conditions alleged under the facility agreement are set out in paragraph 4.

[9] In paragraph 7 and following of the further amended defence and counter-claim it is alleged, in summary: that the Brownings were misled and deceived in transactions leading up to the alleged facility agreement, and were thereby wrongfully induced to enter into it; that they relied upon the Bank's representative and, in view of their reliance, there was an implied warranty on the part of the Bank that the Bank's facilities and financial services would be provided in terms which were reasonably fit and suitable for the defendants' purposes, as graziers; and that, in the premises, the transaction itself was unconscionable and should be set aside. Reliance is also placed upon alleged breaches, by the Bank, of provisions of the *Australian Securities and Investment Commission Act* 2001 (Cth).

[10] The alleged representations are said to have continued up to and including the time the facility agreement was executed by the defendants, by signing the Bank's letter of offer. All of this means, it is said, that subsequent steps taken by the Bank are a nullity, and of no effect.

[11] The further amended defence begins a specific traverse of, and responses to, the allegations set out in the amended statement of claim at paragraph 39. Paragraph 40 contains an admission that a letter of offer was sent in March 2010. In paragraph 42 the following appears:

> "42. The Defendants have sighted a copy of the Letter of Offer upon which the plaintiff relies and admit the document contains the terms alleged but do not admit allegations set forth at paragraph 4 of the Amended Statement of Claim ***because those allegations assume a fact, the existence of which is not admitted***".(emphasis added)

[12] A pleading using similar wording appears in paragraphs 47(b), 52, 54-59 inclusive and 61 of the defence. The plaintiff says that the alleged reason for the non-admission of the fact wrongly fails to identify what that fact – i.e., the "assumed" fact – might be.

[13] In response, counsel for the defendants took me to various earlier parts of his pleading at paragraphs 1–41 which, he said, plainly revealed that the "fact" referred to in those subsequent paragraphs was a précis or capsule of what had been alleged

in those earlier paragraphs: namely, that in the circumstances surrounding his client's execution of the Bank's letter of offer, it should be set aside. In other words, the assumed fact was the Bank's pleaded allegation that the March Facility Agreement was binding upon the defendants.

[14] UCPR r 149(1)(b) requires that a pleading must contain a statement of all of the material facts upon which a party relies; and r 149(1)(c) that a pleading must specifically state any matter that, if not stated, may take another party by surprise.

[15] Absent the explanation provided to me by counsel for the defendants, paragraph 42 is not clear and, in particular, leaves it uncertain as to what fact is referred to. It is not, with respect, helpful that the Court ultimately determine the matter might be required to troll through paragraphs 1–41, and attempt to identify that fact. Nor is it any answer to the plaintiff's complaint that a pleading using these words constitutes a general, but satisfactory, admission. Paragraph 4 of the amended statement of claim is in very clear terms: it simply recites what are alleged to be the terms and conditions of the facility agreement. An admission that the document did contain those terms would not, it might be thought, carry a danger that the defendants were also admitting they were bound by them. In any event, if I have correctly identified the "fact" the defendants wished to plead, an amendment at paragraph 42 to identify the fact would not be difficult, or unduly prolix.

[16] The same may be said of each of the other paragraphs attacked by the plaintiff on this basis: 47(b), 52, 54-59 inclusive and 61.

[17] They, and paragraph 42, should for these reasons be re-pleaded.

Pleadings about the appointment of the Receivers

[18] Paragraph 7 of the further amended counter-claim (the amended defence ends at paragraph 65; the counter-claim begins the numbering paragraphs again, at 1) alleges that in June 2013 the Bank and the Receivers wrongfully entered upon the defendants' cattle stations. In paragraph 8 it is alleged they wrongfully took possession of those stations and stock and farm equipment, and, in subsequent paragraphs, that they wrongfully sold that property for an under-value. Allegations to similar effect appear in paragraphs 11, 22, 23 and 24 of the counter-claim.

[19] The Bank argues that all parts of the defendants' pleading attacking the appointment of the Receivers or their actions are unsustainable because, by reason of earlier orders of this Court, the defendants are estopped from advancing those claims. To understand what each side says it is necessary to go, shortly, into the history of the action itself.

[20] The Bank began its action in August 2012. The defendants filed a conditional notice of defence in October. In November the Bank filed a request for default judgment, which was granted and entered by a deputy registrar on 16 November 2012. Mr and Mrs Browning applied in March 2013 to have it set aside, and that application was refused by the Chief Justice on 25 March 2013. The Brownings successfully appealed, and the Court of Appeal set aside the default judgment in reasons published on 11 March 2014.[1]

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[1] *Browning & Anor v Australia and New Zealand Banking Group Limited* [2014] QCA 43.

