SUPREME COURT OF QUEENSLAND

CITATION:	*Commonwealth Bank of Australia v Dalle Cort & anor* [2014] QSC 296
PARTIES:	**COMMONWEALTH BANK OF AUSTRALIA** (plaintiff) **v** **GILDO CHRISTOPHER DALLE CORT** (first defendant) and **ANTONETTA GABRIELLA DALLE CORT** (second defendant) **GILDO CHRISTOPHER DALLE CORT and ANTONETTA GABRIELLA DALLE CORT** (plaintiffs by counterclaim) **v** **COMMONWEALTH BANK OF AUSTRALIA** (first defendant by counterclaim) and **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (second defendant by counterclaim)
FILE NO/S:	9290 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	5 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17, 30 October 2014
JUDGE:	Carmody CJ
ORDERS:	**1. Judgment for the plaintiff against the defendants in the amount of $143,401.41;** **2. Judgment for the plaintiff/first defendant by counterclaim against the defendants with respect to the claims made by the defendants in and arising from paragraphs 58-79 of the further amended counterclaim filed 15 July 2014;** **3. Judgment for the second defendant by counterclaim against the defendants;** **4. The further amended counterclaim filed 15 July 2014 is otherwise struck out;** **5. The defendants have leave to re-plead only those aspects of the counterclaim raising allegations that**

the plaintiff:

(a) provided erroneous or inaccurate data to the defendants in relation to their margin loan with the plaintiff;

(b) failed to give the defendants a notice of margin call in relation to their margin loan with the plaintiff or a notice of default before exercising the power to redeem the defendants' securities;

6. If the defendants/plaintiffs by counterclaim fail to file and serve an amended counterclaim in accordance with the leave granted in paragraph 5 by 4pm on 12 January 2015, judgment be entered for the plaintiff/first defendant by counterclaim with respect to the counterclaim without the need for any further order;

7. Costs are reserved.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – whether defendants' pleading discloses a reasonable defence or cause of action – guiding principles in determining summary judgement and strikeout application

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – OTHER MATTERS – where defendants claimed equitable setoff based on cross-claim – application of *Forsyth v Gibbs* (2009) 1 Qd R 403 in Queensland

Uniform Civil Procedure Rules (Qld), r 173, r 292

Forsyth v Gibbs (2009) 1 Qd R 403, applied
Heller v Ayre (2005) 2 Qd R 410, applied
McKernan v Fraser (1931) 46 CLR 343, followed
Rawson v Samuel (1841) Cr and Ph 161 at 178, 41 ER 451, applied
Robertson v Hollings & Ors [2009] QCA 303, followed
Ross v Hallam [2011] QCA 92, considered

COUNSEL: R S Hollo with P K O'Higgins for the plaintiff, first defendant by counterclaim.
G C Dalle Cort (17 October 2014), B McGlade (30 October 2014) for the defendants, plaintiffs by counterclaim.
R M Derrington for the second defendant by counterclaim.

SOLICITORS: HWL Ebsworth for the plaintiff, first defendant by counterclaim.
Bosscher Lawyer Commercial (30 October 2014) for the defendants, plaintiffs by counterclaim.
Moray Agnew for the second defendant by counterclaim.

[1] The plaintiff ("**CBA**") applies for summary judgment pursuant to r 292 UCPR of its claim against the respondents and plaintiffs by counterclaim ("**the Dalle Corts**"). It also joins with the second defendant by counterclaim, the Australian Securities and Investments Commission ("**ASIC**"), in seeking orders striking out the Dalle Corts' counterclaim on the basis that it does not disclose a reasonable cause of action.

[2] The Dalle Corts are husband and wife investors. They entered into a $100,000 three year interest only business loan facility ("**the BBL**") on 26 November 2007.[1] Interest was payable monthly by direct debit from a nominated service account ("**the CAA**").[2] The BBL was intended to fund the purchase of shares in the planned initial public offering ("**IPO**") of Storm Financial Limited ("**Storm**").[3]

[3] As it happened the IPO never transpired and the BBL funds were applied by the Dalle Corts for other purposes. Storm went into liquidation on 26 March 2009.[4] Interest accrual and payment on the BBL was suspended by the bank on 22 July 2009 pending negotiations for compensation for loan defaults by Storm investors ("**the resolution scheme**").

