SUPREME COURT OF QUEENSLAND

CITATION:	*Freitag v Bruderle & Anor* [2011] QCA 313
PARTIES:	**SVARGO KLAUS FREITAG as administrator of the Estate of GUNTER MULLER** (appellant) **v** **DIETHARDT EUGEN BRUDERLE** (first respondent) **PARS PRO TOTO PTY LTD** ACN 010 859 579 (second respondent)
FILE NO/S:	Appeal No 5635 of 2011 SC No 165 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	4 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	13 October 2011
JUDGES:	Margaret McMurdo P, Chesterman JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CORPORATIONS – SHARE CAPITAL – SHARES – VALUATION – where the appellant brought proceedings against the respondents as the administrator of the deceased's estate – where the deceased was a shareholder of the second respondent company – where the appellant claims a number of shares were issued below par to the first respondent – where the appellant sought orders for the company to be wound up and for the first respondent to pay the second respondent the unpaid amounts owing for his shares – whether the shares were issued to the first respondent below par value CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – where the appellant alleges the first respondent breached fiduciary and statutory duties as a director – whether the first respondent owed statutory and fiduciary duties to the deceased's estate

Company Law Review Act 1998 (Cth), s 1427
Corporations Act 2001 (Cth), s 232, s 233, s 234, s 236, s 237, s 254B, s 254C
Limitation of Actions Act 1974 (Qld), s 38
Uniform Civil Procedure Rules 1999 (Qld), r 658

Brunninghausen v Glavanics (1999) 46 NSWLR 538; [1999] NSWCA 199, considered
Crawley v Short (2009) 262 ALR 654; [2009] NSWCA 410, cited
Percival v Wright [1902] 2 Ch 421, cited

COUNSEL: The appellant appeared on his own behalf
The first respondent appeared on his own behalf and in his capacity as director of the second respondent

SOLICITORS: The appellant appeared on his own behalf
The first respondent appeared on his own behalf and in his capacity as director of the second respondent

[1] **MARGARET McMURDO P:** The appeal should be dismissed for the reasons given by Chesterman JA.

[2] **CHESTERMAN JA:** The late Gunter Muller ("deceased") died intestate in a motor car accident on 25 April 1990. He and the first respondent Mr Bruderle had been friends and were shareholders in the second respondent ("company"). The appellant who was the plaintiff in an action commenced against the respondents in the Cairns Registry of the Supreme Court on 3 April 2009 brought the claim as administrator of the deceased's estate.

[3] None of the appellant or the respondents has been legally represented, a fact which has made an understanding of the issues in the appeal unusually difficult. The first respondent was given leave to appear for the company.

[4] The claims which the appellant sought to bring against the respondents arose out of the deceased's shareholding in the company. According to the Further Amended Statement of Claim ("SOC") the deceased held 80 ordinary shares which had been issued to him in return for payment of their par value of $1,000 each. The company was apparently formed to implement a joint venture between the deceased and the first respondent to buy land and develop it as a "health and healing centre". The SOC alleged that in June 1989 the company bought a 160 acre property for a price of $140,000; $100,000 of which was obtained by way of two loans each secured by registered mortgage. It was also alleged that the deceased made substantial improvements to the property by constructing a dam and building a shed, and that after his death the deceased's mother and sister travelled to Cairns from Germany and met with the first respondent.

[5] The SOC pleaded:

> "12. On or about … 6th May 1990, The First (respondent) visited the deceased's mother and sister … promising (them) that:
>
> …

(b) The First (respondent) will not sell the property, but develop it as the deceased intended.

…

12A. Relying on the assurances … the deceased's mother and sister agreed to cooperate … in the development of the property and not immediately seek repayment of the $80,000 paid by the deceased for the 80 shares and compensation for the cost of improvements made … to the property until after the First (respondent) had finalised the development of the property.

