

# SUPREME COURT OF QUEENSLAND

CITATION: *Burdett-Baker & Ors v Turner & Anor* [2015] QSC 267

PARTIES: **RACHEL ELIZABETH BURDETT-BAKER AND  
GERALD THOMAS COLLINS AS JOINT AND  
SEVERAL LIQUIDATORS OF MHSM HOLDINGS  
PTY LTD ACN 127 227 025 (IN LIQUIDATION)**  
(First Plaintiff)  
**MHSM HOLDINGS PTY LTD ACN 127 227 025 (IN  
LIQUIDATION)**  
(Second Plaintiff)  
v  
**ROBERT TURNER**  
(First Defendant)  
**GARDA TURNER**  
(Second Defendant)

FILE NO/S: Brisbane No 11046 of 2013

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 11 September 2015

DELIVERED AT: Brisbane

HEARING DATE: 25 June 2015

JUDGE: Boddice J

ORDER: **I shall hear the parties as to the form of orders and costs.**

CATCHWORDS: CORPORATIONS – GENERALLY – CORPORATIONS  
LEGISLATION – where the defendants applied for one of  
summary judgment of part of the plaintiffs’ amended  
statement of claim, striking out of part of the plaintiffs’  
further amended statement of claim, or an order for  
particulars of parts of that further amended statement of claim  
– where the plaintiffs opposed the relief sought on the basis  
that the plaintiffs’ further amended statement of claim and  
response to further particulars adequately pleaded the  
plaintiffs’ claim – whether the relief sought by the defendants  
should be granted

*Corporations Act 2001 (Cth)*  
*Australian Securities and Investments Commission v Rich*  
[2009] NSWSC 1229

COUNSEL: M Jones for the plaintiffs  
A Morris QC for the defendants

SOLICITORS: Tucker & Cowen for the plaintiffs  
Russell Law for the defendants

- [1] **BODDICE J:** The defendants make application for either summary judgment of parts of the plaintiffs' amended claim, or striking out of parts of the plaintiffs' further amended statement of claim filed on 1 May 2015. In the further alternative, the defendants seek particulars of that further amended statement of claim.
- [2] The plaintiffs oppose the relief sought on the basis the further amended statement of claim, together with the plaintiffs' response to the request for further particulars filed on 8 May 2015, adequately pleads the plaintiffs' claim, and there is no basis for summary judgment.
- [3] There is no dispute as to the applicable principles in determining the application. In the case of summary judgment, the application will only succeed if the defendants show there is no real, as opposed to fanciful, prospect of success and that there is otherwise no need for a trial. In the case of striking out, the application will only succeed if the paragraphs complained of are not relevant, are ambiguous and embarrassing, or would otherwise delay a fair trial of the proceeding.

### **Background**

- [4] The defendants are the elderly parents of Stacy Turner, who was previously married to Mark McIvor. The second plaintiff is a family company of Mr McIvor.
- [5] The proceeding arises out of a transfer made by the second plaintiff, prior to being placed in liquidation, of interests in land situated at 29 Regatta Parade and 4A Yacht Street in February 2012. There is no dispute the transfers to the defendants occurred without any money being paid by the defendants to the second plaintiff.
- [6] Prior to the transfers, the Regatta Parade property was owned, as tenants in common, by the second plaintiff and the quadriplegic son of the defendants and his de facto wife. The second plaintiff held 11/20<sup>ths</sup> of that property. The son held 7/20<sup>ths</sup>, and his de facto wife held 2/20<sup>ths</sup>.
- [7] Prior to the transfers, the Yacht Street property was owned, as tenants in common, by the second plaintiff and the defendants. The defendants held 17/25<sup>ths</sup> of the property. The plaintiff held 8/25<sup>ths</sup> of the property.
- [8] The plaintiffs' case is that those transfers occurred for no valuable consideration or at below value. The defence case is that the transfers occurred pursuant to an agreement with Mr McIvor, on behalf of the second plaintiff. The defendants contend that subsequent to that agreement being entered into, they paid for substantial improvements to be undertaken to the dwelling on the property.

