

SUPREME COURT OF QUEENSLAND

CITATION: *Priceline Pty Ltd & Anor v John Lopes Maroochydore Pharmacy Pty Ltd & Anor* [2016] QSC 7

PARTIES: **PRICELINE PTY LTD**
ACN 005 968 310
(first respondent/plaintiff)

AUSTRALIAN PHARMACEUTICAL INDUSTRIES LIMITED
ABN 57 000 004 320
(second respondent/plaintiff)

v

JOHN LOPES MAROOCHYDORE PHARMACY PTY LTD
ACN 116 004 543
(first applicant/defendant)

JOHN BERNARD LOPES
(second applicant/defendant)

FILE NO/S: BS No 1981 of 2008

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 January 2016

DELIVERED AT: Brisbane

HEARING DATE: 7 October 2015

JUDGE: Martin J

ORDER: **1. The Further Amended Statement of Claim is struck out.**

2. The plaintiffs have leave to re-plead.

3. I will hear the parties on what further directions should be made and costs.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – DISCLOSING NO REASONABLE CAUSE OF ACTION OR DEFENCE – where the first plaintiff is a subsidiary of the second plaintiff – where the second defendant is the guarantor under a “Systems and Supply Agreement” (the Agreement) between the second plaintiff and first defendant – where the first plaintiff was not a party to the Agreement –

where the plaintiffs' argument is that the Guarantee imposes a conditional obligation to pay on the second defendant and an obligation to pay as soon as the principal obligor defaults under its contract – where the second plaintiff argues that it is entitled to sue upon the Guarantee because the first defendant has not met its payment obligations under the Agreement – where the plaintiffs' argue that the second plaintiff holds the second defendant's promise under the Guarantee on trust for the first plaintiff – whether the pleadings expose the basis of the second defendant's liability as argued by the plaintiffs

COUNSEL: DA Skennar for the applicant defendants
PD Tucker for the respondent plaintiffs

SOLICITORS: Morgan Conley Solicitors for the applicant defendants
Porter Davies Lawyers for the respondent plaintiffs

- [1] The defendants each seek orders striking out the claims made against them by the plaintiffs. In the alternative, they seek summary judgment.
- [2] The first plaintiff (Priceline) is a subsidiary of the second plaintiff (API).
- [3] The first defendant (the Pharmacy) conducts a retail pharmacy in Maroochydore. The second defendant (Mr Lopes) is the guarantor under a "Systems and Supply Agreement" (the Agreement) between API and the Pharmacy.

The Agreement

- [4] In September 2006 API and the Pharmacy entered into the Agreement. Priceline was not a party to that agreement.
- [5] In clause 4.2 of the Agreement it is provided that the Pharmacy must purchase the Designated Range from API on the API Terms of Trade. But, if API is unable to supply any part of an order within a reasonable time after receiving that order, then the Pharmacy may obtain supply from an Approved Supplier. If that occurs, then the Pharmacy must comply with the trading terms applying to that Approved Supplier. An "Approved Supplier" means a supplier approved by API from time to time to supply any part of the Designated Range, including API itself where the context requires.
- [6] Clause 4.2 (2) provides that the Pharmacy must not purchase any products that are part of the Designated Range from any person other than API or an Approved Supplier.
- [7] The products the subject of the claim all fell within the description "Designated Range".
- [8] Attached to the Agreement was a guarantee under which Mr Lopes agreed to unconditionally and irrevocably guarantee to API the prompt performance of all of the obligations of the Pharmacy contained or implied in the Agreement. It was provided

that, if the obligation was to pay money, API could recover the money from Mr Lopes as a liquidated debt.

The Further Amended Statement of Claim

- [9] In paragraph 4 of the Further Amended Statement of Claim (FASOC) the plaintiff set out a number of the terms of the Agreement.
- [10] In paragraph 4A the plaintiffs plead:

“4A. By a written guarantee signed by the Second Defendant and dated 8 September 2006 (“the Guarantee”), the Second Defendant, in consideration of API entering into the Agreement, agreed to guarantee the prompt performance of all of the obligations of the First Defendant contained or implied in the Agreement.”

- [11] The pleading then goes on:

“5. The First Plaintiff is the owner of the System and was:

(a) to provide on behalf of API, or was appointed by API to provide, the Designated Range and the services required under the agreement; or, alternatively,

(b) as to the Designated Range, an “Approved Supplier” within the meaning of that term as defined in the Agreement.

6. The First Plaintiff provided to the First Defendant the Designated Range and the System as required, or as otherwise contemplated, under the Agreement in or as to the following amounts:

Designated Range	\$457,817.44
Fees	\$110,515.94
(“the amount outstanding”)	\$568,333.38

- 6A. Upon providing the Designated Range and the System to the First Defendant, the First Plaintiff provided invoices to the First Defendant for payment of the Designated Range and Fees constituting the amount outstanding, as set out in Annexure A attached hereto.
- 6B. The First Plaintiff’s trading terms included an obligation to pay the aggregate amount endorsed on its invoices raised in a calendar month in respect of the goods comprising the Designated Range, within 30 days of the end of that calendar month.

