SUPREME COURT OF QUEENSLAND

CITATION:	*Londy v Van Nieuwburg & Ors* [2014] QSC 290
PARTIES:	**CHARLES GEORGE LONDY AS TRUSTEE OF THE MANNIE DOLPHIN FAMILY TRUST AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MANNIE DOLPHIN (DECEASED)** (plaintiff) **v** **LYNN MARGARET VAN NIEUWBURG** (first defendant) **JEAN-MARTIN VAN NIEUWBURG** (second defendant) **NNYLONIT PTY LTD** ACN 128 738 652 (third defendant) **VNB ENTERPRISES PTY LTD** ACN 128 858 506 (fourth defendant) **MFIP HOLDINGS PTY LTD** ACN 129 353 902 (fifth defendant) **EASTERN SERVICES (QLD) PTY LTD** ACN 148 998 556 (sixth defendant) **JOHNATHAN ALEXANDER VAN NIEUWBURG** (seventh defendant)
FILE NO/S:	BS 6202 of 2014
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	1 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2014
JUDGE:	Philip McMurdo J
ORDER:	**Orders:** **1. Paragraphs 60A(a), 60C(a), 53A and 56A of the**

further amended statement of claim be struck out.

2. **The application for strike out is otherwise refused.**

3. **The application for stay is refused.**

4. **The application for security for costs is refused.**

5. **The plaintiff is to pay the defendants' costs thrown away by reason of the filing of the amended claim and the further amended statement of claim.**

6. **The plaintiff is to pay the costs of the sixth and seventh defendants of the proceedings up to and including 18 November 2014 on the standard basis.**

7. **The defendants are to pay the plaintiff's costs of and incidental to the application seeking a stay and security for costs.**

8. **As to:**

   (a) the application for strike out; and

   (b) the application for leave to amend,

   costs as between the plaintiff and the first to fifth defendants be the parties' costs in the proceeding.

CATCHWORDS: PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the plaintiff is a court appointed trustee of a discretionary family trust and personal representative of the estate of the late Mr Dolphin – where the plaintiff was appointed to investigate whether claims should be made for the benefit of the trust and estate – where claims are made against the defendants arising out of conduct of a previous trustee and executor – where the defendants apply to have parts of the statement of claim stuck out – whether the pleadings are vague, bad in law or incapable of establishing the cause or causes of action pleaded – where the defendants are yet to plead their case – where the plaintiff is an outsider – whether parts of the statement of claim should be struck out.

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – UNNECESSARY PARTIES AND APPEARANCES – PARTY UNNECESSARILY JOINED OR BROUGHT TO COURT - where the plaintiff abandoned its claim or claims against the sixth and seventh defendants – where the plaintiff accepts that he should be ordered to pay the costs of the proceedings against those defendants – whether these costs should be assessed on the indemnity basis.

Barnes v Addy (1874) LR 9 Ch App 244

Breen v Williams (1996) 186 CLR 71
El Ajou v Dollar Land Holdings plc & Anor [1994] 2 All ER 685
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89
Grimaldi v Chameleon Mining NL and Anor (No 2) (2012) 200 FCR 296
Norton v Ellam (1837) 2 M & W 461
Quince v Varga [2009] 1 Qd R 359
Young v Queensland Trustees Limited (1956) 99 CLR 560

COUNSEL: D Clothier QC, with L Jurth, for the plaintiff

AJ Greinke, with GC Dempsey, for the defendants

SOLICITORS: Londy Lawyers for the plaintiff

Fox Bradfield Lawyers for the defendants

Background

[1] This proceeding concerns a discretionary family trust and the deceased estate of Mr Mannie Dolphin who died in 2007 and is survived by two daughters. One of them is the first defendant. The other, whose name is Janine Dolphin, is not a party. They are the potential beneficiaries under the trust and equally entitled to the estate.

[2] The first and second defendants are husband and wife. The third, fourth and fifth defendants are companies controlled by them and through which they conduct a business which the statement of claim calls the Flannery's business ("the business").