[4] ASIC commenced a prosecution against Storm and CBA in the Federal Court for Corporations offences in 2010. In September 2012 CBA agreed to pay an extra $136 million to customers who borrowed money from the bank to invest in Storm to be discharged from the Federal Court's proceedings.[5] However, the Dalle Corts' debt was excluded from the resolution scheme reached in 2012 because Mr Dalle Cort was a Storm director.

[5] The BBL was not paid on expiry in 2010. The CBA sent letters of demand to the Dalle Corts on 21 January 2013 and thereafter interest (calculated from the restart date of 2 January 2013 at an annual effective rate of 16%) was debited directly from the BBL rather than the CAA account.

[6] The bank claims a total of $143,401.41 for principal plus outstanding interest as at 16 October 2014.

Litigation history

[7] CBA initially instituted proceedings to recover the BBL debt in the Magistrates Court on 21 February 2013, that is, 20 months ago. The Dalle Corts' first defence and counterclaim was filed on 1 May 2013.[6] The proceedings were transferred to the Supreme Court on 29 October 2014.[7] CBA filed a reply and answer on 21 February 2014 and the Dalle Corts filed an amended defence and counterclaim on

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1 Transcript 2-24 at line 6.
2 Amended Defence of the First and Second Defendant filed 15 July 2014 at [2(d)].
3 Amended Defence of the First and Second Defendant filed 15 July 2014 at [2(e)(v)].
4 Exhibit AEY4 to the affidavit of A E Yates sworn 25 August 2014 at 24; affidavit of C Gray sworn 25 August 2014 at [6.2].
5 Affidavit of C Gray sworn 25 August 2014 at [9]
6 Affidavit of W Jenvey sworn 23 May 2014 at [5].
7 Affidavit of W Jenvey sworn 23 May 2014 at [7].

31 March 2014.[8] On 22 April 2014 CBA's lawyers sent an eleven page letter to the Dalle Corts outlining a number of "difficulties and fundamental problems" with their pleadings.[9] CBA warned that it would apply to strike them out unless the identified deficiencies were satisfactorily addressed in line with the rules of practice.[10] A strike out application listed for 17 June 2014 was adjourned for a month or so to give the Dalle Corts more time to amend.[11]

[8] In the meantime the Dalle Corts joined ASIC as a party to the action and filed a $150 million counterclaim for damages against CBA and ASIC. The proceedings were transferred to the Supreme Court in October 2013. A substantially modified version of the defence was served ten months after that.

[9] The defence and counterclaim has been amended again since then but the respondents concede that even the current iteration is unsatisfactory.

[10] Boddice J placed the application on the civil list and directed the filing of arguments by the end of August 2014. The bank filed its material and outline on 22 August 2014. The Dalle Corts were granted extensions of time for compliance with directions to 25 September 2014 and again to 10 October 2014. Their outline was finally provided a week late on the eve of the hearing without a re-pleaded draft.

[11] In summary, the Dalle Corts, who were self-represented until 30 October 2014, do not contest non-payment of the debit balance of the BBL but deny liability on a range of grounds and accuse CBA and ASIC of conspiracy, misleading conduct, trespass and negligence.

[12] CBA says that in its present state the defence does not disclose any ground with any real prospects of success giving rise to the need for a trial, and that the counterclaim is incurably defective.

[13] The Dalle Corts want the applications postponed "until such time as [they] file a completed defence and counterclaim".[12] They say that they have not been able to "complete" their defence and counterclaim due to lack of time, financial and legal resources. They assert that it is premature and unfair on them to hear the applications now, "especially in light of new information".[13] However, they do not say what the new information is or how much extra time they realistically need to perfect their pleadings other than suggesting March next year.

