

SUPREME COURT OF QUEENSLAND

CITATION: *Stacks Managed Investments Limited v Tolteca Pty Ltd; Tolteca Pty Ltd v Lillas & Loel Lawyers Pty Ltd* [2015] QSC 80

PARTIES: **In BS No 1001 of 2014:**
STACKS MANAGED INVESTMENTS LIMITED
ACN 085 843 125
(plaintiff)
v
TOLTECA PTY LTD
ACN 096 926 519
(defendant)

In BS No 9938 of 2013:
TOLTECA PTY LTD in its personal capacity and as trustee of the TREVOR F PETTETT FAMILY TRUST
ACN 096 926 519
(plaintiff)
v
LILLAS & LOEL LAWYERS PTY LTD
ABN 96 064 450 255
(defendant)

FILE NO/S: BS 1001/14
BS 9938/13

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 10 April 2015

DELIVERED AT: Brisbane

HEARING DATE: 1 April 2015

JUDGE: Bond J

ORDERS: **In BS 1001/14 the order of the court is that:**

- 1. The defendant's application to join Mr Guthrie be dismissed.**
- 2. The defendant's application to consolidate BS 1001/14 and BS 9938/13 be dismissed.**
- 3. The proceeding be set down for trial.**

In BS 9938/13 the order of the court is that:

- 1. The plaintiff's application to consolidate BS 1001/14 and BS 9938/13 be dismissed.**
- 2. Mr Guthrie be joined as the second defendant.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PARTIES – OTHER MATTERS – where the defendant applied to join a third party in both proceedings – where joining the third party would cause significant delay and increase cost – where the application was made very late – where the risk that there would be multiple proceedings, excessive costs and divergent findings in separate proceedings traversing the same subject matter was minimal – whether the third party ought be joined

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – TRANSFERS AND CONSOLIDATIONS – where the defendant applied to consolidate the two proceedings – where the defendant argues that, if consolidated, the decision in one will ‘affect’ the other – where the proceedings are at very different stages - where the proceedings relate to different issues – whether the proceedings ought be consolidated

Australian Securities and Investments Act 2001 (Cth), s 12CB
Uniform Civil Procedures Rules 1999 (Qld), rr 69, 78(a), 78(b)

MGM Containers Pty Ltd v Wockner [2006] QCA 502, considered

Pacific Century Productions Pty Ltd v Taylors Contracting Services Pty Ltd [2003] QSC 289, considered

COUNSEL: **In BS 1001/14:**
D O’Sullivan QC, with D Ananian-Cooper, for the plaintiff
N Ferrett with B Le Plastrier for the defendant
N Pearce (*sol*) for Mr Paul Guthrie

In BS 9938/13:
N Ferrett with B Le Plastrier for the plaintiff
M Byrne (*sol*) for the defendant
N Pearce (*sol*) for Mr Paul Guthrie

SOLICITORS: **In BS 1001/14:**
McCullough Robertson for the plaintiff
Turner Freeman for the defendant
Carter Newell for Mr Paul Guthrie

In BS 9938/13:
Turner Freeman for the plaintiff
Lillas & Loel Lawyers for the defendant
Carter Newell for the proposed Mr Paul Guthrie

