SUPREME COURT OF QUEENSLAND

CITATION:	*Pomitix Pty Ltd v Rees Law* [2016] QSC 100
PARTIES:	**POMITIX PTY LTD (ACN 008 108 441)** (plaintiff) **v** **REES LAW** (defendant)
FILE NO/S:	No 4300 of 2015
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	12 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2016
JUDGE:	Dalton J
ORDER:	**Application dismissed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – GENERALLY – where the plaintiff entered into a contract of sale – where the plaintiff argues that the defendant did not advise it of certain risks – where the defendant argues that the plaintiff's cause of action is statute barred – where the plaintiff argues that there was no reasonably arguable basis for the defence – whether a paragraph of the defence should be struck out *Commonwealth v Cornwell* (2007) 229 CLR 519, considered *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514, considered
COUNSEL:	W Sofronoff QC, with B F Charrington for the plaintiff D Clothier QC for the defendant
SOLICITORS:	Bennett & Philp for the plaintiff Barry.Nilsson. Lawyers for the defendant

[1] Application was made to strike out a paragraph of the defence which takes a limitation point. Except for one factual matter which I deal with at the end of these reasons, the

application proceeded upon the pleadings. The ground advanced for striking out the plea was that there was no reasonably arguable basis for the defence.

[2] The Claim in this proceeding reads as follows:

> "1. Damages in the sum of ($1,233,416.50) caused by reason of the negligence of the defendant;
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> 2. Ongoing interest on such damages calculated at the default rate as prescribed by the Queensland Law Society under the Real Estate Institute of Queensland Residential Contract for Sale; and
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> 3. Costs."

[3] The prayer for relief in the amended statement of claim is for "damages in the sum of $815,000 caused by reason of the negligence of the defendant". By amendment, interest is claimed under the *Civil Proceedings Act* 2011 (Qld) and *Supreme Court Act* 1995 (Qld), rather than under the contract for sale. It does not appear that the Claim has been amended.

[4] The amended statement of claim pleads that the defendant was a solicitor and was retained to act on behalf of the plaintiff in respect of the sale of a piece of land. It is pleaded that the contract of retainer had implied terms to the effect that the defendant would exercise reasonable care and skill; protect the plaintiff's interests in relation to the contract of sale and associated transactions; advise the plaintiff of risks associated with the contract of sale and associated transactions, and advise the plaintiff on appropriate means to protect itself from "economic harm associated with the contract of sale" and related transactions. A separate paragraph pleads that further, or in the alternative, a duty was owed as a consequence of the solicitor/client relationship, "in like terms to the implied terms" pleaded previously.

[5] The outline of submissions read and filed on behalf of the plaintiff described the paragraph of the defence which takes the limitation point as embarrassing because it refers to an action for breach of contract as well as an action for negligence. In my view it is the statement of claim and claim which are embarrassing, for it is not entirely clear what cause of action is being relied upon.

[6] The amended statement of claim pleads the following facts. The plaintiff began negotiations for the sale of its land with a company named Historic Carbarlah Developments Pty Ltd (HCD). Before a contract was made, the plaintiff sought advice from the defendant. At that stage HCD proposed to pay for the land with a deposit of $25,000, an amount of $1 million on completion, and an amount of $975,000 within 12 months thereafter from sales of the land, which HCD planned to subdivide. HCD could not grant a first mortgage to secure the $975,000 payment because its financier, Westpac, required a first mortgage over the land. HCD offered personal guarantees from two of its directors.

[7] It is pleaded that on 8 September 2006 the plaintiff contracted with HCD in the terms outlined above, taking a second mortgage and personal guarantees from the directors as security for the $975,000 payment. It is pleaded that the defendant did not give the

plaintiff any advice or warning as to the risks associated with the provision of vendor finance; the taking of a second mortgage, or the risks associated with taking personal guarantees. Further it is pleaded that the defendant did not recommend, or undertake, any enquiries to investigate the worth of the guarantors.

[8] Then it is pleaded that on 15 August 2007 the plaintiff entered into a contract to sell the land to two corporate purchasers, each of which was a family trust, on terms which were the same as to the deposit and payment on completion, but slightly different as to the amount of $975,000. This latter sum was to be paid either by instalments of $32,500 on the completion of each subdivided lot or, alternatively, on the first anniversary of the completion of the sale, whichever was earlier. If it were not repaid by the first anniversary of completion, the purchasers would pay interest under the REIQ Contract for Sale. It is not pleaded, but the implication is that the earlier contract of 8 September 2006 was abandoned or novated. It is pleaded that a director of each family trust gave a personal guarantee in relation to the amounts due under the sale contract. I find this part of the pleading unclear, but it seems to be the plaintiff's case that it took a second mortgage over the land as security.

