

# SUPREME COURT OF QUEENSLAND

CITATION: *Fletcher & Ors v Fortress Credit Corporation (Australia) II Pty Limited & Ors* [2015] QSC 51

PARTIES: **WILLIAM JOHN FLETCHER AND KATHERINE ELIZABETH BARNET AS LIQUIDATORS OF OCTAVIAR LIMITED (IN LIQUIDATION)**  
ACN 101 069 390  
(first plaintiffs)

**OCTAVIAR ADMINISTRATION PTY LIMITED (IN LIQUIDATION)**  
ACN 101 069 390  
(second plaintiff)

v

**FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LIMITED**  
ACN 114 624 958  
(first defendant)

**FORTRESS INVESTMENT GROUP (AUSTRALIA) PTY LIMITED**  
ACN 111 940 713  
(second defendant)

**DAVID MARK ANDERSON**  
(third defendant)

**CRAIG ROBERT WHITE**  
(fourth defendant)

**FCCD (AUSTRALIA) PTY LIMITED**  
ACN 134 182 380  
(fifth defendant)

**FCCO (AUSTRALIA) PTY LIMITED**  
ACN 134 182 415  
(sixth defendant)

**FCCO (AUSTRALIA) II PTY LIMITED**  
ACN 151 669 402  
(seventh defendant)

**FCCD (AUSTRALIA) NOMINEE PTY LIMITED**  
ACN 134 182 657  
(eighth defendant)

**FORTRESS CREDIT CORP (AUSTRALIA) PTY LIMITED**  
ACN 112 133 178  
(ninth defendant)

FILE NO: BS 3135 of 2012  
DIVISION: Trial Division  
PROCEEDING: Hearing  
ORIGINATING COURT: Supreme Court of Queensland  
DELIVERED ON: 17 March 2015  
DELIVERED AT: Brisbane  
HEARING DATE: 4 and 17 March 2015  
JUDGE: Applegarth J  
ORDER:

1. Pursuant to rule 375 of the *Uniform Civil Procedure Rules 1999 (Qld)*, that the first, second and fifth to ninth defendants (“the Fortress Parties”) have leave to amend their Second Further Amended Defence filed on 30 October 2014, in the form that is at page 1 of Exhibit DJW-1 to the Affidavit of David James Walter sworn on 9 February 2015 in the proceeding, such amended pleading to be filed and served by 4:00 pm on 18 March 2015.
2. The plaintiffs file and serve any amended reply by 4:00pm on 1 April 2015.
3. The application otherwise be dismissed.
4. The Fortress Parties pay the plaintiffs’ costs thrown away by reason of the amendments to their defence.
5. The Fortress Parties pay the plaintiffs’ costs of and incidental to the application to be assessed on the standard basis.

COUNSEL: A M Pomeranke QC and D E F Chesterman for the first plaintiff  
B D O’Donnell QC and C N Bova for the first, second, fifth, sixth, seventh, eighth and ninth defendants  
B Porter for the third defendant  
B Cohen (Solicitor) for the fourth defendant  
J Hewitt for the proposed additional defendant, Octaviar Ltd (receivers and managers appointed) (in liquidation)

SOLICITORS: Henry Davis York for the plaintiffs  
 Baker McKenzie for the first, second, fifth, sixth, seventh, eighth and ninth defendants  
 Dibbs Barker for the third defendant  
 Bartley Cohen for the fourth defendant  
 Clifford Chance for the proposed additional defendant,  
 Octaviar Ltd (receivers and managers appointed) (in liquidation)