[14] The Court can neither allow a degree of indulgence to a self-represented litigant at the expense of fairness to an opponent, nor permit such a party to include allegations or claims in pleadings that fall short of the minimum requirements of

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8 Affidavit of W Jenvey sworn 23 May 2014 at [8] to [9].
9 Affidavit of W Jenvey sworn 23 May 2014 at [11(a)].
10 Exhibit WJ-1 to the affidavit of of W Jenvey sworn 23 May 2014 at 2.
11 Draft Order of Boddice J dated 3 June 2014 at [5].
12 T 1-59 at line 47 – T 1-60 at line 1.
13 T 1-60 – T 1-61.

basic fairness reflected in the rules of court.[14] The admitted and regrettable disadvantages and difficulties of self-representation do not give a party "license…to proceed unconstrained by [those] rules" or in a way that tends to prejudice or delay a fair resolution of the dispute.[15] For these reasons and in light of the litigation history, the fate of the applications will be decided on the basis of the filed pleadings and supporting material. The postponement application of the Dalle Corts is refused.

The summary judgment issue

[15] CBA's summary judgment will only succeed if the Dalle Corts have no real prospects of successfully defending and there is no need for a trial of the claim or part of it. The jurisdiction to deny a litigant's implied right to his or her day in court must be exercised with care (but not timidity) by reference to the relevant requirements of procedural fairness. Before granting summary judgment the court must be reasonably sure that depriving a defendant of the forensic advantages of disclosure and a full benefit of the adversarial method will not lead to injustice.

[16] The Dalle Corts are entitled to have the application decided on the basis of the most generous view of the material. A trial will generally be warranted if the suggested defence depends on disputed or uncertain facts.[16]

The pleaded defences

[17] The amended defence is ten pages long consisting of 21 paragraphs and numerous subparagraphs. Attached to the defence is a 36 page amended counterclaim. In addition there are at least 114 annexures to the defence and counterclaim.[17] It is clearly not as brief as the nature of the case permits. Multiple factual assertions and allegations are included with, in many instances, supporting evidence and argumentative comments. Much of the content is unnecessary and irrelevant. Nor is it fit for the intended purpose of identifying the reasons why the claim is not maintainable.[18] As the Court of Appeal noted in *Robertson v Hollings & Ors* [2009] QCA 303, Supreme Court litigation is not a "learning experience". It is necessarily managed and controlled by a common set of rules and standards designed to achieve final and just outcomes for the parties as quickly, fairly and inexpensively as can be. It is not enough for a self representing party "merely to use ... best endeavours however inadequate those efforts might be".[19]

[18] The Dalle Corts concede that they have "sought the indulgence and patience" of the applicants and the Court and that their lack of legal representation has made it hard for them to properly prepare and present their case.[20] They emphasise that the bank's debt claim only arises from and must be seen in the context of the events

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14 *Ross v Hallam* [2011] QCA 92 at [13].
15 *Robertson v Hollings & Ors* [2009] QCA 303 at [11].
16 *Jessop v Lawyers Private Mortgages Ltd* (2006) QSC 003 per Chesterman J at [21].
17 See Amended Defence and Counterclaim of the First and Second Defendants filed 15 July 2014.
18 *Melco Engineering Ltd v Eriez Magnetics Pty Ltd* [2007] QSC 198 per Dutney J [11].
19 [2009] QCA 303 per Keane JA at [11] – [15].
20 Amended Defence and Counterclaim of the First and Second Defendants filed 15 July 2014 at 1.

recounted in and supporting the counterclaim. The applicant, however, complains that the Dalle Corts' repeated recasting of pleadings in failed attempts to properly identify and articulate a viable defence and counterclaim that complies with standard procedural stipulations is contrary to the stated philosophy and policy purpose of the UCPR. The applicant submits that this causes delay and expense to the applicant itself, to the court, and to other litigants, all of whom possess finite resources and cannot be adequately compensated by a costs order. They say, correctly and understandably, that lack of representation does not entitle a party to ignore the fundamental requirements of a properly pleaded case to the prejudice and forensic disadvantage of opposing parties.[21]