…

14. The First (respondent) … gave to the (appellant) and the deceased's mother and sister a piece of paper showing the share structure of the Company who owned shares in the Company and further represented …

(h) That the company had no liquid funds …

(i) That the First (respondent) had … met people who would be interested in the … idea of a Health and Healing Centre that the First (respondent) would set up on the property.

(j) That the First (respondent) would create a profitable business.

(k) That if the deceased's mother and sister leave the deceased's money in the company (they) would … recover such monies at a later stage after the First (respondent) had completed his business development.

(l) That the improvements the deceased had made … would not be lost and the First (respondent) would make use of (them) … in his proposed development … ."

[6] The SOC then pleaded that the deceased's mother and sister accepted the assurances and representations and agreed not to "immediately seek repayment of the $80000 paid by the deceased for the 80 shares and compensation for the cost of improvements …".

[7] Paragraph 17 pleaded a breach of the "assurances promises and representations" by the first respondent in that he did not develop the property but sold it on 26 June 1990 for $185,000 without informing the appellant or the deceased's mother and sister of the sale. Paragraph 17A alleged that:

> "Following the sale of the property the First (respondent) did not account … for any part of the proceeds of the sale … . Instead (he) paid the proceeds of sale of the property to himself and other shareholders and excluded any payment to the estate of the deceased."

Particulars of the payments were pleaded but it is not necessary to set them out.

[8] The respondents took the point in the defence that the appellant's claims were barred by operation of the *Limitation of Actions Act* 1974 ("*Limitation Act*"). That defence was set down for determination as a preliminary point and on 31 May 2011 Jones J found the action had been brought out of time and gave judgment for the respondents in the whole of the claim, pursuant to *UCPR 658*.

[9] The appellant had relied upon s 38 of the *Limitation Act* which provides for postponement of the limitation period where the cause of action is concealed by fraud. The section reads:

> "(1) Where in an action for which a period of limitation is prescribed by this Act –
>
> (a) the action is based upon the fraud of the defendant … ; or
>
> (b) the right of action is concealed by the fraud of a person referred to in paragraph (a); or
>
> (c) …;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or, … could with reasonable diligence have discovered it."

[10] The trial judge found that the appellant knew of the existence of the alleged cause of action, or could with reasonable diligence have known of it, by 1992 when he received a report from Messrs Hall Chadwick, Chartered Accountants, who had been retained to investigate the payments made from the proceeds of the sale of the company's land.

[11] It is not necessary to discuss the trial judge's reasons, or the facts, or the operation of s 38, because the appellant conceded at the commencement of the appeal that his claim was based upon the paragraphs of the SOC which I have quoted or summarised was properly struck out.

[12] The appellant's pleaded claims for relief in respect of the alleged misapplication of the proceeds of sale of the land, and for compensation for the deceased's improvements to it, faced difficulties in addition to the expiration of the limitation period.

[13] Those which relate to the second claim might have been overcome by suitable amendments though there must be a doubt whether, after the lapse of 20 years, evidence would be available to support the necessary additions to the SOC. The problem here is that no basis for the recovery of the value of the improvements, or even their value, was pleaded. Depending on the facts a claim in restitution as for a *quantum meruit* might have been available but the applicant has given no indication of the factual background to the deceased's making the improvements which might support such a claim.

[14] More serious problems attended the claim to recover the alleged misapplication of the proceeds of sale. The applicant represents the deceased shareholder. If the

company's monies, the proceeds of sale, were misapplied the proper plaintiff was the company, not a shareholder who would have no claim to the company's money. The applicant has not, as far as the material shows, sought to persuade the company in general meeting to commence proceedings to recover its money nor has he sought to make use of s 236 of the *Corporations Act* 2001 by seeking leave from the court pursuant to s 237 to bring an action on behalf of the company. Nor has he sought to make use of sections 232-234 on the basis that paying the company's money to some shareholders but not to the deceased was oppressive conduct which the court might have redressed.

[15] These questions were not addressed in oral or written submissions and may be ignored given the appellant's concession that the claims in question were brought out of time.