Factual background to the applications

- [1] In 2010, Tolteca Pty Ltd (“Tolteca”) borrowed \$1,000,000 from Stacks Managed Investments Limited (“Stacks”) in order to acquire and develop land at 33 Richards Street, Loganlea. As part of the security for the loan, Tolteca granted Stacks a mortgage over land at 9847 Mt Lindesay Highway.
- [2] Before me there are two proceedings which are related to that original transaction.
- [3] In Proceeding 9938 of 2013 (“the Tolteca proceeding”) Tolteca sues its former solicitors, Lillas & Loel Lawyers, alleging, amongst other things, that –
- (a) Mr Loel, the principal of the defendant firm, had promoted to the sole director of Tolteca (Ms Pettett), the idea of involvement in a joint venture with a third party to acquire and develop the land at 33 Richards Street, Loganlea;
 - (b) Tolteca had retained the defendant firm to act on its behalf in relation to that joint venture;
 - (c) Tolteca proceeded with the joint venture and amongst other steps taken in the prosecution of the joint venture, Tolteca borrowed the acquisition price of the land at 33 Richards Street, Loganlea from Stacks on mortgage security;
 - (d) the defendant firm failed to provide Tolteca with adequate advice in relation to the joint venture and its conduct should be regarded as in breach of its contract of retainer, its duty of care and fiduciary duties it owed to Tolteca because (amongst other things) –
 - (i) Mr Loel promoted the joint venture to Ms Pettett as a transaction which would enable Tolteca to repay another loan agreement and to fund existing litigation in which the defendant firm acted for Ms Pettett’s husband;
 - (ii) to Mr Loel’s actual or constructive knowledge Ms Pettett thought that if Tolteca did not embark on the joint venture the defendant firm might refuse to act further for her husband in that litigation;
 - (iii) the defendant firm did not recommend to Tolteca that it obtain independent financial, investment or legal advice when it should have done so;
 - (iv) the defendant firm did not inform Tolteca that its proposed joint venture partner was bankrupt;
 - (e) but for the various breaches of duty by the defendant firm, Tolteca would have obtained proper advice and would not have proceeded with the joint venture; and
 - (f) accordingly, as a result of the various breaches of duty by the defendant firm, Tolteca had suffered loss and damage, the proper measure of which included the debt which it owed to Stacks and another lender less the value which remained in the property acquired by the joint venture.
- [4] In Proceeding 1001 of 2014 (“the Stacks proceeding”) -

- (a) Stacks sues Tolteca, seeking an order for recovery of possession of the land at 9847 Mt Lindesay Highway;
- (b) Tolteca admits all the material facts pleaded by Stacks (essentially the terms of the loan, mortgage and default), but counterclaims for relief founded on “unconscionable conduct” by Stacks in the giving of the loan in breach of section 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (“the Act”);
- (c) Stacks’ alleged “unconscionable conduct” was giving the loan to Tolteca in circumstances which justified the conclusion that Stacks’ conduct was morally tainted;
- (d) the circumstances said to justify that conclusion are:
 - (i) the subject loan was far in excess of the amount which Tolteca had unsuccessfully sought from Stacks in a loan application which Tolteca had made (with the encouragement of Mr Loel and using a Mr Paul Guthrie as a broker) only some 4 months earlier, but there had been no material change in Tolteca’s circumstances;
 - (ii) Stacks knew that the sole director of Tolteca (Ms Pettett) was not commercially sophisticated and lacked understanding of the detail of the proposed joint venture transaction;
 - (iii) Stacks knew that Tolteca’s solicitor (Mr Loel) was in control of the direction of the joint venture and that Ms Pettett needed independent advice to enable her to make an informed choice about the subject loan;
 - (iv) Stacks failed to enquire into various discrepancies in documentation concerning the loan transaction; information which it had concerning Tolteca’s income; and the financial position of Ms Pettett;
- (e) Tolteca says that by reason of Stacks’ unconscionable conduct in contravention of section 12CB –
 - (i) it has suffered loss and damage in the form of interest, default interest and fees which have been charged and/or paid to date; and
 - (ii) it will continue to suffer loss and damage in the form of interest, default interest and fees which will be charged on the loan;
- (f) Tolteca claims the following relief under the Act –
 - (i) an order that Stacks pay Tolteca the amount of the loss and damages it has suffered by reason of Stacks’ conduct;
 - (ii) further or alternatively, an order declaring void *ab initio* the loan agreement and the mortgage which it had entered into with Stacks;
 - (iii) further or alternatively, an order varying the loan agreement and the mortgage so that Tolteca is not liable for unpaid interest due and owing but is only liable for the unpaid principal in the sum of \$780,000;

- (g) Stacks' reply and answer traverses Tolteca's pleaded criticisms of its conduct and pleads details concerning the relationship between it and Tolteca, the knowledge which it had and the assessments it made of the prudence of making the loan which, if true, might be thought to tend to defuse those criticisms.