7. Despite requests, the First Defendant has failed to and/or refused to pay to the First Plaintiff and, or alternatively, API, the amount outstanding.
8. The First Defendant is indebted to the First Plaintiff and, or alternatively, API, in the sum of \$568,333.38 as set out in Annexure A attached hereto.
9. The amount outstanding is due and payable by the second defendant to the First Plaintiff and, or alternatively, API, pursuant to the Guarantee.”

The Guarantee

[12] Mr Lopes argues that the Guarantee is in favour of API only and, therefore, Priceline cannot sue upon it.

[13] Clause 2.2 of the Guarantee provides:

“The Guarantor unconditionally and irrevocably guarantees to API the prompt performance of all of the obligations of the Retailer contained or implied in the Systems and Products Supply Agreement. If the obligation is to pay money, API may recover the money from the guarantor as a liquidated debt.”

[14] Mr Lopes refers to a large number of clauses and sub-clauses in the Agreement in which specific mention is made of API to support an argument that the Agreement identifies the rights and obligations of API and the Pharmacy and that the Guarantee only concerns obligations of the Pharmacy to API.

[15] The argument continues that the FASOC does not plead the manner in which it is said that Priceline is entitled to rely upon the Guarantee. Paragraph 9 of the FASOC simply asserts that the amount claimed is payable by Mr Lopes to Priceline and, or in the alternative, API, pursuant to the Guarantee.

[16] In the particulars provided of paragraph 9 the following was said:

“5(a) The Plaintiffs say that the First Plaintiff acted on behalf of API pursuant to clause 8.2 of the Agreement; and

(b) The Plaintiffs say that the First Plaintiff was appointed by API during the period of about 2006 for the purpose pleaded therein and pursuant to clause 8.2 of the Agreement.”

[17] Clause 8.2 of the Agreement provided:

“During the Term, where API appoints a person or organisation to handle some of its responsibilities under this Agreement or any other relevant agreements, the Retailer and all the Retailer’s staff shall deal directly with such person or organisation.”

- [18] This clause does not provide support for the claim by Priceline that it is entitled to the benefit of the Guarantee. All that clause 8.2 allows is the nomination of another entity to handle some of API's responsibilities.
- [19] In the plaintiffs' argument it is said that the Guarantee imposes both a conditional obligation to pay on Mr Lopes and an obligation to pay as soon as the principal obligor defaults under its contract. It is said that API is entitled to sue upon the Guarantee because the Pharmacy has not met its payment obligations under the Agreement. That argument is not consistent with either the pleading or of the particulars which have been provided. Further, the argument that was advanced to the effect that API holds Mr Lopes' promise under the Guarantee on trust for Priceline is not pleaded.
- [20] The plaintiffs have advanced arguments which may have some weight but find no backing in the pleading. The pleading in its current form does not expose the basis of Mr Lopes' liability as was argued in this matter. It is, therefore, inadequate and needs to be remedied. In order to do so, the plaintiffs need to re-plead their case on the Guarantee. Subject to the order I make later, paragraphs 4A and 9 are struck out and the plaintiffs are given leave to replead.

The claim by API against Priceline

- [21] Under this heading, the Pharmacy argues that the pleading in paragraph 5 of the FASOC demonstrates that the plaintiffs are unable to properly articulate their case. Paragraph 5 pleads that either API provided the goods and services to the Pharmacy or that Priceline was appointed to provide the goods and services.
- [22] It is argued for API that there is an admission in the set-off pleaded by Mr Lopes that API did in fact supply goods to the Pharmacy. It was not explained how Mr Lopes could admit something on behalf of the Pharmacy in the current state of the pleadings. The plaintiffs' pleading is particularly confused on this issue. It is clear from the Agreement that, when certain circumstances exist, API is relieved of its obligation to supply goods and the Pharmacy may obtain such goods from an Approved Supplier. API argues that Priceline is such an Approved Supplier. But it is argued that API performed its obligations to supply the Designated Range through Priceline and that that was always intended. As a consequence, it is argued, API is entitled to sue the Pharmacy. That may be the case. But it is not pleaded in that way.
- [23] It is further argued that API holds on trust for Priceline the Pharmacies promise under the Agreement to pay for the Designated Range. Such a trust arises, it is said, where it is the intention of the relevant contracting party (API) to hold such promise on trust and that intention may be imputed from the contract and the relevant surrounding circumstances. None of that is pleaded.
- [24] As with the case on the Guarantee, there may be a claim available to the plaintiffs. But the arguments advanced to support that claim are not based upon the pleadings. If the plaintiffs wish to pursue the case which was argued before me, then the pleading needs to be amended. Rather than seek to identify some parts of the pleading which may

remain, it is better to strike the whole pleading out and give leave to re-plead so that the case advanced during argument may be properly set out.

Orders

- [25] The FASOC is struck out. The plaintiffs have leave to re-plead. I will hear the parties on what further directions should be made and costs.