[3] The sixth defendant and the seventh defendant are no longer parties, having been omitted from the amended claim and further amended statement of claim which were filed by leave at the hearing of these applications. The only question in respect of them is whether the assessment of the costs which they will have against the plaintiff should be upon the indemnity basis.

[4] After the death of Mr Dolphin, a solicitor who had acted for him, Mr Gray, saw fit to appoint himself as the new trustee of the family trust. Subsequently he was approached by the first defendant and asked for money in these circumstances. The business had been purchased on terms which did not require the payment of the full purchase price contemporaneously with the transfer of the relevant property to the purchasers. It had been agreed that the purchasers (apparently the third, fourth and fifth defendants) would pay the balance of the price by two further instalments, being the second and third instalments under that contract. The defendants needed funds for those instalments.

[5] It appears that Mr Gray agreed to assist with the finance of these two instalments. By this stage, Mr Gray had made himself the registered owner of a number of pieces of real property which belonged to the trust, which he purported to hold as the new trustee. But his appointment as trustee was invalid, at least because he had been the settlor of the trust and the trust instrument expressly precluded the appointment of the settlor as a trustee.

[6] Mr Gray then borrowed money from an unrelated third party upon the security of mortgages over those trust properties and also a mortgage over a property which belonged to the estate of the late Mr Dolphin.

[7] On the plaintiff's case, most of the funds borrowed by Mr Gray from this third party were used by the defendants in the payment of the two instalments under the contract for the purchase of the business. Subsequently these loans by the third party had to be repaid and it appears that the mortgaged properties were then sold and their proceeds were used in that repayment.

[8] Some time ago, Mr Gray was removed as the trustee. The present plaintiff, Mr Londy, was appointed by an order of this court made in April this year to be a trustee of the family trust and a personal representative of the estate of Mr Dolphin for the limited purposes of investigating whether claims should be made for the benefit of the trust and the estate from the events which I have outlined and for the prosecution of any such claims.

[9] This proceeding was commenced by Mr Londy in July by a claim and statement of claim. The defendants made a number of complaints about the terms of that pleading and an amended statement of claim was filed in October. Still the complaints continued resulting in the amended claim and further amended statement of claim filed by leave at the hearing.

The present applications

[10] The defendants apply to strike out certain parts of the current statement of claim on grounds that they are embarrassingly vague, that they are bad in law or incapable of establishing the cause or causes of action to which they are apparently directed.

[11] The defendants also apply to stay the proceeding, at least whilst the plaintiff is Mr Londy, because they say that he has been compromised in the performance of his duties as the court appointed trustee by reason of what they allege has become a solicitor and client relationship between Mr Londy and Ms Janine Dolphin.

[12] The defendants had also filed an application seeking security for costs, but ultimately abandoned that application in the light of evidence which was provided not long before the hearing. It is now revealed that Mr Londy holds $150,000 in trust, which was deposited by Ms Dolphin to indemnify him against his liability under any order for costs which might be made against him in this proceeding. With the benefit of that evidence, the defendants concede that there is not the risk which would found an order for security for costs. But it must be said that in any event, the defendants offered no evidence to suggest that Mr Londy, without the benefit of this indemnity and the funds in trust, but as a practising lawyer would be unable to meet an order for costs.

[13] What remains of the security for costs application is a submission for the defendants that the court should direct the plaintiff not to release those funds in his trust account without the leave of the court. I am not persuaded to make that direction. Mr Londy has taken the prudent step of having these funds paid to his trust account and it is not to be expected that he will allow the protection which they provide to him to be lost by imprudently releasing them.

[14] As I have mentioned, there is also an issue as to the costs to be paid to the sixth and seventh defendants.

Stay application

[15] The order appointing Mr Londy specified his functions as including:

> "If he is of the opinion that the proposed claims are worth pursuing, to enter into arrangements acceptable to him to fund such proceedings and to indemnify him for any adverse costs orders …"

I have mentioned already the arrangements which he has made for an indemnity against adverse costs orders.