The applications which are to be determined

- [5] The current status of the Tolteca proceeding is that no notice of intention to defend has been filed, although the time allowed to do so under the UCPR has long since passed. Nothing has occurred in the proceeding save for a request for particulars served 6 months after the claim was filed and the filing of an amended claim in August 2014.
- [6] The current status of the Stacks proceeding is as follows.
- [7] Stacks contends that the proceeding is ready for trial. It has advanced that contention since 20 October 2014, when its solicitors first wrote to Tolteca's solicitors asking to have them sign a request for trial date. Pleadings have closed, disclosure has been completed and Stacks has prepared witness summaries for the witnesses it would propose to call at trial. Before me Stacks now applies for an order dispensing with the need for Tolteca's signature on the request for trial date or alternatively an order that the matter be set down for trial. The estimate which it gives (which is not disputed) is 3 to 4 days.
- [8] Inquiries made with the registry at the time of argument suggested that the matter could be set down for a trial of 4 days in late July 2015.
- [9] Tolteca disputes the proposition that the Stacks proceeding, as currently constituted, is completely ready for trial.
- [10] It wishes to obtain non-party disclosure from the broker, Mr Guthrie and from its former solicitors who are the defendants in the Tolteca proceeding. During oral argument Counsel for Tolteca – properly in my view – conceded that if the Stacks proceeding stayed as it was currently constituted it was not likely that the need for non-party disclosure would pose any obstacle to Tolteca being ready for a trial, in that the Stacks proceeding, in late July 2015. I mention parenthetically that Stacks sought to persuade me that the evidence suggested that non-party disclosure was either not necessary or likely to be futile, however given the timing considerations it seems to me to be unnecessary to consider that argument further.
- [11] Initially Tolteca took the position that it wished to obtain expert opinion evidence from a handwriting expert to support its pleaded case concerning discrepancies in one of the documents which it had provided to Stacks for the purpose of the loan transaction. However it resiled from that position during argument after Stacks gave it the opportunity to inspect the original of the relevant document. Counsel, on behalf of Tolteca, flagged the possibility that expert evidence might still be sought in relation to that document, but acknowledged that taking that course would not provide any obstacle to Tolteca being ready for a trial in late July 2015.
- [12] As the Stacks proceeding is currently constituted there is no reason why I would not accede to Stacks application to set the Stacks proceeding down for trial.

- [13] However, the critical question before me is whether I should accede to applications by Tolteca which would change how the Stacks proceeding is constituted. Tolteca applies –
- (a) to join the broker, Mr Guthrie, as a second defendant to its counterclaim in the Stacks proceeding;
 - (b) to join the broker, Mr Guthrie, as a second defendant to its claim in the Tolteca proceeding; and
 - (c) to consolidate the two proceedings.
- [14] It was common ground that, if I did so, it would be impossible for the Stacks proceeding to be heard in July 2015 or indeed at all in the short term. The evidence from Stacks' solicitor – which I accept – was that the joinder of Mr Guthrie as a defendant to the Stacks proceeding would delay the trial of that proceeding by up to 12 months and, if that joinder was accompanied by consolidation with the Tolteca proceeding, the delay in bringing the consolidated proceeding to trial would be even longer.
- [15] In resolving what essentially seems to me to be the case management issue posed by the competing applications, the proper course is first to consider whether Mr Guthrie should be joined as a second defendant to Tolteca's counterclaim in the Stacks proceeding. I reach that view because:
- (a) In the absence of that joinder and bearing in mind the timing considerations to which I have already adverted, the case for consolidation is unpersuasive. That would be so because the degree of commonality between the two cases would be very small, the Stacks proceeding would be ready for trial and the Tolteca proceeding would be a long way from being ready for trial.
 - (b) But, if I was minded to join Mr Guthrie as a defendant by counterclaim to the Stacks proceeding, and bearing in mind there was no objection to his being joined as a defendant to the Tolteca proceeding, the case for consolidation might be more attractive because there would be no opportunity for an early trial of the Stacks proceeding and the question of whether there was sufficient commonality of issues as between the two proceedings to justify consolidation would be a more complicated question.
- [16] Before considering the arguments for and against the joinder of Mr Guthrie to the Stacks proceeding it is appropriate briefly to describe the case which Tolteca would seek to advance against Mr Guthrie in each proceeding.
- [17] In the Tolteca proceeding, Tolteca would seek to join Mr Guthrie so as to contend that he breached the duty of care and fiduciary duties which he owed to Tolteca by virtue of having been its mortgage broker, and accordingly a damages award should be made against him. The loss claimed from him would be the same loss as that said to have been suffered by reason of the conduct of the defendant firm. The gravamen of the claim would be that Mr Guthrie made no proper inquiries as to Tolteca's circumstances, or Ms Pettett's level of financial acumen. His interest should have been piqued by the fact that the same lender had only recently turned down an application for a loan for \$140,000, and by his having notice of (at least) the