### **The pleading**

- [9] The further amended statement of claim seeks recovery of what is said to be the proper consideration for the transfers. That claim is not challenged in the present application. The pleading also seeks declarations and orders for compensation pursuant to the *Corporations Act 2001 (Cth) (Act)* on the basis the transfers were voidable transfers to defeat creditors, uncommercial transactions or unreasonable director related transactions.
- [10] The thrust of the plaintiffs' case is that the transfers occurred when Mr McIvor knew the second plaintiff was insolvent, and in circumstances where both the second plaintiff and the defendants intended to defraud the creditors of the second plaintiff. It is contended Mr McIvor acted in breach of his duties under sections 181 and 182 of the Act, and the defendants were knowingly involved in, procured or conspired with and aided Mr McIvor's contraventions.

### **Defendants' submissions**

- [11] The defendants submit the pleading, even allowing for the particulars, is deficient because it fails to plead material facts essential to establish the causes of action for breaches of director's duty, and the defendants being knowingly concerned in those breaches. There is no plea of dishonesty, which the defendants contend is an essential element of a contravention of section 181 of the Act, and no allegation of a subjective purpose to gain an advantage, as required by section 182 of that Act.
- [12] The defendants accept, for the purposes of the application, that these deficiencies may be rectified by a further amended pleading and do not press for summary judgment in respect of this aspect of the claim. However, the defendants do press for striking out of the present pleading of those causes of action.
- [13] The defendants submit the claim for compensation under section 1317H(1) of the Act is properly the subject of summary judgment. The plaintiffs' claim is based on a "but for" thesis, when the applicable law requires the common law test of causation. The defendants submit once that conclusion is reached, the plaintiffs' claim for relief based on a breach by Mr McIvor of his fiduciary duties must also fail.
- [14] In relation to the strike out application, the defendants submit the plea the defendants were knowingly involved in contraventions by Mr McIvor of his director's duties is liable to be struck out, as it fails to identify the acts or omissions of the defendants and fails to allege the requisite knowledge.
- [15] Finally, the defendants contend many of the paragraphs in the pleading are liable to be struck out on the basis they are prolix, contain irrelevant allegations, or are allegations lacking in precision.

### **Plaintiffs' submissions**

- [16] The plaintiffs submit the pleas of contravention of sections 181 and 182 of the Act are properly made. The law does not require dishonesty. In any event, the allegation the defendants conspired with Mr McIvor would suffice.
- [17] The plaintiffs further submit the claim for compensation pursuant to section 1317H of the Act is properly made. Once it is established the defendants were involved in Mr McIvor's contravention of his director's duties, they are liable to compensate the company. The plea does not rely on the "but for" test. It is properly premised on an allegation that as a result of Mr McIvor's contraventions, the second plaintiff suffered loss and damage.
- [18] Finally, the plaintiffs submit there is no basis to strike out any parts of the pleading. The relevant material facts are pleaded and the defendants know and understand the case they are required to meet. To the extent the pleaded facts constitute background facts, they are not prolix. Each is a necessary component to the ultimate claims made by the plaintiffs.

### **Discussion**

#### *Summary judgment of paragraphs 8, 9 and 10B of amended claim*

- [19] The claim for summary judgment was premised on a finding by the Court that the claims made under sections 79, 181 and 182 of the Act were not maintainable. The claim for compensation arises out of the allegation that the defendants were knowingly concerned in a breach by Mr McIvor of his director's duties under sections 181 and 182 of the Act.
- [20] A breach by a director of those obligations involves a consciousness that what is being done is not in the interests of the company, and deliberate conduct in disregard of that knowledge.<sup>1</sup> The requirement that the conduct be "to gain an advantage for themselves or someone else; or cause detriment to the corporation" requires the person alleging the breach to establish that the conduct was undertaken in order to gain that advantage or cause that detriment.<sup>2</sup> It must be established that was the subjective purpose of the conduct in question.
- [21] In order for another to be involved in the contravention by a director, it must be established that that conduct involved a subjective intention to act dishonestly or to act improperly and with the requisite purpose.<sup>3</sup> The requisite knowledge is of the actual events which constitute the contravention, although that knowledge may be inferred from the fact that the person is exposed to the obvious.