[19] CBA's chief complaint is that, despite its prolixity and superfluidity, the pleading does not disclose a reasonable defence. Non-payment of the amount CBA claims is admitted in the Defence[22] and the Dalle Corts' outline[23] but liability for it is disputed on the grounds that:

(a) there was no act of default because:[24]

(i) the CAA was sufficiently in credit to meet interest payments;[25] or

(ii) repayment on expiry was not a condition of the BBL;

(b) the maturity date of the facility was extended;[26]

(c) the bank wrote off the loan.[27]

The first ground – acceptance before formal offer

[20] The Dalle Corts contend that they never received a copy of the UTC (as the bank claims) either at the advance date, when the UTC documents were signed or any time since.[28] They say that the CBA is "grasping at straws" by now "quoting chapter and verse from a document which had no relevance at the time the monies were advanced on 22 November 2007".[29] There is uncontested evidence that the Dalle Corts accepted the loan on the UTC terms by their conduct in signing the document and making interest payments. This ground is barren

The second ground – no default

[21] This ground of defence is not directly addressed in the Dalle Corts' outline except insofar as it is noted that the funding of the loan predated acceptance of the Letter of

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21 Outline of Argument of the Plaintiff filed 3 September 2014 at [88] to [91].

22 Amended Defence and Counterclaim of the First and Second Defendants filed 15 July 2014 at [5], [6(b)], [6(c)], [7(c)].

23 Outline of Argument of the Defendants dated 16 October 2014 at [28] to [36].

24 Amended Defence of the First and Second Defendants filed 15 July 2014 at [3(a)(iv)], [3(b)], [3(c)], [7], [12].

25 Amended Defence of the First and Second Defendants filed 15 July 2014 at [2(a)-(d)], [3], [4], [6(a)], [7(a)], [12].

26 Amended Defence of the First and Second Defendants filed 15 July 2014 at [3(f)], [6(b)-(d)].

27 Amended Defence of the First and Second Defendants filed 15 July 2014 at [2(e)].

28 Outline of Argument of the Defendants dated 16 October 2014 at [42]-[45].

29 Ibid at [45].

Offer dated 20 November 2007.[30] CBA does not rely on the failure to keep the CAA in funds as a default event for the purposes of the application. Its claim is based, instead, on the failure to repay the principal on the maturity date, that is, on 26 November 2010.

[22] The terms and conditions of the offer were accepted by the Dalle Corts in writing on 26 November 2007.[31] Clause 4.5 of the contract ("**the UTC**") provides for payment of the BBL in full at the end of the term. Clause 12.2 makes it clear that failure to make payment of interest or the residual balance on the due date amounts to an "event of default" and that the bank's rights were exercisable at any time in its sole and absolute discretion. The loan has been repayable on demand since 26 November 2010,[32] and a demand was in fact made on 21 January 2013.[33]

[23] The Dalle Corts' denial of liability on the basis that they did not breach the UTC is untenable. There is no real prospect of successfully defending on this ground.

The third ground – writing off the balance

[24] The alleged "write off" is based on an implication from suggested past conduct of CBA's including the omission of any reference to any details of the disputed loan account in a draft deed of release document in June 2012.[34] In short, it is asserted in this line of defence that CBA had a habit of writing off "near identical"[35] loans (presumably in the sense of forgiving default) to former Storm staff like them including, most recently, after the bank had commenced these recovery proceedings against them.[36] As far as I can ascertain from the material, the previous "write offs" relate to margin loan (not BBL) claims against other customers which have no logical connection with the Dalle Corts' liability to repay the BBL.[37] Moreover, the assertion that the Dalle Corts understood that a loan was written off in the course of settlement negotiations cannot assist them because they rejected CBA's compromise offer.[38]

[25] The fact that the original purpose of the loan (the IPO) was not fulfilled and the bank did not "recall the loan at that time or [at any time] since" the failure of the IPO does not provide any valid relief against the Dalle Corts' contractual liability to repay the amount advanced.[39] Nor does the fact that the bank did not ask the Dalle Corts to refinance[40] or request repayment at expiry[41] provide any legal basis for