[21] By a separate proceeding (5084/13) the Receivers, Mr Lee and Mr Quinn, had brought proceedings against the Brownings, initially for injunctive relief preventing Mr and Mrs Browning from dealing with any stock on the cattle properties. A week later Douglas J, after a hearing partly attended by Mr Browning by telephone, declared that the Receivers had been validly appointed and were immediately entitled to both the cattle stations and the livestock on them.

[22] Later in 2013 Mr and Mrs Browning applied in that action for an order staying the Receivers in respect of the sale pending their appeal against the Bank's summary judgment. The matter was heard and determined by Boddice J on 10 October 2013. As his reasons show, the application was brought despite the fact there had been no appeal against the appointment of the Receivers. His Honour's reasons included an observation that Mr and Mrs Browning did not have any reasonable prospects of success in their appeal – something which, of course, turned out to be incorrect – but, as is otherwise clear, it was the combination of the absence of any appeal against the earlier order of Douglas J, and delay on the part of Mr and Mrs Browning, which were the principal reasons for his decision to refuse a stay order. As his Honour said: "*... it does not follow that that impacts at all on the appointment of the receivers or the actions taken by the receivers to sell the land in accordance with their rights and obligations as receivers. In those circumstances the receivers submit that there is no point in a stay being granted ...*".

[23] Where the defendants' further amended pleading in this case oversteps the mark is where it asserts (e.g., in par 11 of the amended counter-claim) that the actions of the Bank and the Receivers were made upon purported rights "*... pursuant to orders of the Court which orders were invalid, or have been set aside ...*". While it is true that in the course of the hearing of the appeal some remarks were made by Muir JA and Daubney J about the circumstances surrounding the events which had occurred, those were not matters relevant to the question before, and answered by, the Court in the appeal – namely, whether the default judgment was entered in irregular circumstances, and should be set aside.

[24] Under UCPR r 171 a pleading may be struck out if it is an abuse of process. An abuse of process may occur if a party seeks to litigate, in a later proceeding, an issue that was determined in an earlier proceeding. Here, the question is whether the claims about the appointment of Receivers have already been finally determined – in other words, are *res judicata*.[2]

[25] The obvious intent of the counter-claim is to assert and set up a case that the Brownings were wrongly induced to enter into the facility agreement; that the agreement and its associated security documents should be set aside; and, that everything that happened after that (including the taking of possession and the sale of the property and stock by the Receivers) was therefore done without a proper lawful basis, and the Brownings are entitled to damages.

[26] Oddly, and surprisingly, that point was not made in submission for Mr and Mrs Browning. Their pleading is prolix and repetitive but, in paragraph 16 of the counter-claim, it is made clear that the defendants seek an order setting aside each of the "credit contracts" alleged in the plaintiff's pleadings. Once that is appreciated, it becomes clear that allegations like those contained in paragraph 22 of

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[2] *Haines v Australian Broadcasting Corporation* (1995) 43 NSWLR 404 at 414.

the counter-claim (that the Receivers, in taking possession of the two cattle stations, "*trespassed*" on the land) are seen for what they are: superfluous, and unnecessary. The same conclusion applies to paragraphs 23 and 24.

[27] Paragraph 11 of the counter-claim is different. It alleges that the orders of the Court under which the Receivers purported to enter upon the defendants' land were "... *invalid, or have been set aside*...".

[28] The defendants do not need to show that the order of Douglas J was, as paragraph 11 appears to allege, invalid, or that it was set aside by the decision of the Court of Appeal. The use of those terms in paragraph 11 is superfluous and confusing and has excited the plaintiff into detailed and lengthy submissions about matters of *res judicata* and issue estoppel.

[29] The proceedings before Douglas J began as an application by the Bank for an enforcement warrant enabling the Receivers to move ahead with the taking of possession of the cattle properties, but were met by the Brownings with a cross-application for, among other things, a declaration that the Receivers had not been lawfully appointed.

[30] There is nothing to suggest, however, that in the proceedings before Douglas J he was required to consider whether or not the documents which lay at the heart of the transaction between the Bank and the Brownings, and upon which the Bank relied to appoint Receivers and have them take possession, were liable to be set aside or, even, under attack.

[31] The question which has previously been adjudicated is, then, simply whether the procedure by which the Receivers were appointed was, on its face, valid. If the Bank's case here succeeds, there is unlikely to be any question about that order. If, however, the Brownings succeed in establishing that the original transactions should be set aside, they will be in a position to argue that everything that followed was without lawful justification. But, the only issue adjudicated by Douglas J was one made in a vacuum, as it were, so far as those issues are concerned. In that sense, the issue of the "validity" of the Receivers' appointment has not, for present purposes, been fully and finally adjudicated.