[16] During the hearing the appellant advanced a different claim which he had not addressed to the primary judge. It was mentioned, if obliquely, in the SOC and arises from complaints of irregularities in the shareholding of the company brought about by the first respondent. The dealings in the company's shares are said to have had the effect of diluting the deceased's estate's stake in the company and/or in reducing the value of the deceased's share in the capital of the company.

[17] The appellant's argument was that "some parts of the pleading are not out of time, especially p26.(e); p26.(f); p26.(j); p26.(l); p26.(m); p26.(n); p29; p35; p38; and p40" of the SOC.

[18] The relevant parts of those paragraphs plead:

> "26. The First (respondent) has committed numerous irregularities pertaining to the company shares … with the purpose of concealing information from the (appellant) as to the actual shares held by the First (respondent) or any other shareholder … loans … in favour of the First (respondent) with the company and payments made to other shareholders ... for the purpose of obtaining benefits for himself … .
>
> **Particulars**
>
> …
>
> e. in the 2002 … and subsequent annual returns … The First (respondent) declared the total amount paid for the then 400 issued shares as $82,775; this is $925 less than the $83,700 reported as paid for 205 issued shares in the 1999 annual return; The First (respondent) further declared … the amount unpaid for the 400 issued shares to be nil instead of $317,225;
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> f. the First (respondent) has declared in documents … lodged with ASIC that he is the owner of 320 ordinary shares in … the Company register … as at May 2009 … shows (three named individuals) to be continuing shareholders and there is no record of any transfer of these shares to the First (respondent).
>
> …

j. (The company) has since 15 August 2003 contrary to the Articles of Association … only had one director … when two directors are required.

…

l. In March 2000 the First (respondent) … issued 195 shares to himself with a total par value of $195,000 and declared them to be fully paid with the amount of $195 which is in breach of Paragraph 5 of the Articles of Association … which requires the Company's directors to issue shares … at par or at a premium;

m. Subsequent to the share allotment in paragraph (l) the total amount paid for all shares, as reported in the … annual returns, was reduced from $83,700 to $82,775

n. In the 2000 … and all subsequent annual returns the First (respondent) changed the status of his previous partly paid shares to … fully paid without the … payment of the unpaid amount of $122,500

…

35. The (appellant) … assumed that the company was de-registered, until … in or about 2008 … .

…

38. In his capacity as Director … and … agent of the deceased's estate the First (respondent) owed the (appellant), the deceased's mother and sister a fiduciary duty and a statutory duty to act:

a) in good faith and in the best interests of the shareholding of the … estate …;

b) with bona fides in the exercise of his discretion; and

c) to avoid a conflict of interest in duty

…

40. The conduct of the First (respondent) set out in paragraph … 26 was … in breach of (his) fiduciary and statutory duties … in that:

a) the First (respondent) acted in a conflict of interest in duty in relation to dealings between himself, the Company and the (appellant);

b) the Plaintiff being entitled to being a shareholder in the Company … has been deprived of dividends and a return on capital on the shares held by the deceased;"

[19] The relief which the appellant now seeks in respect of these parts of the SOC are orders (i) that the company be wound up; and (ii) the first respondent pay the company the sum of $317,225 "being the unpaid amount owing by the (f)irst (respondent) for shares held by (him)."

[20] Although the appellant now contends that the identified parts of the SOC give rise to a separate cause of action which has not been brought out of time it is far from clear that that was the use made of those parts of the SOC at the hearing before Jones J. They seem, rather, to have been part of the appellant's argument that the first respondent's misuse of the company's money was concealed from him by fraud so that time did not run pursuant to s 38 of the *Limitation Act* until a date not more than six years before the commencement of the action. The primary judge dealt with the allegations in paragraph 26 on that basis, and on the additional basis that the complaints made in paragraph 26 did not demonstrate how the appellant has suffered loss, and the allegations were "not supported by any evidence as to the value of the shareholding or how the changes caused any detriment or loss to the deceased's estate."

