SUPREME COURT OF QUEENSLAND

CITATION:	*Mayfair Property Holdings Pty Ltd v Southland Packers Pty Ltd (No 2)* [2016] QSC 145
PARTIES:	**MAYFAIR PROPERTY HOLDINGS PTY LTD** (plaintiff) **v** **SOUTHLAND PACKERS PTY LTD** (defendant)
FILE NO/S:	SC No 9813 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	24 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2016
JUDGE:	Bond J
ORDER:	**The orders of the Court are:** **1. Upon the plaintiff's undertaking to submit to a stay of any judgment which it might obtain against the defendant in this proceeding until the determination at trial of the defendant's claims against the plaintiff in the separate proceeding referred to in the next order, the defendant's application is refused.** **2. If, within the 7 days of the date of this order, the defendant files a claim and statement of claim substantially in the form of the proposed counterclaim which was exhibit "GJH-1" to the affidavit of Guy John Humble filed on 30 March 2016, then –** **(a) the proceeding so commenced will be placed on the Commercial list; and** **(b) the proceeding will be listed for review before me on a date to be fixed after the defendants have been served.** **3. The parties have liberty to apply.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – CROSS-CLAIMS: SET-OFF AND COUNTERCLAIM – COUNTERCLAIM – PROCEDURE – where separate questions on liability answered – where delivery of counterclaim was late – whether leave to amend defence and to deliver counterclaim

should be granted

EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – ASCERTAINMENT OF RELATIONSHIP – where defendant, by its counterclaim, pleaded a fiduciary relationship and breaches of fiduciary duties – whether pleading made out arguable claim for alleged fiduciary duties

Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175, cited
Blair v Curran (1939) 62 CLR 464, cited
Bli Bli #1 Pty Ltd v Kimlin Investments Pty Ltd [2010] QCA 136, cited
Byrne v People Resourcing (Qld) Pty Ltd [2014] QSC 39, cited
Gangemi v Osborne [2009] VSCA 297, cited
Hartnett v Hynes [2009] QSC 225, followed
Hoysted v Federal Commissioner of Taxation (1925) 37 CLR 290, considered
Kuligowski v Metrobus (2004) 220 CLR 363, cited
John Alexander's Clubs v White City (2010) 241 CLR 1, cited
Mayfair Property Holdings Pty Ltd v Southland Packers Pty Ltd [2016] QSC 27, cited
McPherson v Watt (1877) 3 App Cas 254, cited
Mitreski v Metropolitan Petar [2009] NSWCA 319, cited
Monto Coal 2 Pty Ltd v Sanrus Pty Ltd [2014] QCA 267, cited
Ord v Ord [1923] 2 KB 432, cited
Reading Australia Pty Ltd v Australian Mutual Provident Society (1999) 217 ALR 495, cited
Willett v Thomas [2012] NSWCA 97, cited

COUNSEL: A M Pomerenke QC, with P J McCafferty, for the plaintiff
D A Kelly QC, with D M Turner, for the defendant

SOLICITORS: Russells Lawyers for the plaintiff
McCullough Robertson for the defendant

[1] On 3 September 2014, the defendant and the plaintiff entered into a contract pursuant to which the defendant agreed to sell and the plaintiff agreed to buy the defendant's land at Ashmore in Queensland for a contract price of $3,650,000 ("the Mayfair contract").

[2] The Mayfair contract (by SC 7) acknowledged that the land was the subject of a registered lease which contained a pre-emptive right of purchase in favour of the lessee and provided for the termination of the contract in the event that the lessee availed itself of that right.

[3] The defendant contended that events happened which engaged the operation of SC 7 with the result that the Mayfair contract was terminated. It proceeded to sell the land to someone else. The plaintiff disagreed that the defendant had been entitled to take that course.

[4] In this proceeding – which was commenced on 17 October 2014 - the plaintiff contended that the defendant had breached the terms of the Mayfair contract and sued the defendant for damages for breach of contract.

[5] The plaintiff's pleaded case on liability was straightforward. The Mayfair contract obliged the defendant to sell the land to the plaintiff; contractual provisions which might have permitted the defendant to avoid that obligation had not been engaged; and, in breach of contract, the defendant sold the land to someone else. The defendant's case on liability was that its conduct was justified because events had happened which had properly engaged the contractual terms which brought the Mayfair contract to an end.