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30 Outline of Argument of the Defendants dated 16 October 2014 at [42].
31 Amended Statement of Claim filed 16 April 2014 at [3(a)-(d)].
32 *Heller v Ayre* (2005) 2 Qd R 410 at 417-423.
33 Amended Statement of Claim filed 16 April 2014 at [9].
34 Annexure 41 to the Amended Defence and Counterclaim of the First and Second Defendants filed 15 July 2014.
35 Outline of Argument of the Defendants dated 16 October 2014 at [35].
36 See Outline of Argument of the Defendants dated 16 October 2014 at [27]-[41].
37 See Amended Defence of the First and Second Defendants filed 15 July 2014 at [15]-[21].
38 See Amended Defence of the First and Second Defendants filed 15 July 2014 at [17] and [20]; Outline of Argument of the Plaintiff filed 3 September 2014 at [27].
39 Cf. Amended Defence of the First and Second Defendants filed 15 July 2014 at [2(e)(vi)] and [3(f)].
40 Amended Defence of the First and Second Defendants filed 15 July 2014 at [2(e)(iii)(iv)].
41 Amended Defence of the First and Second Defendants filed 15 July 2014 at [2(e)(iv)].

concluding that the CBA had written off the debt they are now suing the Dalle Corts for.[42]

[26] The Dalle Corts have not demonstrated any real prospect of successfully defending CBA's claim based on asserted "write off".

The fourth ground – extension of the term

[27] This ground of defence appears to suggest that the BBL was impliedly extended by CBA's conduct in not requesting repayment or commencing recovery action at or near the time of expiry.[43] However, the bank's right to cancel the facility for default and refinance on a fresh transaction basis instead of taking recovery action were all options for the bank's sole benefit and discretion. There is nothing in the CBA's conduct suggestive of an intention to waive the Dalle Corts default or to extend the obligation to repay to some indefinite time in the future.[44] Thus, the weight of the evidence does not support the contrary contention.

The new ground – equitable setoff

[28] On 30 October 2014 counsel appeared for the Dalle Corts arguing it would be inappropriate to refuse to give leave to re-plead their defence and counterclaim for procedural irregularities because it would have the inequitable effect of allowing the CBA to proceed to judgment without bringing to account the counterclaim as an equitable setoff – a true defence The Dalle Corts' revised position is that the root cause of all their problems is CBA's misleading and deceptive conduct and acts of complicity with ASIC. These allegations form the spine and ribs of the counterclaim they are now also raised as a shield against the money claim.

[29] In essence the Dalle Corts say that CBA supplied them with "incorrect data" in the form of daily on-line information about loan-to-security value ratio. This induced them to make investments (funded by increased borrowings) instead of, for example, selling secured assets so as to reduce liability and avoid a negative equity position brought on by a sudden downturn in the market that sparked an allegedly premature (and secret) selloff of their assets by the bank to restore relative LVR value. It is contended on behalf of the Dalle Corts that the bank's conduct in providing incorrect data and secretly selling down their assets gives them valid causes of action supporting both a counterclaim and a true defence in the nature of an equitable setoff.

[30] Under UCPR 173 a cross-claim may be relied on as a setoff against all or part of a disputed claim or pursued as a counterclaim. The Dalle Corts concede that the setoff claim is not squarely pleaded but ask for leave to retain lawyers to properly articulate it in accordance with the UCPR. The bank submits that even if it was possible for the Dalle Corts to cure the pleading deficiencies with the help of lawyers, the cross-claim is a counterclaim at best and not a true equitable setoff.

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42 Outline of Argument of the Plaintiff filed 3 September 2014 at [20].