[16] He has also reached an agreement with Ms Dolphin for the funding of his own costs of the proceedings. The defendants argue that this agreement for the funding of the proceedings is unsatisfactory for two reasons. The first is that it is not an agreement of the kind specified by that part of the order which I have set out. The submission here is that "'litigation funding' is a term of art referring to a loan (as opposed to any other form of arrangement, agreement or understanding) and … no loan has been granted by Ms Dolphin in favour of Mr Londy …". The second complaint is that the agreement which Mr Londy has made with Ms Dolphin for the funding of his costs has resulted in Mr Londy becoming her solicitor, thereby compromising his role as an independent trustee appointed by the court.

[17] The agreement between Mr Londy and Ms Dolphin is in writing, and comprises Mr Londy's letter to her of 8 May 2014 and a document headed "Costs Agreement" of the same date. Notably his letter is addressed to Ms Dolphin care of another firm of solicitors, Broadly Rees Hogan Lawyers.

[18] If read alone, the costs agreement would give the impression that Mr Londy (or his firm) had been retained by Ms Dolphin. For example, it refers to her as a "client" and requires him, or more precisely his firm Londy Lawyers, to "act reasonably and take reasonable care to protect your own interests with respect to the Matter". However, the effect of this document is markedly qualified by the letter which, as I have said, forms part of the contract between them. In the letter, the independence of Mr Londy is preserved by, most importantly, these paragraphs:

> "**Special Qualifications upon Costs Agreement**
>
> The Costs Agreement is in the usual form used by us in the course of our practice. Because of the peculiar nature of this retainer, the terms of the Costs Agreement are subject to the following further matters:
>
> 1. Although you are named as 'client' under the Costs Agreement, you are only our client in the sense that you are liable for our fees - not in the sense that we are acting upon your instructions.
>
> In fact, this firm is acting on behalf of Charles George Londy as Trustee of part of the property of the Trust, pursuant to the Court Order. Because Charles Londy is the principal of this firm, this means that effectively, Charles Londy as principal

> of this firm is acting on behalf of Charles Londy as Trustee of the Trust.
>
> 2. Consequently, we are not required to contact you directly. All contact with you ma be via your solicitors Broadley Rees Hogan Lawyers, who have your full authority.
>
> 3. Another consequence of the manner of our appointment is that we do not take instructions from you or Broadley Rees Hogan Lawyers. We are not required to act and will not act upon instructions from you or any other beneficiary. Charles Londy will discharge his function as the Trustee, and this firm will discharge its role as solicitors for the Trustee, based solely upon consideration of the terms of the Court Order and Charles Londy's obligations as trustee and under the Costs Order.
>
> That is not to say Charles Londy will not consider any submissions that may be put to him by you (or any other beneficiary, or anyone else) - but the fact that you are paying our fees does not give you any right to require this firm (or Charles Londy) to do any act or thing in the course of this firm's retainer (or the carrying out of the Trust duties)."

[19] Consequently, I reject the defendants' submission that Mr Londy or his firm have been retained by Ms Dolphin. Rather, the effect of their agreement is that she is to fund the case whilst he will act independently and in the interests of the trust and the estate and not in any respect upon her instructions. There is no basis for concluding that Mr Londy is or might become subject to a conflict between his duties according to his appointment by the court and a duty to Ms Dolphin.

[20] I return to the other argument for the stay, which is that his agreement with Ms Dolphin is not of a kind which corresponds with that part of the order which I have set out above. It is correct to say that it is not a form of litigation funding constituted by a *loan* from the funder. But I do not accept that the order, in referring to an "arrangement acceptable to him to fund such proceedings", was limited to funding by way of a loan. The argument seems to set up the expression "litigation funding" as a term having such a well recognised meaning that it should be imported into this order. One difficulty with this argument is that the order does not use that term. Further, the order conferred a broad discretion upon Mr Londy in this respect by providing for the funding to be according to "arrangements acceptable to him". Therefore, I reject the submission that he has not obtained funding according to the order, even accepting for the moment that the order required, rather than permitted, him to do so.