possibility that Ms Pettett did not appreciate the full effect of the proposed transaction.

- [18] In the Stacks proceeding, Tolteca would seek to join Mr Guthrie in order to seek a declaration that Mr Guthrie was involved in Stacks' alleged unconscionable conduct and an order that Mr Guthrie "pay the Defendant the amount of loss or damage suffered by the Defendant by reason of the conduct the Second Defendant by Counterclaim". That loss claimed would be the same loss as that said to have been suffered by reason of the conduct of Stacks. Tolteca would contend that Mr Guthrie was knowingly concerned in the statutory unconscionable conduct of Stacks and acknowledges that it must demonstrate that Mr Guthrie had knowledge of the essential facts constituting the contravention by Stacks.
- [19] Against that background it is appropriate to consider the arguments for and against the joinder of Mr Guthrie as a defendant to the Stacks proceeding.

The resolution of the application to join Mr Guthrie to the Stacks proceeding

- [20] Rule 69 provides that a party may be joined to a proceeding where it "would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding".
- [21] It is common ground that in resolving the application I should apply the approach taken by the Court of Appeal in *MGM Containers Pty Ltd v Wockner* [2006] QCA 502 in relation to a late application to introduce a third party notice. In *Wockner* the Court of Appeal held (Chesterman J, with whom Williams JA and Keane JA agreed) that:

"[27] The applications called into question two conflicting principles. The first is that there are good reasons why a third party should be joined in an action where a defendant has an arguable case for contribution or indemnity from the third party against a plaintiff's claim. Such a joinder ensures finality in litigation, avoids multiple proceedings with associated extra cost, and obviates the possibility that there might be different decisions given on the same issues if tried by different courts. The second principle is that a plaintiff should be allowed to prosecute its action and obtain judgment without being delayed or inconvenienced by the defendant's endeavours to offset its liability."

- [22] It seems to me, therefore, that the Court must balance two competing considerations:
- (a) the desirability of avoiding multiple proceedings, excessive costs and the possibility of divergent findings in separate proceedings traversing the same subject matter;
 - (b) the interest of Stacks in being allowed to prosecute its action and obtain judgment without being delayed or inconvenienced by Tolteca's endeavours to obtain a remedy against a further party.
- [23] On the evidence before me, the considerations affecting that balance may be analysed under the following heads:

- (a) The prejudice which Stacks might suffer in the form of delay to and increased cost incurred in relation to the resolution of its claim;
- (b) The risk that the delay and associated increased costs might result in a situation where Stacks claim became partially unsecured because the value of the subject land would be insufficient to cover the increased debt;
- (c) The strength or weakness of the proposed case against Mr Guthrie;
- (d) The adequacy of the explanation for the lateness of the application to join Mr Guthrie; and
- (e) The extent of the risk that there might be multiple proceedings, excessive costs and divergent findings in separate proceedings traversing the same subject matter.

[24] I consider each of those matters below.

