SUPREME COURT OF QUEENSLAND

CITATION:	*Eaton & Ors v Rare Nominees Pty Ltd* [2017] QCA 25
PARTIES:	**CHRISTOPHER JOHN EATON** (first appellant) **MODERN CITY HOLDINGS PTY LTD** ACN 122 023 803 (second appellant) **BELINDA JANE EATON** (third appellant) **v** **RARE NOMINEES PTY LIMITED AS TRUSTEES OF THE MACKELLAR FAMILY SUPERANNUATION FUND** ACN 094 976 833 (respondent) **E-COASTAL DEVELOPMENTS PTY LTD** ACN 105 138 056 (in liquidation) (not a party to the appeal)
FILE NO/S:	Appeal No 3537 of 2016 DC No 4799 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – Unreported, 24 March 2016
DELIVERED ON:	3 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2017
JUDGES:	Morrison and Philip McMurdo JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellants pay the respondent's costs of the appeal.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INTERLOCUTORY PROCEEDINGS – where the defendant applied for summary judgment and, in the alternative, to strike out the plaintiff's statement of claim – where the plaintiff had an arguable equitable interest in the property which was not properly pleaded – where summary judgment was refused because of the existence of the non-pleaded equitable claim – where the application to strike out the pleadings was refused because the plaintiff proposed to amend the pleadings in any event –

where costs were awarded against the defendant – whether the trial judge's discretion to order costs miscarried

COUNSEL: The first appellant appeared on his own behalf, and on behalf of the second and third appellants
B Hall for the respondent

SOLICITORS: The first appellant appeared on his own behalf, and on behalf of the second and third appellants
Robinson Locke Litigation for the respondent

[1] **MORRISON JA:** I have read the reasons of Philip McMurdo JA and agree with those reasons and the orders his Honour proposes.

[2] **PHILIP McMURDO JA:** The appellants are defendants in a proceeding in the District Court in which the respondent is the plaintiff. They applied for summary judgment, pursuant to r 293 of the *Uniform Civil Procedure Rules* (Qld), against the plaintiff for the entirety of its claims against them. Alternatively they applied to strike out the then statement of claim.

[3] A judge heard and determined those applications on 24 March 2016. He dismissed the application for summary judgment, rejecting an argument that the claims against the defendants had no prospects of success. He declined to strike out the statement of claim, not because it was in all respects satisfactory, but because the plaintiff said that it should and would be amended, so that it would be futile to consider it. The defendants' applications were thereby dismissed. His Honour ordered them to pay the costs of the applications.

[4] The defendants appealed against those orders. However by an amended notice of appeal, they abandoned their appeal against the refusal of summary judgment. They also abandoned their appeal against the dismissal of their application to strike out the statement of claim, save that they preserved their challenge to the pleaded case against the third appellant, Mrs Eaton. And they have persisted in their appeal against the costs order.

[5] The ground of appeal in relation to the claim against Mrs Eaton is expressed as follows:

> "(b) The primary judge erred in dismissing the applicants' application to strike out the third further amended statement of claim insofar as it concerned the third appellant because:
>
> (i) the learned judge wrongly dismissed the application on the basis that the respondent proposed to make unidentified further amendments to its statement of claim;
>
> (ii) the allegations against the third appellant (fourth defendant) did not disclose a cause of action, or alternatively had a tendency to prejudice a fair trial of the proceeding, and should have been struck out;"

The reasons of the primary judge

[6] The plaintiff's case was based upon a joint venture agreement for the development of land. The agreement was made between the plaintiff, another company which is the first defendant in the proceeding but which is in liquidation and not a party to

this appeal, and some other parties who are not involved in the proceeding. It was agreed that the first defendant would develop certain land and that it would pay to the plaintiff and the other parties to the agreement certain percentages of monies received by the first defendant from the land. Upon the plaintiff's case, the first defendant received monies and became obliged to pay to the plaintiff an amount of approximately $124,000. The plaintiff alleged that this sum was instead, as the primary judge described it, "syphoned off, essentially, to the pockets of the second, third and, rather more indirectly, fourth defendants." (The second defendant is Mr Eaton, the husband of the fourth defendant and the alleged controlling mind of the first defendant and of the third defendant, another company. Mrs Eaton is the fourth defendant.)