[21] It is submitted that it was preferable for Ms Dolphin to be substituted as the plaintiff. That submission seems to revisit at least some of the ground which must have been covered when the order appointing Mr Londy was made. If Ms Dolphin had standing to prosecute this proceeding (where she has no vested interest but only a contingent interest under this discretionary trust), still no basis has been demonstrated for setting aside the orders appointing Mr Londy.

[22] It follows that the application for the stay must be refused.

Strike out application

[23] Mr Londy's case has many alternatives, largely because of the various legal characterisations which might be given to the facts and also, of course, because he had no personal experience of any of the events.

[24] One of his alternative cases is that the funds which Mr Gray caused to be provided, to or for the benefit of one or more of the defendants, were provided by loans by him to them. The first part of the pleading which the defendants say should be struck out is that which pleads that there were such loans by Mr Gray. Paragraph 53A alleges that the payment which went towards the second of the instalments under the Contract constituted a loan by Mr Gray to the first and second defendants or the third, fourth and fifth defendants "pursuant to an agreement between them". (When I raised the ambiguity in the word "them", counsel for Mr Londy said the intention was to allege a loan by Mr Gray to all five defendants pursuant to an agreement between them. The same correction is required for paragraph 56A where a similar allegation is made in relation to the payment towards the third instalment under the Business Sale Contract.)

[25] The defendants submit that this allegation of an agreement is bound to fail because the alleged agreement or agreements would be uncertain, incomplete and lacking essential terms such as the amount of the alleged loan, its duration and the effect of interest rates.

[26] Mr Londy's case is that these payments, which are quantified in the pleading, were at the times of the payments agreed to be loans. So there is no uncertainty as to the amount of the alleged loans.

[27] Paragraph 106A alleges that there was no agreement as to the date of repayment of either loan with the consequence that they were repayable on demand. More correctly, the position would be that absent an agreed time for repayment, the liability to repay the loan would arise immediately without a demand.[1] But the point is that there is no incompleteness or want of certainty from the absence of an agreed date for repayment. The same applies to the absence of any agreement about interest. The absence of a term about interest does not mean the payments were not agreed loans.

[28] A further complaint is about the alternative plea that there were two loans on each occasion, one by Mr Gray to the first and second defendants and a further loan by them to the corporate defendants. It is said that the allegation of a loan by them to their companies could not be relevant to any cause of action which is pleaded. But the plaintiff is not attempting to sue for repayment of a loan made by the first and second defendants to their companies. Rather the allegation of this on-lending by the first and second defendants is said to be relevant to another branch of the plaintiff's case, which is that the first and second defendants, as well as the corporate defendants, were knowing recipients of moneys paid out by Mr Gray in breach of trust or fiduciary duty. By this on-lending allegation, the plaintiff wishes

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1 *Norton v Ellam* (1837) 2 M & W 461 at 464; *Young v Queensland Trustees Limited* (1956) 99 CLR 560 at 566.

to argue that the first and second defendants first received the moneys before they were received by the corporate defendants.

[29] As to what in fact occurred with the payment of these funds, there are some indications that they were paid by Mr Gray's lender to the vendors of the business. But at this stage of the proceeding, the plaintiff should not be held to that being the fact. When the true facts as to the passage of the funds become clearer, it will be possible to assess more fairly the merit of an allegation such as this succession of receipts of the funds.

[30] For these reasons, I will refuse the application to strike out paragraph 53A, 53B, 56A, 56B and 106A.

[31] The next category is constituted by paragraphs 60A through 60D. They are preceded by allegations, which are not presently challenged, that Mr Gray held the trust assets as a trustee *de son tort* and that the mortgaging of the trust assets and the payments made to or for the benefit of the defendants constituted unauthorised dealing with and misapplication of trust property. It is also alleged that Mr Gray well knew that he did not hold a valid appointment as a trustee.