[6] The plaintiff's damages case was also straightforward. The plaintiff said that the defendant's conduct caused it to lose the opportunity to re-develop the land and then to on-sell it for a profit of in excess of $2.4 million[1]. The defendant's case was that it had not acted in breach of the Mayfair contract and therefore the plaintiff had not suffered any loss and damage in consequence of the alleged breach.

[7] The matter has been managed on the Commercial list since being placed on the list by order of Philip McMurdo J (as his Honour then was) on 26 November 2014. Indeed, his Honour had, by order made on 11 August 2015, set the proceeding down for trial for five days commencing 15 February 2016.

[8] On 17 December 2015, I made consent orders vacating those trial dates and for the determination at a one day hearing on 15 February 2016, which the order referred to as "the Liability Hearing", of the following separate questions:

(a) whether, in the events that have happened, the Mayfair contract came to an end pursuant to SC 7; and

(b) whether, in the events that have happened, the defendant was in breach of the Mayfair contract as alleged in paragraph 19 of the plaintiff's statement of claim,

and I also made directions as to the nature of the evidence on which the parties could rely at the Liability Hearing.

[9] Although any answers would be properly described as interlocutory decisions, they would be final and binding on the parties in any later stages of the proceeding[2]. Moreover, it was plain that the intention of the parties and of the order I made was that the answer to those questions would finally determine the questions of liability which arose in the proceeding. For this reason, it was accurate for the consent order to describe the hearing as "the Liability Hearing". The questions posed were not merely some amongst many which might arise in relation to the question of liability. Answering the questions in favour of the defendant would have negated the need to embark upon any further hearing at all because such answers would, inevitably, have led to a successful application for judgment dismissing the proceeding.

[10] As it transpired, on 26 February 2016, I answered the questions in favour of the plaintiff, by answering them "No" and "Yes", respectively[3]. Once that decision was made the only live question in the proceeding was whether the defendant's breach of contract had caused the loss as alleged by the plaintiff.

[11] On 31 March 2016, having changed its legal representation since the questions were answered, the defendant filed an application for leave to amend its defence and to file a

---

1 When the proceeding commenced the plaintiff had claimed lost profits of $2.1 million. By amendments made in August 2015 the plaintiff increased its claim to the existing amount.

2 Cf *Mitreski v Metropolitan Petar* [2009] NSWCA 319 at [28] per Handley AJA.

3 *Mayfair Property Holdings Pty Ltd v Southland Packers Pty Ltd* [2016] QSC 27.

counterclaim against the plaintiff and three proposed new parties. Essentially, the defendant now seeks to alter the complexion of this proceeding so that, by reference to the proposed counterclaim, it may advance new defences to the plaintiff's claim, as follows:

> 10 Further and in the alternative to paragraph 9 above, and in answer to the whole of the statement of claim, the defendant says that by reason of the matters pleaded in the counterclaim:
>
> (a) the Mayfair Contract is liable to, and should, be rescinded by order of this Honourable Court in equity;
>
> (b) alternatively, this Honourable Court should make an order pursuant to section 237 of the *Australian Consumer Law* in Schedule 2 to the *Competition and Consumer Act* 2010 (Cth) (ACL):
>
> (i) declaring the Mayfair Contract to be void;
>
> (ii) alternatively, declaring that the plaintiff is not entitled to enforce the Mayfair Contract;
>
> (c) alternatively, if (which is denied) the defendant has any liability to the plaintiff on the plaintiff's claim for damages in this proceeding:
>
> (i) the defendant has good claims against the plaintiff for pecuniary relief in the form of a claim to an account of profits or equitable compensation, and, further or alternatively, a claim for damages pursuant to section 236 of the ACL, which claims are pleaded in the defendant's counterclaim; and
>
> (ii) the defendant is entitled to set off against its liability to the plaintiff the amounts claimed by the defendant by way of the claims for pecuniary relief pleaded in the defendant's counterclaim, in extinguishment or diminution of the claim by the plaintiff against the defendant.