[25] As to the prejudice which Stacks might suffer in the form of delay to and increased cost incurred in relation to the resolution of its claim:

- (a) I have mentioned that as the Stacks proceeding is currently constituted it could be heard in late July 2015.
- (b) Joinder of Mr Guthrie as a defendant to the counterclaim would essentially represent the commencement of new litigation against Mr Guthrie. He would have to be afforded the time to plead, conduct disclosure, and prepare his case. I have already said that I accepted the evidence of the Stacks' solicitor that the joinder of Mr Guthrie would delay the trial of the Stacks proceeding by up to 12 months.
- (c) The evidence of Stacks' solicitor – which I accept – was that he estimated that joining Mr Guthrie would add further costs of between about \$29,000 and \$42,000.
- (d) Both of these considerations are powerful considerations in favour of rejection of the joinder application.

[26] As to the risk that the delay and increased cost might result in a situation where Stacks claim became partially unsecured because the value of the subject land would be insufficient to cover the debt:

- (a) Stacks adduced evidence as to the value of the property at 9847 Mt Lindesay Highway. A market appraisal by a real estate agent valued the property at \$920,000 to \$970,000. An indicative assessment of market value from a valuer, initially valued the property at \$925,000 to \$975,000. However, upon considering the evidence adduced by Tolteca (which I will mention shortly) and carrying out further investigations, the valuer revised the figure upwards to \$1.2 million to \$1.3 million, subject to a discount of as much as 10% for sale by a mortgagee in possession.
- (b) Stacks adduced evidence that the amount owing under the mortgage as at 4 February 2015 was \$777,885 and that if there was a further 12 months delay, a further \$300,000 in interest, legal and receiver fees, sale costs, council rates

and other costs would be incurred over the next twelve months, all of which would be sought to be recovered from the sale proceeds. It would be necessary to add to that the further \$29,000 to \$42,000 caused by the joinder of Mr Guthrie. That would give a secured debt of \$1,106,885 to \$1,119,885.

- (c) Stacks' argument was that further delay in the sale of the mortgaged property increased the risk that the sale proceeds may not cover the whole of the sum for which the property was security. That risk was a problem for Stacks because to its knowledge, the subject property was Tolteca's only remaining asset of real value. Stacks also points to the interest of second mortgagees over the property and contends that I should take into account the fact that their rights (if they have any value) would also be adversely affected by delay and increased costs.
- (d) For its part, Tolteca adduced evidence on information and belief concerning a different real estate agent's opinion of the fair value of the property. That real estate agent thought that a figure of \$1.4 million to \$1.5 million would represent fair value in the current market. Obviously if I were in a position to accept that evidence over the evidence adduced by Stacks, then it would negate the risk which Stacks argues I should take into account (at least so far as Stacks is concerned). It would leave only such concern as I should have in relation to the rights of the second mortgagees and Tolteca says that I should ignore their position because although they have chosen to swear an affidavit (upon which Stacks relies), they have not appeared.
- (e) I am not in a position to decide between the competing views as to the value of the subject property. Neither Stacks nor Tolteca suggested that I should.
- (f) Senior Counsel for Stacks submitted that I could and should form the view that there is a risk that if the applications are acceded to, Stacks would be in a materially worse position because it will be put in a position where the secured debt overtops the value of the property. I accept that submission. I observe that on the evidence before me that risk does not seem to be high. Accordingly, I would accord this consideration some, but not overwhelming, weight in favour of rejection of the joinder application. I should also say that I do not think that the position of the second mortgagees is irrelevant.

[27] As to the strength or weakness of the proposed case against Mr Guthrie:

- (a) Senior Counsel for Stacks submitted I should form the view that the proposed case against Mr Guthrie was extremely weak, although not unarguable.
- (b) The gravamen of that argument was an inconsistency on the face of the proposed pleading between an allegation in proposed paragraph 72 that Mr Guthrie was Stacks' agent in the approval of the subject loan, and earlier paragraphs of the pleading which allege that in fact he was Tolteca's agent because he was described as "the defendant's broker".
- (c) I was taken to some documentary evidence which tended to support the proposition that Mr Guthrie was appointed by Tolteca as its mortgage broker. And I note that before me Tolteca has also applied for leave to join Mr Guthrie to the Tolteca proceeding in which its case is explicitly that he was Tolteca's broker and owed it fiduciary duties.

