

SUPREME COURT OF QUEENSLAND

CITATION: *Nichols Constructions Pty Ltd v Mt Marlow Pty Ltd & Anor*
[2015] QSC 165

PARTIES: **NICHOLS CONSTRUCTIONS PTY LTD (ACN 010 763 505)**
(plaintiff)
v
MT MARLOW PTY LTD (ACN 134 480 354)
(first defendant)
LUTZ BERGER
(second defendant)

FILE NO/S: 5714 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 22 June 2015

DELIVERED AT: Brisbane

HEARING DATE: 4 March 2015

JUDGE: Martin J

ORDERS: **1. The Statement of Claim is struck out.**
2. The plaintiff has leave to replead.
3. An amended Statement of Claim is to be filed and served within 21 days of the date of this order.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – STATEMENT OF CLAIM – where the second defendant seeks to strike out the Statement of Claim – where the second defendant is the sole director of the first defendant – where the second defendant made an undertaking, in his sole capacity and in his capacity as the sole director of the first defendant, to pay the net proceeds from the sale of various lots to the plaintiff – where the plaintiff pleads that the undertaking included express/implied terms, including that the second defendant would not divest his interest in the first defendant – where the plaintiff alleges that the second defendant breached his undertaking – where the second defendant does not have an interest in the first defendant – whether the Statement of Claim tends to prejudice, embarrass, or delay, the fair trial of the action

Uniform Civil Procedure Rules, r 171, r 293

Robert Bax & Associates v Cavenham Pty Ltd [2011] QCA 53

COUNSEL: D Thomae for the respondent/plaintiff
P Hackett for the applicant/second defendant

SOLICITORS: Parker Simmonds for the respondent/plaintiff
Roberts Law for the applicant/second defendant

- [1] The second defendant (Mr Berger) seeks orders striking out the claim and statement of claim pursuant to r 171 of the *Uniform Civil Procedure Rules* ('UCPR') or, alternatively, that he have judgment pursuant to r 293 of the UCPR or, alternatively that this proceeding be heard with proceeding 3368 of 2014.
- [2] No application was made by the first defendant and it did not appear on this application.
- [3] At the hearing, the plaintiff (Nichols Constructions) produced an Amended Statement of Claim (ASOC) which it sought leave to file. Although the second defendant (Mr Berger) had prepared his case on the basis of the original pleading the parties argued the case on the basis of the proposed ASOC.
- [4] In its ASOC Nichols Constructions seeks declarations and other orders against the first defendant (Mt Marlow) and Mr Berger with respect to a loan from Nichols Constructions to another entity, Lake Laurel Pty Ltd.
- [5] It will assist in understanding the background to this application if I describe the relationship between the various entities. At the relevant time:
- (a) Mr Berger was the sole director of:
 - Mt Marlow
 - Berger Brothers Pty Ltd
 - Lake Laurel
 - (b) Mr Berger was the sole shareholder of Lake Laurel;
 - (c) Lake Laurel was the sole shareholder of Berger Brothers; and
 - (d) Berger Brothers held 50 per cent of the shares in Mt Marlow.
- [6] In November 2012 Lake Laurel and Nichols Constructions entered into a loan agreement and a mortgage debenture. Mt Marlow had been named as a party in the security documents but was removed in consideration of an undertaking given, Nichols Constructions says, by Mt Marlow and Mr Berger. The undertaking was:
- "I, Louie Berger in both my individual capacity and in my capacity as sole director of Mt Marlow Pty Ltd hereby solemnly undertake to pay Nichols Constructions Pty Ltd the net proceeds of sale, to which I am entitled from

my 50% interest therein, from the sale by Mt Marlow Pty Ltd of the balance of its unsold lots.

I irrevocably authorize and direct my Solicitors Robertslaw Pty Ltd to pay such net proceeds to Nichols Constructions Pty Ltd or to the trust account of Parker Simmonds on the completion of each sale.

Dated this 7th day of November, 2012.