[12] Unsurprisingly – as it has already fought and won the Liability Hearing – the plaintiff resists this course. The plaintiff contends that I should exercise my discretion to refuse the application. Amongst other things, it contends that –

(a) because I have already determined not only that the Mayfair contract did not come to an end but that the defendant was in breach of it, I must necessarily be taken to have made an anterior finding that there was a valid and enforceable contract and, accordingly, the defendant must be the subject of an issue estoppel preventing it from advancing its contention that the Mayfair Contract should be set aside; and

(b) in any event, the proposed defences should not be regarded as having worthwhile prospects because of the weakness of the pleaded case as to the existence of a fiduciary relationship.

[13] For its part, the defendant rejects both these arguments and contends that the proper exercise of my discretion is to permit the application.

[14] It is necessary, first, to identify the principles by reference to which I should exercise my discretion, second, to examine the nature of the proposed case and the criticisms advanced of it, and, finally, to explain the view I take as to the proper exercise of my discretion in this case.

The relevant principles

[15] The defendant needs leave to deliver its counterclaim because it is seeking to do so many months outside the time provided for so doing by the UCPR[4]. Save in one respect – to which I will shortly return - the plaintiff has not contested the defendant's submission that the approach which I should take to its application for leave to deliver the counterclaim should be akin to the approach which I would take on an application for leave to amend. The defendant accepted that it needed leave to amend the defence and that similar principles

---

[4] UCPR 179 provides that any counterclaim must be served at the same time as the defence, namely 28 days after the day the claim is served. Accordingly the counterclaim is about 18 months late.

applied in relation to that application[5]. It is convenient, accordingly, to refer to both aspects of the application as an application for leave to amend.

[16] In dealing with the application for leave to amend I will have regard to the 12 principles deriving from the High Court decision of *Aon Risk*[6] which were identified by Applegarth J in *Hartnett v Hynes*[7]. I do note, however, as was observed by the Court of Appeal in *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd*[8], those principles "are, of course, only a guide in the sense that the application of those principles will vary from case to case… [and] [e]ach case will depend on its own circumstances."

[17] The principles listed by Applegarth J in *Harnett* were:

1. An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation.
2. The discretion is guided by the purpose of the rules of civil procedure, namely the just and expeditious resolution of the real issues in dispute at a minimum of expense.
3. There is a distinction between amendments which are necessary for the just and expeditious resolution of "the real issues in civil proceedings" and amendments which raise new claims and new issues.
4. The court should not be seen to accede to applications made without adequate explanation or justification.
5. The existence of an explanation for the amendment is relevant to the court's discretion, and "[i]nvariably the exercise of that discretion will require an explanation to be given where there is a delay in applying for amendment".
6. The objective of the court is to do justice according to law, and, subject to the need to sanction a party for breach of its undertaking to the court and to the other parties to proceed in an expeditious way, a party is not to be punished for delay in applying for amendment.
7. Parties should have a proper opportunity to plead their case, but justice does not permit them to raise any arguable case at any point in the proceedings upon payment of costs.
8. The fact that the amendment will involve the waste of some costs and some degree of delay is not a sufficient reason to refuse leave to amend.
9. Justice requires consideration of the prejudice caused to other parties, other litigants and the court if the amendment is allowed. This includes the strain the litigation imposes on litigants and witnesses.
10. The point the litigation has reached relative to a trial when the application to amend is made is relevant, particularly where, if allowed, the amendment will lead to a trial being adjourned, with adverse consequences on other litigants awaiting trial and the waste of public resources.
11. Even when an amendment does not lead to the adjournment of a trial or the vacation of fixed trial dates, a party that has had sufficient opportunity to plead their case may be denied leave to amend for the sake of doing justice to the other parties and to achieve the objective of the just and expeditious resolution of the real issues in dispute at a minimum of expense.
12. The applicant must satisfy the specific requirements of rules, such as UCPR 376(4) where it seeks to introduce a new cause of action after the expiry of a relevant limitation period.

[18] I return now to the respect in which the plaintiff disputed the defendant's submissions as to the principles which govern the application.