[32] Paragraph 60A alleges that Mr Gray owed fiduciary duties as a trustee *de son tort*. One alleged duty is that he was to act in the best interest of the beneficiaries. The other is that he was not to place himself in a position where his fiduciary duties conflicted, or might conflict, with his personal interests or his duty to others. The defendants challenge the allegation as to the first of those duties, because it is expressed in prescriptive, rather than proscriptive terms. That complaint is well made. In *Breen v Williams*,[2] Gaudron and McHugh JJ said that equity imposes proscriptive obligations on a fiduciary - not to obtain an unauthorised benefit from the fiduciary relationship and not to be in a position of conflict - and positive obligations to account for any profits and make good any losses arising from the breach. Their Honours added that the law does "not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed".[3]

[33] Counsel for Mr Londy did not challenge that legal submission but suggested that this alleged positive obligation might have a source other than Mr Gray's status as a fiduciary. The particular source was not identified.

[34] The debate about this alleged positive obligation appears to be a pointless one, because there appears to be nothing which is pleaded as a breach of this duty which is not also pleaded as a breach of the proscriptive duty (which is not challenged). But whilst the plaintiff wants to retain the allegation of this positive duty, presumably he or his advisers see some potential benefit in it. I am persuaded that it should be struck out. Therefore the allegation, as pleaded in paragraph 60A(a) and 60C(a), will be struck out. In consequence, those paragraphs will have to be repleaded.

[35] The next complaint about this part of the pleading is directed at paragraph 60B(g) and the relevantly identical terms of paragraph 60D(d). It is there alleged that Mr Gray acted in these events also as the solicitor for the defendants as a result of

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2 (1996) 186 CLR 71.

3 (1996) 186 CLR 71 at 113. See also Gummow J at 137-138.

which his duties to them conflicted with his fiduciary duty or duties as a trustee. The defendants' complaint is that there is no proper case pleaded to the effect that Mr Gray was retained as their solicitor. The statement of claim earlier alleges that Mr Gray was retained "as the solicitor and agent of" the defendants when the first defendant instructed him to raise money from or using the assets of the trust or the estate for the purpose of paying the instalments of the purchase price. The defendants' submission seems to be that Mr Gray could not have been acting in each of the capacities of trustee, executor, solicitor and finance broker. But that is a factual question about which the plaintiff's case is not so devoid of possibility that it should now be struck out.

[36] A further complaint is that this allegation of breach of fiduciary duty is inconsequential because there is no plea that the defendants knew of this breach of duty so as to give an arguable claim under the first limb of *Barnes v Addy*.[4] The defendants then turn their argument to paragraph 63 and 63A, which are pleaded under a heading "Knowledge of the misapplication of funds and breaches of trust".

[37] Paragraph 63 alleges that at the time of each of the payments, the defendants knew of the invalidity in Mr Gray's appointment as a trustee and of the essential facts pleaded as breaches of his fiduciary duty. The alleged knowledge of the invalidity of Mr Gray's appointment as trustee is particularised as knowledge imputed to the defendants on the basis that Mr Gray had knowledge and that he was retained by them. There is a further allegation that the breaches of fiduciary duty were known to Mr Gray and that, again, that knowledge is to be imputed to the defendants. But thirdly there is an allegation of actual knowledge by the first and second defendants, in turn to be imputed to their companies, the third, fourth and fifth defendants, of the breaches of fiduciary duty.