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<sup>1</sup> *ASIC v Maxwell & Ors* [2006] NSWSC 1052 at [107].

<sup>2</sup> *Chu v R* (1992) 173 CLR 626 at 632.

<sup>3</sup> *ASIC v Australian Investors Forum Pty Ltd* (2005) NSWSC 267 at [112].

[22] The plaintiffs contend the requisite knowledge has been pleaded in the further amended statement of claim. They rely, in particular, on paragraph 82 of that pleading:

“82. By reasons of the facts pleaded at paragraphs 11(b), 20 to 46, 49 to 53 and 55 to 58 above, the Defendants knew, by no later than 5 February 2012, that:

- (a) they were unable to redeem their Investments;
- (b) the EPF component of the Investment was worthless;
- (c) the EIF component of the Investment was worth between \$170,318.17 and \$230,430.46;
- (d) the secured creditors of Equititrust and entities controlled by Mr McIvor were enforcing their securities and demanding payment;
- (e) Equititrust, Ms Turner, Mr McIvor and the entities controlled by him were in severe financial distress;
- (f) the Second Plaintiff had a liability to MMH; and
- (g) the receivers of MMH could call in the loan from MMH to the Second Plaintiff.

#### Particulars

- (i) The Defendants had actual knowledge of each of those facts;
- (ii) In the alternative, such knowledge is to be inferred from the combination the paragraphs identified herein and the close family relationship of the Defendants, Mr McIvor, Ms Turner, Mr Turner and Ms Kenny such that it may be inferred that such significant events affecting Mr McIvor and the companies he controlled were discussed with, and known by, the Defendants.”

[23] Further, the plaintiffs have provided particulars of the actual and acquired knowledge:

“29. As to paragraph 29 of the Request concerning paragraph 82 of the Claim, the Plaintiffs say that:

- (a) the facts, matters and circumstances relied upon to support the allegations that the Defendants had actual knowledge of each of

the facts listed at paragraphs 82(a) to (g) are the facts pleaded at paragraphs 11(b), 20 to 46, 49 to 53 and 55 to 58 of the Claim;

- (b) the date the Defendants acquired actual knowledge of each of the matters alleged is wholly within the knowledge of the Defendants, but was acquired between the period 2010 to 22 February 2012 when the transfers were registered;
- (c) the manner in which the Defendants acquired actual knowledge of each of the matters listed at paragraphs 82(a) to (g) is wholly within the knowledge of the Defendants but may include:
  - (i) correspondence sent by Equititrust to the Defendants;
  - (ii) notices posted on the Equititrust website;
  - (iii) newspapers; and
  - (iv) conversations at unknown times between the Defendants and:
    - (1) Mr McIvor;
    - (2) Ms Turner;
    - (3) Brock Turner;
    - (4) Employees of Equititrust; or
    - (5) Other third parties.
- (d) otherwise rely upon the transcripts of the public examination of the Defendants and the s19 transcript of examination of the First Defendant;
- (e) as an answer to paragraph 29(b) of the Request, the Plaintiffs rely upon the particulars given in relation to paragraph 29(a);
- (f) further particulars will be provided, if possible, following the completion of interlocutory steps, including disclosure.”

[24] Whilst there is no doubt the plaintiffs have pleaded many facts which are alleged to support the plea that the defendants had actual or acquired actual knowledge sufficient to support an allegation that they were knowingly concerned in McIvor’s contraventions, a

consideration of the present pleading as a whole does not support the conclusion that it sufficiently apprises the defendants of the case that is to be met by them in respect of actual and acquired knowledge.