[19] The plaintiff submitted that in the circumstances of this case – in which allowing the amendment would dash the plaintiff's expectations that it had already achieved finality on the question of liability - I should take a more rigorous approach to the assessment of the merits of the proposed new case, than merely seeking to form a view whether the defendant's case is reasonably arguable. As will appear, I do consider that questions of

---

5 See, Transcript 1-15 at line 45 to 1-16 at line 11 and the defendant's written submissions at [20].

6 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

7 *Hartnett v Hynes* [2009] QSC 225 at [27].

8 *Monto Coal 2 Pty Ltd v Sanrus Pty Ltd* [2014] QCA 267 at [74] per Flanagan J (with whom McMurdo P and Morrison JA agreed).

finality are relevant to the proper exercise of my discretion in this case. The principles articulated by Applegarth J in *Harnett* already permit me to consider those matters and to give them appropriate weight. I do not think it is necessary or appropriate to seek to impose a higher threshold in assessing the merits of the proposed amended case.

The nature of the proposed case

[20] The engine driving the proposed new defences to the plaintiff's claim is the proposed counterclaim.

[21] The defendant summarises its proposed counterclaim essentially in this way:

(a) The plaintiff (and proposed first defendant by counterclaim) is a company whose business is connected with the business of Synergy Property Partners Pty Ltd (the proposed second defendant by counterclaim).

(b) Mr Griffith (the proposed third defendant by counterclaim) is involved in the business of Synergy and held himself out as a director of Synergy.

(c) Mr Masterson (the proposed fourth defendant by counterclaim) is the sole director, secretary and shareholder of each of the plaintiff and Synergy.

(d) Mr Venuto is the sole director of the defendant.

(e) Mr Gurner is Mr Venuto's longstanding business partner and trusted adviser.

(f) Before the plaintiff and the defendant entered into the Mayfair contract, the defendant's Mr Venuto wanted advice about the market value of the property in order to work out whether the defendant ought to sell it. Mr Gurner, on the defendant's behalf and acting as its agent, sought advice from Mr Griffith. For this purpose, Mr Gurner provided to Mr Griffith a range of documentation and information concerning the property. This included a market rent assessment report prepared by Jones Lang LaSalle.

(g) Synergy (by Mr Griffith as its agent) gave advice in writing to the defendant (by Mr Gurner) concerning the value of the property, based upon calculations as to market rent and yield.

(h) The defendant reposed trust and confidence in Synergy. As the defendant's advisor, Synergy was a fiduciary of the defendant. The defendant propounds the existence of a fact-based fiduciary relationship by reference to relevant indicia.

(i) Shortly prior to the provision of the advice by Synergy, Mr Venuto was contacted by a representative of Jones Lang LaSalle and told of an interested purchaser of the property. The interested purchaser (and the subsequent actual purchaser) was the plaintiff.

(j) It is to be inferred that there was a common intention on the part of Synergy and the plaintiff to purchase the property from the defendant, and for the plaintiff and Synergy to develop the property for their joint benefit.

(k) At no relevant time was the relationship between the plaintiff, Synergy, Mr Masterson, and Mr Griffith disclosed to the defendant.

(l) The entry by the plaintiff into the Mayfair contract constituted:

(i) in substance, a transaction involving Synergy as a fiduciary dealing for its own benefit and the defendant as principal, by reason of the common sole directorship of Synergy and the plaintiff, arising out of which transaction both parties derived benefits; and

(ii) a breach by Synergy of its proscriptive "no conflict" and "no profit" fiduciary duties.

[22] Those facts, are, as against the plaintiff, said to justify –

(a) an order for rescission of the Mayfair contract in equity;

(b) alternatively, an order pursuant to s 237 of the *Australian Consumer Law* declaring that the Mayfair contract is void;

(c) alternatively, an order pursuant to s 237 of the *Australian Consumer Law* declaring that the plaintiff is not entitled to enforce the Mayfair contract;

(d) alternatively, if the defendant is held liable to pay damages to the plaintiff for breach of the Mayfair contract:

(i) at the defendant's election, either an order in equity to account for and disgorge profits (or to pay compensation) in an amount equal to the damages liability to the plaintiff; or

(ii) an order pursuant to s 236 of the *Australian Consumer Law* that the plaintiff pay damages to the defendant in an amount equal to the damages liability to the plaintiff; and

(e) additionally, the defences to the plaintiff's claim against the defendant to which reference has already been made at [11] above.