(Signature of Mr Berger)

(Signature of Mr Berger)

.....

.....

Louie Berger

Director of Mt Marlow Pty Ltd”

- [7] The reference to “unsold lots” concerns a number of lots of land for which Mt Marlow was the registered owner at the time of the undertaking. Since the undertaking was given, a number of those lots have been sold and there is evidence that the net proceeds on the sale of two lots in the amount of about \$260,000 had been paid to either Mr Berger or Lake Laurel. Mr Berger denies that he has received any of the net proceeds.
- [8] Nichols Constructions’ case against Mr Berger is in two parts. The first is that he is in breach of an implied term of the undertaking.
- [9] Nichols Constructions pleads in para. 7 of the ASOC that it was “an express and/or implied term” of the undertaking that:
 - (a) Mr Berger had the actual authority of Mt Marlow to give the undertaking on its behalf;
 - (b) Mr Berger would not divest his interest in Mt Marlow without the consent of Nichols Constructions;
 - (c) Mr Berger was the legal, or alternatively, the beneficial owner of a 50 percent interest in Mt Marlow; and
 - (d) By its terms the undertaking was an irrevocable authority by Mt Marlow to pay Nichols Constructions 50 percent of the net proceeds from the sale of the lots.
- [10] It is then pleaded in para 8 that on or about 6 December 2013 Mr Berger caused Berger Brothers to cease being a shareholder in Mt Marlow. Mr Berger admits this.
- [11] There is no specific pleading to this effect, but the claim against Mr Berger appears to be that, by causing Berger Brothers to sell its shares in Mt Marlow, he is in breach of the alleged implied term: “Mr Berger would not divest his interest in Mt Marlow without the consent of Nichols Constructions” and thus in breach of the undertaking. But, it is not alleged that Mr Berger had an interest in Mt Marlow and, on the material

produced, he did not have such an interest. Rather, Lake Laurel was the sole shareholder in Berger Brothers which, in turn, held half the shares in Mt Marlow.

- [12] The alternative case raised by Nichols Constructions is one of misleading and deceptive conduct. Three representations are pleaded against Mr Berger in the ASOC:
- (a) that Mr Berger would not divest his interest in Mt Marlow without the consent of Nichols Constructions,
 - (b) that he had the legal or beneficial interest in Mt Marlow “to give effect to the terms of the undertaking”, and
 - (c) he would remain the sole director of Mt Marlow to give effect to the terms of the undertaking.
- [13] It is then pleaded that those representations come within the *Competition and Consumer Act 2010* (Cth) and that they were misleading and deceptive.
- [14] Part of the representations case is hobbled by the problem identified above – Mr Berger did not have an interest in Mt Marlow which he could sell.
- [15] The other representations may, if pleaded properly, be arguable but I need say no more than that.

Principles for strikeout

- [16] The court is invested with a broad discretion under r 171 as “Rule 171 closely resembles the language of former O 22 r 32 *Rules of the Supreme Court 1991* (Qld) which enabled a judge to strike out or amend any matter in the pleading which tended ‘to prejudice, embarrass, or delay, the fair trial of the action’”.¹
- [17] The pleading is inadequate. It relies on at least one allegation – Mr Berger’s interest in Mt Marlow – which is not properly pleaded and which, on the material, may not be able to be pleaded. That, in turn, affects the rest of the pleading to such an extent that it is not a fruitful exercise to attempt to excise the inadequate parts. In its current state, the ASOC is an embarrassing pleading. It is struck out.

Orders

- [18] The Statement of Claim is struck out. The plaintiff has leave to replead. An amended Statement of Claim is to be filed and served within 21 days of the date of this order.

¹ *Robert Bax & Associates v Cavenham Pty Ltd* [2011] QCA 53 at 7.

- [19] The application for discharge of a costs order earlier made in favour of the plaintiff was made by consent and no circumstances have been demonstrated which would give rise to the power to set aside the order.
- [20] I will hear the parties on costs.