43 Amended Defence of the First and Second Defendants filed 15 July 2014 at [3(f)].

44 Outline of Argument of the Plaintiff filed 3 September 2014 at [22]-[24].

[31] An unliquidated claim for damages can be a setoff against a money claim based on a different contract or transaction, provided the transactions are so directly connected that it would be inequitable not to deduct the defendant's cross-claim before acknowledging the plaintiff's debt. However, to establish a right of equitable setoff the relevant transaction must be so closely linked that the equity relied on goes to the root of and "impeaches" the claimant's legal title to the point of rendering a demand for payment unconscionable as a matter of principle in circumstances where no regard is given to the cross-claim.[45] Submissions to the contrary made on behalf of the Dalle Corts are inconsistent with the settled position in Queensland. A sufficient nexus between the rival claims is required.[46] The mere fact that the defendant's ability to meet repayment obligations was reduced by the plaintiff's alleged misconduct is insufficient to establish a setoff.[47]

[32] There is no evidence (or even allegation) that either the decision to enter into the BBL in 2007 or breaching its terms in 2010 has any connection with CBA's handling of its margin loans. Nor does the bank's alleged misconduct in connection with the margin loan appear to impeach its BBL-related claim.

[33] In the circumstances the right course to take, in my view, is to grant the bank judgment on the claim and leave the cross-claim to proceed as a counterclaim if and when the Dalle Corts are in a position to plead their case properly.[48]

The counterclaim

[34] Apart from their complaint about the margin loan data and securities, the Dalle Corts also seek redress (including exemplary damages) from CBA and ASIC for conspiracy to exclude them from the 2012 settlement scheme.[49] There is also an allegation (not subject to any claimed relief) of "unauthorised provision of…confidential information [about the defendants] by ASIC to the CBA".[50]

The confidential information claim

[35] This claim arises out of events in July 2009 and relates to the release of information ASIC obtained from Storm in the exercise of its investigative powers. The confidential information is a Storm database containing the Dalle Corts "personal client information". In summary it is alleged that ASIC undertook an investigation into Storm in the course of which it compulsorily obtained information, some of which contained details about its investors including the Dalle Corts. Information was provided to ASIC on a hard drive. It is alleged that in around July 2009 ASIC

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45 *Forsyth v Gibbs* (2009) 1 Qd R 403 at [10].

46 *Rawson v Samuel* (1841) Cr and Ph 161 at 178, 41 ER 451 at 458.

47 *Forthsyth v Gibbs* (2009) 1 Qd R 403 at [15].

48 Cf. *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [2011] QCA 105 at [36].

49 Amended Counterclaim of the First and Second Defendants filed 15 July 2014 at [74]-[79].

50 Amended Counterclaim of the First and Second Defendants filed 15 July 2014 at [72(iix)] and [73].

gave the hard drive to CBA. This is said to be evidenced by the fact that the hard drive was delivered to Storm by the receivers appointed by CBA.[51]

[36] The allegation stems from the fact that a hard drive containing the information was returned to Storm by Korda Mentha, not ASIC.[52] However, Korda Mentha were agents of Storm and not CBA, despite having been appointed by CBA as receiver/manager of Storm's assets, including the database. The mere fact that they may have had the hard drive does not raise any implication of improper disclosure to the bank of itself. Moreover, the Dalle Corts do not claim any compensation or damages against CBA for its "receipt" (as distinct from its use) of the information.

[37] The pleading is deficient in a number of respects. First, it does not identify the "confidential" information that was stored on the database and released to the bank. Second, there is no allegation that ASIC or CBA received the material under an obligation of confidence.

[38] The Dalle Corts identified the purpose of including the unauthorised disclosure of confidential information claim as "…to at least demonstrate the close 'buddy-buddy' relationship that existed and exists between ASIC and the CBA".[53] The purpose is also said to be to illustrate that

> "ASIC did not act in good faith or consider the "huge" conflict of interest that was created by using its coercive power to obtain confidential information for investigative purposes and then providing that information to a party [Korda Mentha] that did not even ask for the information but which obviously had had a vested interest in it given the Storm CBA saga that was then unfolding."[54]

[39] Importantly, there is no allegation of loss or claim for relief arising out of the CBA's alleged possession of the information on a hard drive, since returned, for a period of about six days. No facts are asserted suggesting that the information about the Dalle Corts was confidential in any way nor is it asserted how or on what terms Storm received the information. Even if the information was confidential it belonged to Storm, not the Dalle Corts. No damage is alleged to flow from the disclosure. No relief is sought. Thus, the release of confidential information allegation does not raise a viable cause of action.