[23] Alternatively, as against Synergy, those facts are said to justify, if the defendant is held liable to pay damages to the plaintiff for breach of the Mayfair contract, an order in equity or pursuant to s 236 of the *Australian Consumer Law* that Synergy pay to the defendant an amount equal to the damages liability to the plaintiff. Alternatively, damages claims pursuant to s 236 of the *Australian Consumer Law* to similar effect are said to be justified as against Mr Griffith and Mr Masterson.

[24] So far as it relates to the plaintiff, the critical propositions are:

(a) Synergy (via the conduct of Mr Griffith) became a fiduciary of the defendant; and

(b) Synergy's involvement in the transaction and relationship with the plaintiff was such as would justify the claims for relief against the plaintiff.

[25] As to the first proposition:

(a) The defendant contends that it has pleaded the existence of a fact-based fiduciary relationship by reference to relevant indicia identified in *John Alexander's Clubs v White City* (2010) 241 CLR 1 at 34 to 37 [86] to [93] *et seq*; *Bli Bli #1 Pty Ltd v Kimlin Investments Pty Ltd* [2010] QCA 136 at [12]; and *Willett v Thomas* [2012] NSWCA 97 at [115] to [120].

(b) The plaintiff criticises the argument because there is no allegation –

(i) that Mr Griffith was anything other than another participant in the property industry (for instance, he was not said to have been engaged as a valuer or even as a real estate agent);

(ii) that a retainer of Mr Griffith by the defendant exists or that his advice was sought and obtained on other than a voluntary basis; and

(iii) Mr Griffith undertook to act for the defendant in a manner entailing subordination of his interests to the interests of the defendant.

(c) It is true that for a fiduciary relationship to exist it will be necessary for the defendant to establish that –

(i) Synergy (via the conduct of Mr Griffith) had undertaken or agreed to act for or on behalf of or in the interests of the defendant in the exercise of a power or discretion which will affect the interests of the plaintiff in a legal or practical sense; and

(ii) the circumstances were such as to justify the conclusion that Synergy subordinated self-interest in favour of the defendant's interest.

(d) But, at least on the basis of the facts asserted in the current proposed pleading, it seems to me that I should treat the defendant's case as an arguable one, on the basis that the requisite subordination of interests is arguably implicit in the facts which have been pleaded. It is not an insurmountable obstacle that neither Synergy nor Mr Griffith were not being paid for their advice. I am not persuaded that the facts pleaded by the defendant do not reveal a case which warrants consideration at a trial.

[26] As to the second proposition:

(a) The defendant contends it has pleaded a case which is arguably analogous with *McPherson v Watt* (1877) 3 App Cas 254, a case where the actual purchase from the fiduciary's principal was made by the brother of the fiduciary but in circumstances in which there was an arrangement between the two of them that the fiduciary would receive a benefit from his brother. That arrangement meant that the fiduciary had an indirect interest in the transaction between his brother and his principal.

(b) In the present case the defendant's pleading of the alleged arrangement between the fiduciary (Synergy) and the plaintiff rests on inference, based on the timing of the various events, the identity of the actors and the fact that, in the damages part of this proceeding, the plaintiff seeks damages on the basis of an alleged intention of Synergy to develop the land and for the plaintiff to sell it for profit, as expressed in the summary of evidence of Mr Masterson delivered in this proceeding.

(c) Again, at least on the basis of the facts asserted in the current proposed pleading, it seems to me that I should treat the defendant's case as an arguable one which warrants consideration at a trial.

[27] For these reasons, I do not accept the plaintiff's argument that, for the purposes of determining the defendant's application, I should conclude that the defendant's proposed case should be regarded as having no worthwhile prospects. For the purposes of determining the defendant's application, it seems to me that I should regard its case as arguable.

[28] Notably, the plaintiff did not contend that, if the defendant's breach of fiduciary duty case was arguable, the alleged entitlement to pecuniary relief, the principal integer of which was the measure of any liability in damages to the plaintiff, was not arguable. On that basis, the circularity of action set off referred to in the proposed paragraph 10(c) quoted at [11] above would be arguable.