[7] As his Honour summarised the pleaded case, the claims against the defendants were upon the basis that the first defendant owed trust or fiduciary duties to the plaintiff, which were breached by the wrongful disposition of the plaintiff's $124,000, for which the plaintiff should have remedies tracing the funds into the hands of the second, third and fourth defendants.

[8] The application for summary judgment was made upon an argument that such a claim was bound to fail because it was irreconcilable with the express terms of the joint venture agreement, particularly clause 14 which provided that the first defendant would not hold any asset upon trust for the other parties and that none of them would have any "proprietary, beneficial or other interest" in the subject land.

[9] The primary judge identified the basis for the plaintiff's claim as clause 6 of the joint venture agreement, by which the first defendant charged the land with the due payment to the other parties (including the plaintiff) of all monies due and payable to them pursuant to the agreement. His Honour said that this charge would extend to the proceeds of sale of the land or any part of it. Consequently, he reasoned, pursuant to clause 6 the plaintiff had an arguable equitable entitlement to the proceeds of sale to the extent of $124,000. In turn the plaintiff could seek to trace those funds into the hands of the second, third and fourth defendants, who either took with notice of the plaintiff's interest or as a volunteer. In his Honour's conclusion, the joint venture agreement had not put paid to any arguable equitable entitlement to the funds; rather, clause 6 of the agreement arguably conferred that entitlement.

[10] As his Honour made clear, the case which he identified as sufficiently arguable as to require a trial, had not been pleaded, or at least adequately pleaded, in the then statement of claim. But he said that the plaintiff's prospects of success were to be assessed with a wider view and that under r 293:

> "Ultimately, it is not a question of whether there is, at the moment, a good cause of action pleaded or whether the particular cause of action that is pleaded is a good one. [Instead] it is a question of whether there is no real prospect of the plaintiff winning if the matter goes to trial."

He concluded as follows:

> "If one looks at the particular rights given by the agreement itself, they include equitable rights in respect of the assets and, hence, in respect of the proceeds of sale, and, in those circumstances, equitable relief is available. Accordingly, the application for summary

> judgment, in my view, is misconceived. It would certainly not be the case where I could be satisfied that the plaintiff has no real prospect of succeeding on all or part of the plaintiff's claim."

[11] His Honour then turned to the application to strike out the pleading. His Honour accepted that the pleading required some amendment, at least because it had not alleged the effect to be given to clause 6. He also referred to "an apparent deficiency" in the pleading against Mrs Eaton, in that it did not clearly identify the way in which she was said to have received some of the benefit of the subject claims by having them paid in reduction of a debt which, it was alleged, she and Mr Eaton owed to a bank. His Honour did not see it necessary to decide that last question or any other questions of the adequacy of the then pleading. Because it was clear that the plaintiff intended to further amend the statement of claim, in his view it would be "a complete waste of time to decide whether any part of the current statement of claim should be struck out".

The appellants' arguments

[12] It is argued that the primary judge was wrong to dismiss the application to strike out the pleading insofar as it concerned Mrs Eaton, because the allegations against her did not disclose a cause of action and the plaintiff had not identified any proposed amendment to its statement of claim which would have remedied that defect. By the Amended Notice of Appeal, the order sought in this Court is that the subject paragraphs of the then statement of claim (the third further amended statement of claim) be struck out.

[13] In my conclusion that argument should be rejected for two reasons. The first is that the dismissal of the application to strike out the pleading (including those parts pleaded against Mrs Eaton) was a discretionary one and it is far from demonstrated that there was an error in the exercise of that discretion. His Honour was not bound to consider the merits of any pleading arguments in the circumstances where his Honour had refused the application by each of the defendants for summary judgment, the plaintiff was permitted by the relevant procedural rules to further amend its pleading and it proposed to do so. Consistently with his conclusion on the summary judgment application, his Honour held that this was not a case where if the existing pleading were struck out, leave to replead could be refused. It was clearly open to his Honour to take the course which he did. A decision about the existing pleading against Mrs Eaton may have had some utility for a challenge to the next version of the pleading, but it could not have decided the outcome of that challenge.