[9] It is pleaded that on 14 February 2008 the sale completed and that on the same day the plaintiff agreed to postponing the final date for payment of the amount of $975,000 to the second anniversary of the completion date. It is pleaded that before completion the plaintiff executed the deed of priority in favour of Westpac, although it is hard to see what that adds to the cause of action.

[10] It is said that prior to entry into the second contract, and prior to its completion, the defendant provided the plaintiff with none of the advice, warnings or investigations outlined at [7] above.

[11] It is pleaded that default was made in repaying the amount of $975,000; only $260,000 was paid. It is not clearly pleaded, but I interpret the amended statement of claim as meaning that no monies were available to the plaintiff on its second mortgage because Westpac exercised its rights under the first mortgage and exhausted that source of funds. It is pleaded that the plaintiff has default judgment against the two guarantors. It is not express, but I interpret the case to be that the plaintiff has not recovered any funds from them.

[12] Towards the end of the pleading it is alleged that while the plaintiff was negotiating with HCD, its real estate agent (unnamed) received an offer (undated) to purchase the property from a third party (unnamed) for $2.1 million, which offer was not subject to finance. It is said that the plaintiff advised the defendant of the offer (it is not pleaded when or how), but that the defendant did not advise the plaintiff to accept the offer, nor advise that it represented a better deal than that which the plaintiff was negotiating with HCD.

[13] It is pleaded that the plaintiff would not have entered into the contract of sale with HCD or the second contract, had the defendant advised it of the risks associated with vendor finance; the risk of default by the purchasers; the risk that a second mortgage would be insufficient security; that the guarantors did not have sufficient assets to enable them to

give a worthwhile guarantee, or that the offer received by the real estate agent would yield a better purchase price and not have risks associated with vendor finance.

[14] It is not distinctly pleaded that, had investigations of the guarantors been made prior to entry into the second contract of sale, they would have revealed that the guarantors lacked sufficient assets to give worthwhile guarantees.

[15] By amendment to the pleading a paragraph 32A was added to the effect that had the plaintiff been advised of the above matters, not only would it not have entered into the two contracts of sale it did make, but it would have either sold the land to the buyer who made the offer received by the real estate agent, or "retained the land and retained the value thereof to be determined by an expert valuer however estimated to be $2,100,000." It is not distinctly pleaded when the land had a value of $2.1 million.

[16] The amended statement of claim pleads a loss of $815,000 calculated as the difference between the amount of purchase price received under the contract of sale and the amount of $2.1 million, which is pleaded to represent alternatively the amount available from the buyer who made the offer to the real estate agent, or the value of the land. Prior to amendment, the amount of loss claimed was the amount still claimed in the Claim – $1,233,416.50, which sum was calculated as the unpaid balance of the purchase price, together with interest calculated pursuant to the REIQ Sale Contract.

[17] The amendments to the statement of claim were made because the defendant (correctly) complained that the amount of damages originally pleaded was inconsistent with the basis of loss claimed – ie., that if properly advised the plaintiff would not have entered into either the HCD contract or the second contract.

[18] While it is impossible to assess the factual merits of a case only from the pleading, the pleading at paragraph 32A of the amended statement of claim does give cause for scepticism as to whether the plaintiff will make out the factual foundation for loss as currently pleaded. No details of the offer received by the real estate agent are given. Presumably if the offer was made by the tender of a signed contract in the amount of $2.1 million with the finance clauses struck through, and if that written document was available to the plaintiff, the pleading of the fact of the offer would be more particular than it is. If the offer was any less formal than that, one might anticipate that the plaintiff will have trouble proving this part of its case. Secondly, the pleading of value of the land acknowledges that the plaintiff had no valuation at the time of the pleading. The estimate may be on the basis of the offer said to have been received by the real estate agent, with the attendant uncertainties discussed.