[29] As I have noted, the plaintiff also contended that the defendant was the subject of an issue estoppel which operated to bar the defence that the Mayfair contract ought be rescinded by order of the Court in equity or pursuant to the *Australian Consumer Law* on the footing that it was entered into in consequence of a breach of fiduciary duty.

[30] It was common ground that the following observations by Dixon J in *Blair v Curran* (1939) 62 CLR 464 at 531 to 532 were still authoritative:

> A judicial determination directly involving an issue of fact or law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be

> commanded or restrained or that rights be declared. The distinction between *res judicata* and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.
>
> Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded. In matters of fact the issue estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order…the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous.

[31] The plaintiff emphasised the statements that –

(a) the "issue" encompasses matters "necessarily decided by the prior judgment, decree or order" and "legally indispensable to the conclusion"; and

(b) the estoppel is not confined to "the final legal conclusion expressed in the judgment decree or order" and "concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, though not then directly the point at issue."

[32] The plaintiff then submitted that as I had already determined that the Mayfair contract did not come to an end, and that the defendant is in breach of it, that determination necessarily involved an anterior finding that there was a valid and enforceable contract because, if it were otherwise, there could be no breach. The plaintiff relied in particular on observations made in *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290 at 299 in the speech of Lord Shaw on behalf of the Judicial Committee of the Privy Council (emphasis added):

> Very numerous authorities were referred to. **In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact.** Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. **Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which has not been taken. The same principle of setting parties' rights to rest applies, and estoppel occurs**.

[33] In reliance on *Hoysted* the plaintiff says that my previous decision must be taken to have proceeded on the traversable assumption – which the defendant wishes now to traverse – that the Mayfair contract was enforceable as against the defendant when it was breached as alleged in paragraph 19 of the statement of claim. The plaintiff says that the defendant not having taken the traverse at the time of the previous decision, it is too late now to do so.

[34] The defendant, on the other hand, emphasised the criticality of identifying what specifically was decided by the prior judgment and submitted that it was not correct that a determination of breach of contract necessarily involves an anterior finding that there is an enforceable contract. It relied in particular on observations concerning the strict requirements for the

application of issue estoppel made by the High Court in *Kuligowski v Metrobus* (2004) 220 CLR 363 at 381 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) where the Court referred with approval to earlier observations by Barwick CJ in *Ramsay v Pigram* (1968) 118 CLR 271 at 276:

> Long standing authorities, in my opinion, warrant the statement that, as a mechanism in the process of accumulating material for the determination of issues in a proceeding between parties, an estoppel is available to prevent the assertion in those proceedings of a matter of fact or of law in a sense contrary to that in which that precise matter has already been necessarily and directly decided by a competent tribunal in resolving rights or obligations between the same parties in the same respective interests or capacities, or between a privy of each, or between one of them and a privy of the other in each instance in the same interest or capacity. The issue thus determined, as distinct from the cause of action in relation to which it arose, must have been identical in each case.

[35] It contended that the question of enforceability (in the sense of the relief (if any) available to the plaintiff) is separate to the question of breach and there was no necessary inconsistency between my previous judgment and the relief it now seeks because -

(a) it does not now seek to contend that the Mayfair contract was not on foot at the time of the determination or is not presently on foot; and

(b) the principal relief sought by it is an order for rescission of the Mayfair contract in equity or by way of a similar order under the *Australian Consumer Law* and the consideration by the Court of whether to grant either remedy proceeds on the basis that the Mayfair contract is on foot until set aside by order of the Court.

[36] The defendant also relied on two cases to support its argument that it could seek a remedy vitiating a contract at a stage subsequent to a decision which relied on the fact of the contract conferring enforceable rights, namely *Ord v Ord* [1923] 2 KB 432 and *Gangemi v Osborne* [2009] VSCA 297 at [169]. It suffices to note that in the latter case, the Victorian Court of Appeal concluded that a finding that "the Heads of Agreement" were contractually binding would not give rise to an issue estoppel which would prevent a subsequent claim of rescission for fraud.