[38] The defendants submit that imputed knowledge does not suffice for the first limb in *Barnes v Addy*. That proposition was disputed in the submissions for Mr Londy. There is little point in the court endeavouring to resolve this legal question at present. To do so would not dispose of the *Barnes v Addy* case because, as just discussed, there is also an allegation of actual knowledge of the specified circumstances which made Mr Gray's conduct in breach of his fiduciary duty. It is not alleged that the defendants actually knew of the invalidity of his appointment. But it is alleged (and at present seems likely to be the case) that they did know that Mr Gray was using trust property to obtain funds for their benefit and not for the purposes of the trust. Moreover, on the pleaded case, he was doing so without a written record of the terms of the provision of these funds or any provision for the payment of interest or for the securing of the repayment of the funds by the defendants. It is yet to be seen whether the defendants are able to put in issue their allegation of actual knowledge of the facts and circumstances constituting the breaches of fiduciary duty.

[39] There is a further complaint by the defendants that if the first and second defendants had actual knowledge, nevertheless the corporate defendants had imputed knowledge, ie their knowledge would be imputed to their companies. This misunderstands the case pleaded in paragraph 63, which is that their actual knowledge became the actual knowledge of their companies. In other words, they

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4 (1874) LR 9 Ch App 244.

were the corporate minds of those companies. If that is disputed, it will be a factual question to be tried but there is no defect in the pleading in this respect.

[40] Therefore I decline to strike out the allegations of imputed knowledge. To return to an earlier point, which was that the alleged breaches of duty were inconsequential absent a case of knowledge by the defendants, there is a pleaded case of actual knowledge.

[41] The result is that apart from paragraphs 60A(a) and 60C(a), the application to strike out paragraphs 60A through 60D, as well as paragraph 63, will be refused.

[42] Paragraph 63A pleads an alternative case that the defendants became actually aware of the invalidity of Mr Gray's appointment as trustee in about early 2009. The defendants say that this could not be relevant because it was an awareness after the payments were made. For Mr Londy, it is submitted that this could matter because on one view, the defendants or some of them were then in receipt of property as volunteers and accordingly, it is argued, they would thereafter be accountable. Again this is a legal issue for which there is no apparent utility in its immediate determination. Knowledge of the invalidity of Mr Gray's appointment is not an essential element of the case of knowledge of his breach of fiduciary duty and of the relevant causes of action. Therefore paragraph 63A will not be struck out.

[43] Next there is a challenge to paragraph 80 of the statement of claim which alleges that by reason of the defendants' receipt of the payments, a loss was suffered by the trust and the estate of Mr Dolphin. In the case of the trust, the loss is quantified as the total of the payments together with interest paid by Mr Gray to his lender and certain other amounts referrable to what was otherwise paid to that lender. In the case of the estate, there is a claim for so much of the repayments made to that third party lender as were fairly attributable to the use made of its property.

[44] The defendants say that this compensation case is flawed because the alleged liability of the defendants under the first limb of *Barnes v Addy* would not make them liable for losses caused by the trustee's conduct beyond their obligation to restore to the trust the property received by them. They submit that the components to be quantified by reference to interest paid to Mr Gray's lender are not recoverable under the first limb of *Barnes v Addy*, but appear instead to be losses attributable to some negligence by Mr Gray in the way in which he raised the funds.

[45] It is submitted for Mr Londy that losses in the nature of interest paid to Mr Gray's lender are recoverable even under the first limb of *Barnes v Addy*. In that respect, counsel for the plaintiff cited *Grimaldi v Chameleon Mining NL and Anor (No 2)*[5] where the Court (Finn, Stone and Perram JJ) said that the available remedies under either limb of *Barnes v Addy*:

> "… are not limited to an account of profits made or to pay compensation to restore the trust or for the loss occasioned by [the third party's] wrongdoing."[6]

It is not plain that this passage supports the losses as claimed here. But again, the question is whether there is any utility in resolving this issue at present, especially where the plaintiff's case is unlikely to be yet fully developed and where the extent

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5 (2012) 200 FCR 296.

6 (2012) 200 FCR 296 at 415 [555].

of the interest paid by Mr Gray to his lender, at least from the proceeds of sale of the trust assets which were mortgaged to that lender, will be still relevant. In particular, the amounts repaid to or awarded in favour of the lender to Mr Gray are pleaded in paragraphs 75-77, which are not challenged.