- [25] First, the particulars of the actual knowledge rely upon the same paragraphs in the pleading. That is hardly a sufficient further particular. Second, the facts relied upon are multiple. It is not apparent from within the pleading or the particulars how it is that the defendants are said to have had actual knowledge of all of those facts.
- [26] For example, paragraph 82 relies upon paragraphs 21, 22, 23, 24 and 25 of the pleading, which plead events at a meetings of directors of Equititrust held on 9 and 14 June 2011. It is not alleged the defendants attended either meeting or received minutes of those meetings. It is only alleged Mr McIvor attended one of those meetings. There is no plea as to the basis it is alleged the defendants had actual knowledge of those facts. Similar comments can be made in relation to paragraphs 39 and 40 of the pleading, which are also relied upon in paragraph 82 of the pleading.
- [27] Paragraph 82 also relies upon the facts pleaded in paragraphs 55 to 58 of the pleading. They relate to a Deed entered into between an entity controlled by Mr McIvor and his former wife, the defendants' daughter. Again, nothing in the pleading indicates the basis upon which it is alleged the defendants had actual knowledge of those events.
- [28] Whilst paragraph 82(g)(ii) seeks to rely, in the alternative, on a plea that knowledge is to be inferred from a combination of the paragraphs and the close family relations, such a general plea is inadequate to establish actual knowledge in circumstances where there is no plea suggestive of a basis for such knowledge. As was observed in *Mio Art Pty Ltd v Macequest Pty Ltd*,<sup>4</sup> it is not the proper function of a pleading to invite the reader to trawl through a lengthy historical account of facts to determine the case that is to be met at trial.
- [29] To the extent paragraphs 88, 89, 90 and 103(a) of the pleading repeat reliance upon the facts in paragraph 82, the above observations are also applicable. There are also other deficiencies in paragraph 103. Subparagraphs (f) and (g) allege the defendant "conspired" with Mr McIvor. The particulars of subparagraph (f) include a bald assertion the defendants knew various matters and that the conduct "is otherwise wholly within the knowledge of the defendants and Mr McIvor". Such a plea of what essentially amounts to an allegation of criminal conduct is wholly adequate. The obligation on a pleader in such circumstances is to plead the best particulars possible, not rely on a bundle of allegations without specificity in respect of each such allegation.
- [30] The defendants submitted the plaintiffs have no real prospects of success in respect of the claim for compensation under section 1317H of the Act, in any event, as that claim is reliant upon an allegation that "but for" the impugned transfers the company would have survived and not have suffered the losses which are quantified as all of the liquidators' "professional fees and outlays". However, the only loss or damage that may be the subject

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<sup>4</sup> [2013] QSC 2011 at [63].

of such a compensation order is loss or damage that has “resulted from” the defendants’ contraventions.<sup>5</sup>

- [31] That latter proposition may be accepted as correct at law. However, a consideration of the pleading does not support the applicant’s earlier contention that the claim for compensation is based upon an allegation that “but for” the impugned transfers the losses would not have been suffered by the company. Paragraph 105 of the further amended statement of claim specifically pleads that the loss and damage was “as a result of” Mr McIvor’s contraventions of the Act, and paragraph 107 asserts the defendants’ liability to compensate arises by reason of their involvement in those contraventions. Whilst paragraph 106 does use the words “but for”, that plea relates back to paragraph 105, which specifically pleads that it was as a result of those contraventions that the company suffered the loss and damages.
- [32] That said, a strict reading of paragraph 105 of the pleading does support the defendants’ contention that what is being claimed is all the professional fees and outlays of the liquidators of the company, in circumstances where the plaintiffs’ own claim is premised on an assertion the company was insolvent and therefore would have been placed into liquidation in any event.
- [33] The plaintiffs asserted in argument that what is sought to be claimed is only those professional fees and outlays incurred by the liquidators as a consequence of the company entering into the transactions sought to be impugned by this proceeding. Such a contention seems inconsistent with the inclusion of subparagraph (d) as a separate item to subparagraph (a) in paragraph 105 of the pleading. However, if the position be as the plaintiffs contend, paragraph 105 ought to be amended to clarify that allegation.
- [34] Whilst the pleading in its present form is deficient, the plaintiffs should be given the opportunity to address those deficiencies before the summary judgment application is determined. That will allow a determination on the best available pleading. To do otherwise is to merely invite yet another application in due course.