[37] A court would not grant leave to amend to introduce a defence which was not reasonably arguable. The competing submissions on issue estoppel raise interesting points of law. But I do not think they should be resolved by me on an application by the defendant for leave to amend. The defendant's case that there is no issue estoppel is at least arguable, but, importantly, there would be no utility in seeking to determine the question of law now, because I have already concluded at [28] above that the defendant's breach of fiduciary duty claim gives rise to an arguable defence by way of set off to the plaintiff's claim. The plaintiff has not contended that issue estoppel would lie to prevent that case being advanced.

The proper exercise of my discretion

[38] The foregoing discussion reveals that I have concluded that the proposed new defences and counterclaims are arguable. However, as we have already seen, justice does not permit a party to raise any arguable case at any point in the proceedings upon payment of costs.

[39] In substance the defendant's application seeks to raise new defences to the plaintiff's case after the plaintiff has already fought and won the pleaded case on liability. The application is to be regarded as a belated attempt to raise new claims and new issues with a view to re-opening the question of liability. Allowing the amendment would be to sanction a departure by the defendant from the way of structuring the resolution of the disputes between it and the plaintiff which had been distinctly the subject of a Court order and to which the defendant had explicitly assented. This proposition would not be greatly lessened even if the order setting down separate questions had not been a consent order.

[40] The questions which I have answered would never have been set down for separate determination if the pleadings had included the allegations which the defendant now seeks leave to make, because they would not have been "ripe" for separate determination in the way contemplated by the authorities.[9] Allowing the amendment would be to sanction the waste of costs and time and public resources inevitably involved in having had the separate questions determined. And, although the defendant submitted the contrary, it would be a waste which is not capable of being entirely remedied by any costs order.

[41] Moreover, it seems to me likely that allowing the amendment would delay the resolution of the proceeding as it is currently formulated. The plaintiff's case on the remaining issues is complete, in the sense that it has complied with directions made in Commercial list review hearings and provided to the defendant the witness summaries and expert opinion on which it intends to rely. The defendant has had much of that material since June 2015 and the last of it for of the order of 5 months. It would remain for the defendant to finalise its evidence and expert opinion on those issues and then the balance of the proceeding based on the current trial and consistently with expectations created by my previous order would be ready for trial. If the amendment is allowed, it seems to me that while it might just be possible that the issues as between the plaintiff and the defendant could be made ready for trial without too much delay (although that would be at the undesirable expense of requiring the plaintiff to defend the counterclaim at an accelerated pace), the addition of three new parties would render that goal very unlikely.

[42] Additionally, the explanation for the outcome for which the defendant seeks the Court's approval is in many respects unsatisfactory. I observe:

(a) The defendant's new solicitor says on information and belief that the defendant's director, Mr Venuto, had not understood that the Liability Hearing might determine liability until about the time that the Liability Hearing occurred. But that is an indictment either of the attention which Mr Venuto had paid to what was going on or to the advice he was given (or both). The matter had been set down for a trial of all issues in February 2016 by order made in August 2015. The order which I made in December 2015 reduced the extent of what was going to be finally determined, but the concept of final determination still remained.

(b) It seems that Mr Venuto spoke to his trusted adviser, Mr Gurner, after the hearing but before judgment and then after judgment. He sent Mr Gurner a copy of my reasons for judgment, some unspecified court documents and witness summaries and expert reports which the plaintiff had provided. Mr Gurner realised the seriousness of what had happened by the judgment I had given and "turned his mind to the facts the subject of the proceeding".

(c) Mr Gurner reviewed his email records in conjunction with reviewing the unspecified court records and witness summaries. In undertaking this review he realised for the first time that there was a connection between the plaintiff and Synergy, namely that Mr Masterson was a director of both the plaintiff and Synergy and Mr Masterson was involved in the affairs of Synergy along with Mr Griffith.

(d) Mr Gurner then told Mr Venuto. Before then, Mr Venuto was "not conscious" of that connection. Prior to that time he had not turned "his mind to the facts in relation to the transaction and Griffith's involvement and connections". Mr Venuto then caused the defendant to change lawyers, retain new counsel and that led to the proposed new pleading and the application for leave.