[46] There is also a submission that the losses claimed in paragraph 80(b), which are those to the deceased's estate, were irrelevant because it was said that there was no *Barnes v Addy* claim in relation to the estate. However, paragraphs 60C and 60D plead that Mr Gray breached his fiduciary duties as executor and trustee of the estate in using property of that estate in the transaction for the final instalment under the contract for the purchase of the business. Paragraph 63 pleads that the defendants knew of not only the breach of Mr Gray's duties as a trustee, but of the breaches as an executor and trustee pleaded in paragraph 60D. As I have said, the invalidity of Mr Gray's appointment as trustee of the family trust is not an essential element of the breach of trust case made against the defendants. Therefore there is no significant difference between the case that they were recipients of trust property and that pleaded that they were recipients of property of the estate.

[47] It follows that the application to strike out parts of paragraph 80 should be refused.

[48] Lastly there is a challenge to the *Barnes v Addy* claims upon the basis that the facts pleaded are inconsistent with any *receipt* by any of the defendants. According to the statement of claim, the relevant payments which Mr Gray caused to be made were made at the direction of the defendants or some of them to the vendor or vendors of the business: paragraphs 53A(b), 53B(b), 56A(b) and 56B(b). The defendants say that therefore there is no alleged receipt by the defendants of any of these funds, so that the *Barnes v Addy* case, which is limited to the so-called first limb, must fail.

[49] Insofar as the plaintiff alleges that there was a knowing receipt of *money*, that submission must be accepted, directly supported as it is by a decision of the Court of Appeal in this court: *Quince v Varga*.[7] In that case there was a claim against the wife and son of a trustee who had misappropriated the plaintiff's money, upon the basis that they had each received it knowing that it had been so misappropriated. The trial judge found that the trustee's wife had received in total a certain amount, made up of components which comprised some payments made directly to her, other sums paid on her behalf such as mortgage payments and amounts paid for the purchase or repair of some items of her personal property such as a car and electrical goods. The Court of Appeal held that not all of the payments from which she had benefited constituted receipts in the requisite sense. Still the plaintiff recovered amounts which had been paid to her as well as the amounts which had been paid for a car purchased for her, for electrical goods purchased for her house and for repairs to the air-conditioning in that house. The plaintiff did not recover the components consisting of payments otherwise for the defendants' benefit, for which there was no asset of the defendant which was "traceable as representing the assets of the plaintiff", a phrase adopted by Holmes JA from *El Ajou v Dollar Land Holdings plc & Anor*.[8] Similarly, Douglas J said:[9]

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7 [2009] 1 Qd R 359.

8 [1994] 2 All ER 685 at 700 cited by Holmes JA [2009] 1 Qd R 359 at 365, 366 [2].

9 [2009] 1 Qd R 359 at 381 [52].

> "[T]he recipient must have received and become chargeable with some part of the trust property. The ability to trace trust assets into the possession of the person would be relevant to that analysis."

[50] Therefore, the allegations in paragraphs 53A(c) and 56A(c) that the "instalment payments" were received by the defendants cannot stand. Paragraphs 53A and 56A should be struck out.

[51] However, there is an alternative case pleaded, for each payment, to the effect that the plaintiff could trace into their other property. For the first and second defendants, they are said to have received a debt owed by the corporate defendants to them in consequence of their having borrowed the money from Mr Gray and on-lent it to their companies. In the case of the corporate defendants, they are said to have received "ownership equity" in the business which they acquired: paragraphs 53B(c) and 56B(c). Those allegations do not suffer from the same defect as affects the alleged receipts of money. But the defendants submit that these alternative allegations are "no higher than bare assertion" and that the pleading is "wholly inadequate for a tracing or knowing receipt claim".