[19] The fact that the plaintiff first pleaded its loss on an unsustainable basis, and has amended to plead on a basis about which reservations arise, does not inspire confidence that the current pleading represents with certainty the case the plaintiff will run at trial. Adding to my scepticism in this regard, the reply pleads that the plaintiff suffered damage when the guarantors defaulted in paying the balance of the purchase price after being given the seven day notice in August 2014. This does not sit happily with the part of the plaintiff's case which pleads that had it been properly advised, it would not have sold the land, or

would have entered into the alternative contract which it says was available to it at $2.1 million.

[20] It was argued by the plaintiff that its case is not concerned with the $100,000 difference between the contract which is pleaded to have been available to the plaintiff, and the contract which it made with the two corporate trustees; it was claiming a loss far more substantial than that. There are three things to be said in relation to that point: the plaintiff does not abandon its plea that it lost the opportunity to sell at $2.1 million in 2006. Secondly, the difference between the two contracts is not simply $100,000, but the difference referable to the use of money which it is said could have been available to the plaintiff in 2006 and the money which the plaintiff eventually received ($25,000 on 7 September 2006; $1 million on 14 February 2008; $260,000 before 14 February 2010, and $715,000 not due until the giving of seven days notice in 2014). Thirdly, even if the plaintiff fails to prove that the offer of $2.1 million was available, its case is still a "no transaction" case.

[21] In *Wardley Australia Ltd v The State of Western Australia*[1] the High Court decided that where the State of Western Australia assumed an executory and contingent obligation because of misleading and deceptive conduct, no cause of action under s 82 of the *Trade Practices Act* 1974 (Cth) accrued until both the contingency fell in, and there was a present liability to pay pursuant to the indemnity.[2] There are indications in the judgment that the same result might not obtain in a contract case.[3] Further, even where a claim is not in contract, there are indications that the rule established by *Wardley* as to when loss is suffered may not apply if the case is one of sale at an under-value, or a no transaction case.[4] The proposition that a case put on the basis of breach of contract may not fall within *Wardley* is reinforced by the High Court decision in *Commonwealth v Cornwell*,[5] and the point as to the rule not applying in a case which concerns a sale at an under-value or a "no transaction case" also receives some support from this case – see [38].

[22] The High Court in *Wardley* said:

> "We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question. …"[6]

[23] This dicta has been applied consistently in the case law.[7]

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1 (1992) 175 CLR 514.
2 See the majority judgment at pp 523, 532 and Brennan J at p 538.
3 See the majority judgment at p 531 and Brennan J at p 537.
4 See the majority judgment at pp 529-530.
5 (2007) 229 CLR 519, [3]-[5].
6 Page 533 of the majority judgment.
7 *Melisavon Pty Ltd v Springfield Land Development Corporation Pty Ltd* [2015] 1 Qd R 476; *Khoury v Coffey Projects (Australia) Pty Ltd* [2015] NSWCA 371; *Francesco Giuseppe D'Aquino (as trustee of the D'Aquino Endowment Trust) & Ors v Felice Trovatello & Ors* [2015] VSCA 78.

[24] It is very clear from both *Wardley* and *Cornwell* that in deciding limitation points it is necessary to undertake a precise analysis of what loss is alleged, and indeed what entitlement or interest of the plaintiff has been infringed. In my view, the plaintiff's pleading of its case gives me no confidence that there is utility to determining the limitation point in advance of trial. There is an ambiguity in the pleading as to whether the claim is in contract or negligence, or both. There is currently pleaded a case which I think can be fairly characterised as one of sale at an under-value. However, because of matters with which I have dealt above, I am not confident that this will in fact be the case run by the plaintiff at trial or, if it is run, that the plaintiff will succeed on such a case at trial. However, it will, on the present pleading, still run a no transaction case. It apparently had no valuation evidence to support that case at the time the amended pleading was drawn. It seems to me that there is a more than usual chance that, when evidence is gathered at some later point in the proceeding, the plaintiff will once again modify its case in relation to loss. In my view, the point raised by this application ought not be determined in advance of trial. I dismiss the application.

[25] There remains one factual point. When the defendant's insurer was first notified of a potential claim by the plaintiff, solicitors in its employ expressed the view that loss had not crystallised because the plaintiff had not, at that point, pursued the guarantors. This view was expressed before proceedings were commenced, and before the basis of loss currently articulated in the amended statement of claim was put forward. In any event, there is no pleading that what was said amounted to an estoppel in relation to the limitation point, and no argument was made before me that there was any estoppel.