- (d) Senior Counsel for Stacks submitted that if Mr Guthrie was not Stacks' agent, it is impossible that he could have intentionally been involved in the contravening conduct alleged against Stacks, namely lending money without making adequate inquiries following the coming to light of discrepancies.
- (e) I agree that there is an incongruity on the face of the proposed pleading in the Stacks proceeding. And without having heard any evidence, one might well think it is unlikely that a borrower's mortgage broker might be knowingly concerned with a lender's unconscionable conduct. But I have not heard any evidence from any witness. I do not think that it is sufficient for me to form a view one way or the other about the merits of the proposed case against Mr Guthrie at this stage.
- (f) I do not give this consideration any weight in deciding the joinder application.

[28] As to the adequacy of the explanation for the lateness of the application to join Mr Guthrie:

- (a) Tolteca's Ms Pettett offered as an explanation for the lateness of the application to join Mr Guthrie that –
 - (i) she was unaware of his existence and involvement in either of the loans mentioned in her case against Stacks until in or about August 2012;
 - (ii) following disclosure of Stacks document the gravamen of the allegations which Tolteca would make against Mr Guthrie in the Stacks proceeding "became clear and evident to me";
 - (iii) as a result, she was seeking to have Mr Guthrie joined as a defendant to the counterclaim;
 - (iv) the need for the application to join Mr Guthrie had arisen "in part from facts that have come to light from documents that have been disclosed";
 - (v) it was not until 20 November 2014 that she had the evidence necessary to consider joining Mr Guthrie.
- (b) Ms Pettett was not required for cross-examination. Nevertheless, Senior Counsel for Stacks contended that I should form the view that no explanation has been placed before the court as to why Mr Guthrie was not joined at the outset and Ms Pettett's explanation for the long delay was "entirely unconvincing".
- (c) I accept that there is some documentary evidence (identified in the affidavit of Paul Stack sworn 6 February 2015, para 16-29) which suggests that Ms Pettett must have known about Mr Guthrie's involvement in the conduct which she impugns at a stage earlier than the completion of disclosure, as she now alleges. I also note that she only deposes to the need to join Mr Guthrie as arising "in part" from facts which have come to light after disclosure. I also find it difficult to accept that it was not until 20 November that she had the evidence necessary "to consider" joining Mr Guthrie, when her own solicitors were writing to Stacks solicitors in July 2014 stating "we

are currently seeking our client's instructions to join Mr Paul Guthrie as an additional defendant".

- (d) The result is that I consider the explanation for the late application to join Mr Guthrie is not completely satisfactory. It seems to me that this carries some weight against allowing joinder at this late stage.

[29] As to the extent of the risk that there might be multiple proceedings, excessive costs and divergent findings in separate proceedings traversing the same subject matter:

- (a) Senior Counsel for Stacks submitted – and I accept – that if the proceedings as presently constituted continued and the counterclaim against Stacks were to succeed and be paid, the foreshadowed claim against Mr Guthrie would logically fall away (because Tolteca would then have obtained satisfaction for the loss alleged to have been also caused by Mr Guthrie). There would then be no prejudice to Tolteca. I note that no submission was advanced by Tolteca that there was any risk of non-payment by Stacks, and I note that even if there were, it would be substantially ameliorated by the fact that any damages recovered against Stacks would, presumably, be capable of being set off against the unchallenged liability to repay Stacks for the unpaid principal of the loan.
- (b) If the proceedings were to continue and the counterclaim were to be dismissed, there would be nothing to prevent Tolteca commencing proceedings against Mr Guthrie. Not being a party, no issue estoppel would arise as between the mortgagor and Mr Guthrie. The prejudice to the mortgagor in such a case (if there is no joinder ordered) would be the need to litigate twice, if it chose to pursue Mr Guthrie for knowing involvement in contravening conduct which it had failed to establish against the alleged contravenor. In light of the fact that Mr Guthrie would be added as a defendant to the Tolteca proceeding it seems to me that the real weight of that risk is diminished. In any event, it seems to me that this prejudice is likely to be more theoretical than real.
- (c) Accordingly, in reaching the balance to which I have adverted I do not accord significant weight to this consideration.