- [1] By an application filed 12 February 2015, the first, second, fifth, sixth, seventh, eighth and ninth defendants (“the Fortress defendants”) applied for the following substantive orders:
- “1. An order, pursuant to rule 69 of the *Uniform Civil Procedure Rules* 1999, that Octaviar Limited (receivers and managers appointed) (in liquidation) (ACN 107 863 436) be added as a defendant to the proceeding.
  2. An order, pursuant to rule 375 of the *Uniform Civil Procedure Rules* 1999, that the applicants have leave to amend their Second Further Amended Defence pleading filed on 30 October 2014, in the form that is at page 1 of Exhibit DJW-1 to the Affidavit of David James Walter sworn on 9 February 2015 in the proceeding, such amended pleading to be filed and served by not later than 5:00pm on the day that is two business days after the making of this order.
  3. So far as is necessary, an order, pursuant to section 471B of the *Corporations Act* 2001 (Cth), that there be leave to proceed with the proceeding against Octaviar Limited (receivers and managers appointed) (in liquidation) (ACN 107 863 436) as a defendant to the proceeding.”
- [2] They also sought an order that the plaintiffs pay the costs of and incidental to the application, subject to the proviso that the Fortress defendants pay any costs of the other parties thrown away by the amendment.
- [3] The application in respect of the proposed joinder of Octaviar Ltd (receivers and managers appointed) (in liquidation) was the subject of a contested hearing before me on 4 March 2015. The application to amend was not contested. Instead, the position of the respondents to that application was to not oppose it, provided the amendments did not affect the trial dates or disrupt the orderly conduct of the trial.
- [4] The amendments proposed by the Fortress defendants contend for the existence of certain trusts. They raise interesting and possibly complex issues of law. However, they were not said to require additional evidence or further disclosure. Although no explanation for the lateness of the proposed amendment was given,<sup>1</sup> no submission was made that the amendments, if allowed, would prejudice the other parties in a way that could not be compensated by an appropriate costs order, would prejudice the orderly

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<sup>1</sup> Cf. *Hartnett v Hynes* [2009] QSC 225 at [14], [27].

conduct of the trial over the seven weeks which have been allocated to it, commencing 4 May 2015, or otherwise would be contrary to the interests of justice. Therefore, I indicated at the hearing on 4 March 2015 that I was disposed to grant the application to amend, subject to directions and consequential orders, including directions for the close of pleadings.

- [5] The application to join Octaviar Ltd as a defendant raised a number of issues, including the role which it would play in the proceeding, and whether any defence filed by it would simply mirror relevant parts of the defence of the Fortress defendants or, in addition, claim relief in the form of declarations in respect of the trusts for which it and the Fortress defendants contend. On 4 March 2015 I made directions for Octaviar Ltd to circulate a draft defence and counterclaim. However, on 9 March 2015 my Associate was informed that the Fortress defendants had decided to not pursue the relief in paragraphs 1 and 3 of the application. As a consequence, Octaviar Ltd did not propose to circulate a draft defence and counterclaim. It has become unnecessary for me to determine the relief sought in paras 1 and 3 of the application.
- [6] At a review of the matter today, and after a lengthy exchange of correspondence between solicitors, it was clarified that the Fortress defendants have no present intention to apply to join Octaviar Ltd as a party to this proceeding, and will not apply to join Octaviar Ltd as a party to the proceeding consequent upon being granted leave to amend. Counsel for Octaviar Ltd also indicated today that it had no present intention to apply to be joined as a defendant in the proceeding.
- [7] Having heard from the parties on the timing of pleadings and costs, the orders which I pronounced today were:
1. Pursuant to rule 375 of the *Uniform Civil Procedure Rules* 1999 (Qld), that the first, second and fifth to ninth defendants (“the Fortress Parties”) have leave to amend their Second Further Amended Defence filed on 30 October 2014, in the form that is at page 1 of Exhibit DJW-1 to the Affidavit of David James Walter sworn on 9 February 2015 in the proceeding, such amended pleading to be filed and served by 4:00 pm on 18 March 2015.
  2. The plaintiffs file and serve any amended reply by 4:00pm on 1 April 2015.
  3. The application otherwise be dismissed.
  4. The Fortress Parties pay the plaintiffs’ costs thrown away by reason of the amendments to their defence.
  5. The Fortress Parties pay the plaintiffs’ costs of and incidental to the application to be assessed on the standard basis.