[52] I accept that the claim in this respect is general and lacks the particulars which will be required as the case progresses. But Mr Londy has the difficulty of being an outsider to these events and ultimately whether this part of the case is sustainable will turn upon the facts and circumstances of the acquisition of the business. The fact that the business was apparently acquired prior to the making of these second and third instalments might indicate a difficulty for Mr Londy in proving that the property in those businesses was acquired with trust funds. But that will be a matter for evidence of the particular dealings between the defendants and their vendors, including the terms of the relevant contract or contracts between them. Therefore, these alternative allegations should not be struck out at present.

[53] There were other complaints made about the previous statement of claim which were not maintained having regard to the terms of this current pleading.

[54] The defendants seek an order that the plaintiff pay their costs thrown away by reason of the filing of the amended claim and the further amended statement of claim. The situation is not within UCPR r 386 because these amendments were not made under r 378. They required the court's leave because of the introduction of a new cause of action. The plaintiff does not contest such an order for costs and it will be made.

[55] The defendants also submit that Mr Londy should not have any further opportunity to amend his case without the defendants' consent or the leave of the court, and that an order should be made to that effect. That is a bold submission in the circumstances where there is every likelihood that there are facts yet to be revealed by the defendants which could be material to the pleading of Mr Londy's case. For example, the defendants have not yet had to plead their case and to explain, if possible, how this was a legitimate use of trust property which, as it presently appears, they requested. It is not unlikely that when they are required to plead their case that it will be the cause of some further amendment by Mr Londy. I will not make the direction sought.

Costs of the sixth and seventh defendants

[56] There is no argument by Mr Londy that he should not be ordered to pay the costs of the proceedings against the sixth and seventh defendants which he has abandoned by the most recent amendments. The question is whether those costs should be assessed on the indemnity basis. In essence, it is said for those defendants that the case against them was always fatally flawed and that Mr Londy unreasonably brought it and for some time persisted with it notwithstanding the flaws being drawn to his attention. The claim against the former sixth defendant, being a company of the first and second defendants, was to trace into real property of which the company was the registered owner, upon the allegation that it acquired that property from the income or profits generated by the business (into which the plaintiff could trace). It was pleaded that the sixth defendant was a constructive trustee for the plaintiff. That is a claim which was clearly enough precluded by that company being a registered owner of Torrens land and having the benefit of an indefeasible title.[10]

[57] The claim against the seventh defendant, a child of the first and second defendants, is that he became the registered owner of the family house at Sovereign Islands by the use of the income or profits of the business and that consequently that property was held upon a "resulting or constructive trust" in favour of the first and second defendants or the corporate defendants. That was a somewhat different case from that which was pleaded against the sixth defendant. If, for example, the funds of the first and second defendants were the source of the price paid for this property, then it would be held on a resulting trust for the parents if they could rebut the presumption of advancement. In that event, the plaintiff might have attempted to trace into the property of the first and second defendants constituted by their equitable ownership of that real property. Of course that involves some speculation. But the case as pleaded against the seventh defendant did not suffer so clearly from the flaw affecting the case against the sixth defendant.

[58] But assuming that there was no sustainable cause of action against either of these defendants, in any case it does not follow that the plaintiff should be visited with indemnity costs. It cannot be suggested, and I do not understand that it is suggested, that Mr Londy pleaded or persisted with the pleading of the claims against these defendants knowing that they were bound to fail. On the most serious view of his conduct, he has pleaded and for some months persisted with a case which he ought to have known or been advised was without merit. I do not see that his conduct in that way is so serious that it warrants indemnity costs. He will be ordered to pay the costs of the sixth and seventh defendants of the proceedings on the standard basis.

Orders

[59] It will be ordered that paragraphs 60A(a), 60C(a), 53A and 56A of the further amended statement of claim be struck out. The application for strike out is otherwise refused. The application for stay is refused. The application for security for costs is refused.

[60] The plaintiff will be ordered to pay the defendants' costs thrown away by reason of the filing of the amended claim and the further amended statement of claim. The plaintiff will be further ordered to pay the costs of the sixth and seventh defendants

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10 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

of the proceedings on the standard basis. I will hear the parties as to any further orders.