#### *Strike-out application*

- [35] The application to strike-out specified paragraphs in the pleading is conveniently divided into two groups. The first group relate to the alleged contraventions of sections 181 and 182 of the Act and the resulting claim for compensation. The second group relate to multiple paragraphs on the basis that they are pleas of evidence, are irrelevant, are prolix or are otherwise embarrassing.
- [36] For the reasons previously indicated, the application to strike-out the first group should await a consideration of the pleading in its final form, after the plaintiffs have had the opportunity to consider the matters raised previously in respect of the allegation of the

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<sup>5</sup> *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229 at [7311-2].

defendants being knowingly concerned in Mr McIvor's contravention and claim for compensation.

- [37] The second group is conveniently dealt with in the sections set out in the defendants' outline of submissions.

#### Paragraphs 10 to 13

- [38] These paragraphs deal with a Deed bearing a date 28 January 2010, entered into between the defendants and entities associated with Mr McIvor. Apart from paragraph 11(b), the amended pleading does not now appear to rely upon these paragraphs in support of a claim the defendants had a requisite knowledge. It is not apparent why those paragraphs now have any relevance to the plaintiffs' claim against the defendants.

#### Paragraphs 14 to 19

- [39] It is significant that many of these paragraphs were previously relied upon to support the claims that the transfer of the land was a transfer to defeat creditors, constituted a voidable uncommercial transaction, was an unreasonable director-related transaction and led to resulting or constructive trusts and a debt due and owing. However, the pleading specifically deletes reliance upon those paragraphs for those aspects.
- [40] Accordingly, it is not now apparent from the further amended statement of claim how these paragraphs are relevant to the claim against the defendant. Whilst they continue to be relied upon in respect of the allegation of contravention of an Act, it is not clear again from the pleading how they have relevance to that claim.

#### Paragraphs 20 to 60

- [41] Subject to the plaintiffs addressing the concerns previously identified, it is reasonably arguable that these paragraphs are relevant to the allegations made against the defendants. They are matters about which the defendants may be said to have had actual or acquired actual knowledge. They are not prolix. Their pleading is neither embarrassing nor prejudicial. They will not otherwise delay a fair trial of the proceeding.

#### Paragraphs 71 to 87

- [42] These paragraphs plead facts said to have occurred subsequent to the transfers the subject of the claim. They are specifically relied upon in support of the claims made against the defendants. It cannot be said that they are irrelevant. The pleading is neither prolix nor embarrassing or prejudicial. Their inclusion will not delay a fair trial of the proceeding.

#### Paragraphs 88 to 91

- [43] These paragraphs relate specifically to the claim that the transfer was to defeat creditors. The pleading is not by its terms prolix. It is also not embarrassing or prejudicial.

Paragraph 99

- [44] This paragraph relates to a claim for a resulting trust. It is said to be embarrassing as it is not pleaded in the alternative. Whilst it may be technically correct that it ought to be pleaded in the alternative, it cannot be said the pleading is embarrassing. It is clear what is alleged against the defendants. They know the case to be met by them in relation to the claim for a resulting trust. Its inclusion will not delay a fair trial of the proceeding.

**Conclusion**

- [45] Whilst paragraphs 10-19 do not presently have obvious relevance, the foreshadowed allowance of time for the plaintiffs to consider the deficiencies in the pleading means it is not appropriate to strike these paragraphs out at this time.
- [46] The application for summary judgment and/or strike-out should be adjourned to a date to be fixed, to be brought on after the giving of three business days' written notice, to allow the plaintiffs the opportunity to address deficiencies in the pleading. This will ensure the Court determines the application having regard to the best pleading the plaintiffs are capable of advancing against the defendants.
- [47] I shall hear the parties as to the form of orders and costs.