[30] In my view the balance of these considerations favours rejecting the application to join Mr Guthrie as a second defendant to the counterclaim in the Stacks proceeding. Accordingly, I dismiss that part of Tolteca's application.

The resolution of the application to join the broker Mr Guthrie as a second defendant to its claim in the Tolteca proceeding.

[31] Mr Guthrie was represented before me and did not seek to advance any submissions against this application, and accordingly, I allow it.

The resolution of the application to consolidate the two proceedings.

[32] I have already mentioned that in the event that I decided not to join Mr Guthrie to the Stacks proceeding, the case for consolidation is unpersuasive. I should expand on my reasons for reaching that view.

[33] Rule 78 of the *Uniform Civil Procedure Rules 1999* (Qld) provides:

“The court may order that 2 or more proceedings be consolidated if—

- (a) the same or substantially the same question is involved in all the proceedings; or
- (b) the decision in 1 proceeding will decide or affect the other proceeding or proceedings.”

[34] Senior Counsel for Stacks submitted that the discretion to order consolidation could not arise unless I was first satisfied that the circumstances described in either r 78(a) or r 78(b) apply. If I were so satisfied, a discretion would arise.

[35] Counsel for Tolteca, on the other hand, contended that in considering whether the circumstances described in either rr 78(a) or 78(b) apply, I would address myself to a “post-consolidation” scenario. As I understood his submission, the discretion to order consolidation could not arise unless I was first satisfied that if I did order consolidation the circumstances described in either rr 78(a) or 78(b) would apply. In other words, given that Tolteca relied on the “affect” part of r 78(b) Tolteca’s argument was that I should order the 2 proceedings to be consolidated if I formed the view that after consolidation, the decision in 1 proceeding would affect the other proceeding.

[36] I do not accept this argument. I do not find any support for it in the case to which my attention was directed, namely *Pacific Century Productions Pty Ltd v Taylors Contracting Services Pty Ltd* [2003] QSC 289 at [24]. I accept the argument put on behalf of Stacks. In my view, my attention is first directed to the relationship between two or more separate proceedings. If that relationship is as described in either rr 78(a) or 78(b), then a discretion will arise.

[37] Tolteca eschewed reliance on r 78(a). Nor did it contend that a decision in one proceeding would “decide” the other. Rather, counsel for Tolteca contended that I should be persuaded that the decision in the Stacks proceeding might “affect” the decision in the Tolteca proceeding, or vice versa, within the meaning of r 78(b). I am not persuaded of that proposition for the following reasons:

- (a) The Stacks proceeding involves the question whether Stacks engaged in unconscionable conduct as alleged and what remedy should be granted as a result. It is a comparatively narrow case.
- (b) The Tolteca proceeding will (assuming there is eventually a defence filed by the defendant firm) involve the questions whether the defendant firm and the defendant broker breached relevant duties in bringing about the involvement of Tolteca in the loan transaction.
- (c) Whatever “affect” might mean in the context of r 78(b), the lack of commonality of issues for determination between the two proceedings suggests to me that it is not met.

[38] Even if I were minded to find that my discretion under r 78 had arisen, I would not exercise it in favour of consolidation. The issue of delay and increased cost sounds against a consolidation order, just as it did in relation to joinder. Indeed the extent of the delay and the increased cost would be worse in the case of consolidation. The lack of commonality of issues is also a factor sounding against consolidation.

[39] For the reasons which I have expressed above, I do not consider that the circumstances of this case engage the discretion to make a consolidation order, but even if I am wrong in that view, it seems to me that there are powerful discretionary considerations against making the order. Accordingly, I dismiss the application for consolidation.

Conclusion

[40] It follows from my reasons that:

- (a) I dismiss Tolteca's application for the joinder of Mr Guthrie as a defendant to its counterclaim in the Stacks proceeding.
- (b) I order that Mr Guthrie be joined as the second defendant to the Tolteca proceeding.
- (c) I dismiss Tolteca's application for consolidation of the Stacks proceeding and the Tolteca proceeding.
- (d) I order that the Stacks proceeding be set down for trial.

[41] I will hear the parties on the question of costs.