---

[9] The decision of Branson J in *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495 at [8] has been referred to and applied many times including relatively recently by Applegarth J in *Byrne v People Resourcing (Qld) Pty Ltd* [2014] QSC 39 at [3].

(e) There is no reason why the new defences could not have been identified and pleaded with reasonable diligence before the Liability Hearing. The defendant had had the plaintiff's lay witness summaries since June 2015. Mr Masterson's connection with Synergy was at the forefront of his witness statement. There is no explanation which connects the lateness of the amendment with the reasonable discovery of some new fact. The defendant seems at all material times since June 2015 to have had the information available to it to plead the case which it now seeks to advance, it is just that it says that it had not connected the dots. The overwhelming impression I have is that the defendant only started examining the facts carefully once it appreciated that the separate question judgment exposed it to the possibility of a substantial damages award if the plaintiff could make good its pleaded case on quantum.

[43] In my view, the foregoing considerations are powerful reasons to refuse the grant of leave, notwithstanding that I have concluded that the defendant has an arguable case that the Mayfair contract should be set aside.

[44] Although refusing leave would deprive the defendant of arguable defences which it might otherwise have to the plaintiff's claim in this proceeding, it would not prevent the defendant from pursuing its damages case in a separate proceeding. Indeed, the defendant has instructed its solicitors to take that course if its application fails. And in this regard, the plaintiff, by its counsel, has indicated the plaintiff's preparedness to give an undertaking to submit to a stay of enforcement of any judgment which it might obtain in this proceeding, pending the determination of the separate proceeding. To my mind, this substantially defuses the prejudice to the defendant of refusing its application. If the defendant establishes its case against the present plaintiff in the separate proceeding, it will be able to get a judgment which would prevent the plaintiff in this proceeding ever being able to enforce the judgment it had obtained.

[45] For the foregoing reasons and on the undertaking offered by the plaintiff, I would refuse the defendant's application for leave to amend its defence and to deliver a counterclaim.

[46] That said, and in case –

(a) my assessment of the time which will be taken before the remaining issues in the current proceeding are ready for trial is overly optimistic; or

(b) my assessment of the time which will be taken before the issues in the counterclaim are ready for trial is overly pessimistic,

it does seem to me that it is possible to craft an order which might preserve the possibility that there could be one trial which would involve the resolution of all the issues, at least in substance.

[47] If, as the defendant has said it would do if its application in this proceeding failed, the defendant commenced a separate proceeding, there would be no reason why that proceeding could not be placed on the Commercial list and managed by me in parallel with the current proceeding.

[48] If – bearing in mind the interests of the defendants to the new proceeding and, of course, subject to any submissions to the contrary which they might make – the separate proceeding can reasonably be made ready for trial by the time the current proceeding obtains trial dates, then it might be possible that both proceedings could be heard at the same time.

[49] If not, then the current proceeding could go to trial and, if any judgment is obtained against the defendant, the judgment could be stayed until determination of the separate proceeding, and the separate proceeding could go to trial when it was ready. Further, any unwarranted delay in the prosecution of the separate proceeding (and, *ex hypothesi*, any unwarranted

delay to the present plaintiff's ability to enforce any judgment which it had obtained in this proceeding) could be dealt with by appropriate application.

[50] Accordingly, on condition that the defendant file and serve the separate proceeding, I would order the proceeding be placed on the Commercial list and listed for review before me on a date to be fixed after the defendants to the proceeding have been served.

Conclusion

[51] I make the following orders:

(a) Upon the plaintiff's undertaking to submit to a stay of any judgment which it might obtain against the defendant in this proceeding until the determination at trial of the defendant's claims against the plaintiff in the separate proceeding referred to in the next order, the defendant's application is refused.

(b) If, within the 7 days of the date of this order, the defendant files a claim and statement of claim substantially in the form of the proposed counterclaim which was exhibit "GJH-1" to the affidavit of Guy John Humble filed on 30 March 2016, then –

(i) the proceeding so commenced will be placed on the Commercial list; and

(ii) the proceeding will be listed for review before me on a date to be fixed after the defendants have been served.

(c) The parties will have liberty to apply.

[52] I will hear the parties on costs.