[32] The other matter to be noted is this: an issue estoppel, based upon *res judicata*, will only arise if it relates to an essential matter to be proved by a party in its case. As I understand the defendants' case, it is not necessary for them to prove, discretely, that the appointment of the Receivers and their acts were unlawful. If they prove that the original transactions with the Bank, which lead to those acts, should be set aside, then the relief available to the Brownings may include damages consequential upon the loss (and alleged sale by the Receivers for under-value) of their properties and stock.

[33] Paragraph 11 of the counter-claim should be struck out, with an opportunity to re-plead. Paragraphs 7, 8 and 22-24 inclusive of the counter-claim ought, in light of what has just been said, be re-pleaded, but are not, in my view, liable to be struck out as an abuse of process.

Particulars of loss and damage

[34] UCPR r 155 requires that a party plead the nature and amount of any damages claimed. In a number of paragraphs in their pleading the defendants claim damages of different types. Some paragraphs of the counter-claim promise particulars by separate letter: 5-8 inclusive, 9A, 10A, 11, 15, 20, 22 and 23. While particulars may be delivered separately, promises of that kind do not satisfy the rule.

[35] The only submission advanced in response by the defendants is that the issues are complex, and they have had difficulty organising their lengthy pleading. Surprisingly, however, an earlier version of the pleading does contain lengthy and detailed calculations of damages. No explanation was offered why the detailed information in the earlier pleading was not simply imported into the new one.

[36] This rule must be complied with: *Meredith v Palmcam Pty Ltd* [2001] 1 Qd R 645.

Appropriate orders

[37] The conduct of the defendants' case has been less than optimal.[3] It is, at least, possible to see from their most recent pleading that they may have, as it were, the bones of a case, and that it may have merit. (To ensure that last phrase is not somehow misconstrued and, later, advanced as the basis for an argument that I have concluded that the defendants' case is meritorious, I specifically abjure that conclusion. All that can properly be said, and that I wish to say, is that their case is not, on its face, apparently hopeless or incapable of argument). But, as the discussion above illustrates, their pleadings have been messy and confused. Their case has its complexities, but the delivery of a pleading which fairly and effectively sets it out is far from impossible.

[38] The matter has dragged on. Over and above problems with the pleadings, it has also had other oddities. On 6 August, the day after the hearing before me, the defendants filed a document headed "*Defendants' Particulars of Damages Pursuant to Rules 150(1)(b), 155 and 160*". It can only be assumed that, anticipating an adverse ruling about the want of particulars of damage in the pleading which I was considering, the defendants have attempted to forestall any orders by giving the missing particulars before an order is made. I was not asked to consider or receive the document, or to resume the hearing. In those circumstances it cannot play any role in this application.

[39] In light of the reasons set out above, those paragraphs containing non-admissions – paragraphs 42, 47(b), 52, 54-59 inclusive and 61 – should be struck out, with leave to re-plead.

[40] As to the *res judicata* issue, paragraph 11 of the counter-claim should be struck out, again with leave to re-plead. It would also be prudent for the defendants to further amend the counter-claim in paragraphs 7, 8 and 22-24 inclusive, but I will not make any order about them (in respect of that issue).

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[3] See, eg, paragraphs [19]-[22] of the judgment of Muir JA in the Court of Appeal of [2014] QCA 43, where some of the arguments advanced for the Brownings were described as "foolish", "specious", and lacking substance.

[41] As to the failure to particularise damages, paragraphs 5-8 inclusive, 9A, 10A, 11, 15, 20, 22 and 23 of the counter-claim should be struck out, again with leave to re-plead.

[42] The defendants should be ordered to file and serve a further amended defence and counter-claim in compliance with these orders by 4:00pm on 5 September 2014.

[43] The plaintiff also seeks directions relating to the future conduct of the action. Having regard to the delays which have occurred, directions are appropriate:

a) The plaintiff/first defendant by counter-claim will file and serve any reply and answer by 4:00pm on 12 September 2014;

b) The second and third defendants by counter-claim will file and serve a defence and counter-claim (if any) by 4:00pm on 12 September 2014;

c) The plaintiff and the first, second and third defendants by counter-claim will serve any request for particulars of the further amended defence and counter-claim by 4:00pm on 12 September 2014;

d) All parties provide disclosure by 4:00pm on 26 September 2014;

e) The first and second defendants will file and serve proper particulars to any request for particulars by 4:00pm on 26 September 2014;

f) The first and second defendants will file and serve any expert reports upon which they intend to rely at trial by 4:00pm on 10 October 2014;

g) The plaintiff and the first, second and third defendants by counter-claim will file and serve any expert reports they intend to rely upon at trial by 4:00pm on 24 October 2014.

[44] I will hear from the parties on costs.