[14] The second reason for dismissing that argument is that the then statement of claim has now been superseded by several iterations of the plaintiff's pleaded case. Within the Appeal Record there is a fourth further amended statement of claim to which the appellants filed an amended defence, rather than applying to strike it out. What is sought by this appeal is an order striking out parts of what is no longer the plaintiff's pleading.[1]

---

[1] It should be noted that there appears to be little difference between the pleaded case against Mrs Eaton in the fourth further amended statement of claim and that pleaded in the statement of claim which was before the primary judge. But this court does not have the current version of the statement of claim and nor is it asked to review any judgment which has considered it.

[15] The primary judge ordered the appellants to pay the costs of both the summary judgment application and the application to strike out of the statement of claim. His Honour reasoned as follows:

> "This is not a situation where the summary judgment application failed because of any material which was put in or only disclosed after the application was made by the plaintiff, nor was it a situation where there was an affidavit filed which may prove to be incorrect [at] the trial, but which can't be disbelieved on the summary judgment application. In that situation I'll sometimes reserve costs just in case the affidavit proves to have been false. The position really here was that the defendants tried to advance a particular argument … for summary judgment which has failed. In that situation costs should follow the event. I think that the defendants are putting too much emphasis on the state of the pleadings, which is not a matter of main concern for summary judgment."

Counsel then appearing for the appellants asked his Honour to clarify whether he was "ordering the costs of the summary judgment and strike-out application" pointing out that his Honour had "referred only to the summary judgment aspect of the application". His Honour then said:

> "Well, that was the main matter that I was concerned with today. The other one, as I say, went away because the pleading was going to be amended."

He therefore made an order in terms of the plaintiff's draft which provided for the defendants to pay the plaintiff's costs of the entirety of the application, to be assessed on the standard basis.

[16] For the appellants, who are now without legal representation, Mr Eaton argues that the primary judge erred in his identification of "the event", in deciding that the order which was made would result in costs following the event. He further argues that the primary judge allowed "extraneous matters that he regarded as material to sway his discretion, in particular his views formed from the respondent's (plaintiff's) claims in relation to the disputed actions of the first defendant and the second defendant." Next he argues that the exercise of the discretion under r 681 of the *Uniform Civil Procedure Rules* miscarried because the summary judgment application had been properly brought on the basis of the case as it was then pleaded and in the circumstance where the plaintiff had served a request for a trial date (thereby indicating that it would not further amend).

[17] As to the first of those arguments, his Honour's reference to "the event" was to the summary judgment application and it was the costs of that application which he was then discussing. There was no error in that respect.

[18] The second of those arguments cannot be accepted: there is no indication that his Honour's costs order was affected by some prejudicial view of the conduct of any of the defendants.

[19] The third of those arguments has some substance but is ultimately unpersuasive. It is true that the case identified by his Honour for trial had not been in all necessary respects pleaded. But his Honour was correct to observe that the application for judgment had been brought upon an argument as to the effect of the joint venture agreement which the court had not accepted. For that reason, it was within his Honour's discretion to order that the defendants pay the costs of that application.

[20] It should also be noted that his Honour made a costs order in the appellants' favour. The plaintiff had cross-applied for orders to have the proceeding listed for trial. It did not ultimately press that application, but instead acknowledged that its pleading should be further amended. It was ordered to pay the costs of that application. In that way, there were costs consequences for the plaintiff because of the state of its then pleading.

[21] In my view, there was no error by the primary judge in ordering the appellants to pay the costs of their application.

Orders

[22] None of the grounds of appeal in the amended notice of appeal is established. I would order that the appeal be dismissed and that the appellants pay the respondent's costs of the appeal.

[23] **BODDICE J:** I have read the reasons of Philip McMurdo JA. I agree with those reasons and the proposed orders.