The conspiracy claim

[40] The foundation of the conspiracy claim is a settlement agreement between ASIC and CBA that provided for a payment of a financial benefit of up to $136 million to Storm investors.[55] The Dalle Corts were excluded persons because Mr Dalle Cort was a director of Storm. Mrs Dalle Cort invested jointly with him with the result that she was not entitled to participate in the scheme either. The Dalle Corts allege

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51 Amended Counterclaim of the First and Second Defendants filed 15 July 2014 at [73].
52 Ibid at [73(g)].
53 Outline of Argument of the Defendants dated 16 October 2014 at [46].
54 Ibid at [48].
55 Annexure 113 to the Amended Defence and Counterclaim of the First and Second Defendants filed 15 July 2014.

that the intention of ASIC and CBA was that their entitlements established in the agreement for settlement be denied to them.[56]

[41] The Dalle Corts rely on the tort of "conspiracy by lawful means",[57] the elements of which are:

1. existence of an agreement;
2. "the sole, the true, or the dominating, or the main purpose of the conspiracy" being to injure the plaintiff;[58]
3. the agreement was carried into effect;
4. the carrying into effect of the agreement had the effect of causing damage to the plaintiff.[59]

[42] The Dalle Corts assert that the resolution scheme entered into by CBA and ASIC consisted of two separate agreements: one allocating the $136 million to customers, and the second excluding particular classes of customers.[60] They argue that the latter agreement "could only have been for the purpose of harm."[61] The pleading is defective because there is no assertion that the sole, true or dominant purpose of the ASIC-CBA settlement agreement was to injure the Dalle Corts. For this requirement to be satisfied, CBA and ASIC must have specifically intended to harm the Dalle Corts.[62] The pleadings failed to establish that either CBA or ASIC possessed the requisite state of mind, contrary to the requirement in r 150(1)(k) UCPR. Moreover, neither the conspiracy nor its prosecution is alleged to have caused the Dalle Corts any loss or damage. Contrary to the Dalle Corts' submissions, the resolution scheme was a single agreement that never conferred any benefit on the Dalle Corts of which they could be deprived. The fact that ASIC and CBA conferred benefits on others did not infringe any right, interest or entitlement of the Dalle Corts.

[43] This claim was not subject to any additional submissions by Mr McGlade of Counsel on 30 October 2014.

[44] The pleading fails to plead a cognisable cause of action.

Orders

1. Judgment for the plaintiff against the defendants in the amount of $143,401.41;
2. Judgment for the plaintiff/first defendant by counterclaim against the defendants with respect to the claims made by the defendants in and arising from paragraphs 58-79 of the further amended counterclaim filed 15 July 2014;
3. Judgment for the second defendant by counterclaim against the defendants;

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56 Ibid at [77].
57 Amended Counterclaim of the First and Second Defendants filed 15 July 2014 at [74]-[79].
58 *McKernan v Fraser* (1931) 46 CLR 343 per Dixon CJ at 362; see also Evatt J at 398-99.
59 *Munnings v Australian Government Solicitor* (1994) 118 ALR 385.
60 Outline of Argument of the Defendants dated 16 October 2014 at [14].
61 Outline of Argument of the Defendants dated 16 October 2014 at [15].
62 *Spencer v Australian Capital Territory* [2007] NSWSC 303 at [37] per Brereton J.

4. The further amended counterclaim filed 15 July 2014 is otherwise struck out;
5. The defendants have leave to re-plead only those aspects of the counterclaim raising allegations that the plaintiff:
   (a) provided erroneous or inaccurate data to the defendants in relation to their margin loan with the plaintiff;
   (b) failed to give the defendants a notice of margin call in relation to their margin loan with the plaintiff or a notice of default before exercising the power to redeem the defendants' securities.
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7. Costs are reserved.