[21] The point which the appellant now wishes to advance is, apparently, that the first respondent caused the company to issue shares to him which he only partly paid for. The number of shares was either 400, or 195, or the total of those numbers, 595. It is pleaded that he paid nothing, or only $1 per share, in breach of the company's Articles of Association which required shares to be issued at par or at a premium. The par value of the shares fixed by the articles was $1,000. The consequence is, as I understood the argument, that the first respondent would be liable to pay the unpaid balance of the issue price of the shares to the company in the event of a winding up. The amount is said to be $317,225 but other amounts are referred to in the SOC. It is not clear what number of shares the appellant complains were issued below par, or what the unpaid balance is said to be. The logic behind the appellant's claim must be that if the company is wound up and the liquidator calls for, and is paid, the unpaid balance due on the issued shares there will be a surplus of capital to be distributed to shareholders, including the deceased's estate.

[22] The first respondent opposes the appellant advancing this argument for the first time on appeal but argues anyway that the claim is misconceived. Before dealing with the respondent's objections it is convenient to notice the contents of paragraphs 38 and 40 of the Statement of Claim on which the appellant also relies.

[23] Paragraph 38 alleges fiduciary and statutory duties were owed by the first respondent as director "and as agent of the deceased's estate" to the appellant and the deceased's mother and sister. The duties were to act in good faith and in the best interests "of the shareholding of the deceased's estate."

[24] Paragraph 40 alleges that the first respondent's conduct described in paragraph 26 breached his fiduciary and statutory duties, as a result of which "the deceased's estate has been deprived of dividends and a return on capital … ."

[25] The basis for the complaint about dividends is unexplained in the SOC and can be ignored. The loss of capital is, I apprehend, a reference to the complaint that the first respondent did not pay the full par value of the shares issued to him.

[26] The allegation that the first respondent's conduct in paying $1 each rather than the full par value of the shares was somehow a breach of statutory or fiduciary duty to the deceased's estate appears irrelevant. If unpaid or partly paid shares had been issued the company or its liquidator could make a call for the unpaid balance. The first respondent's motive in having the company issue the shares is immaterial to the right to make the call. It may have been germane to a claim to have the share issues set aside for misconduct, but no such claim is made, and setting the issue

aside would, in any event, defeat the appellant's strategy of having the company wound up in order to enforce the first respondent's obligation to pay the unpaid balance of the shares.

[27] There is another difficulty with paragraphs 38 and 40. No basis is pleaded for the existence of a fiduciary duty owed by the first respondent, as director, to the deceased's estate, a shareholder. A director owes statutory and fiduciary duties to his company but, as a general rule, does not owe any fiduciary duties to a shareholder: see *Percival v Wright* [1902] 2 Ch 421. There may be circumstances in which a course of dealing between a director and a shareholder does give rise to a relationship imposing on the director a fiduciary duty *vis-à-vis* the shareholder. *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 was such a case. The principle it established was said to be beyond dispute in *Crawley v Short* [2009] NSWCA 410 at [102]. However nothing is pleaded to show the "particular factual circumstances" which might give rise to such a duty in the first respondent in favour of the deceased's estate.

[28] Although agency is an established relationship which gives rise to fiduciary duties, and paragraph 38 alleges that the first respondent was agent for the deceased's estate, no basis of fact is pleaded to support that assertion, or the consequence that, because he was agent for the estate he owed the deceased's mother and sister a fiduciary duty.

[29] Accordingly paragraphs 38 and 40 of the SOC add nothing to the plea in paragraph 26 for the winding up of the company and the payment by the first respondent of unpaid capital.

[30] This claim, too, appears to be baseless.

[31] The cornerstone of the appellant's argument is that the company, by its articles, could only issue shares at their par value of $1,000, or at a premium. They were, it is alleged, issued at a price of $1 each.

[32] The appellant's argument overlooks changes made to the *Corporations Act* by the *Company Law Review Act* 1998 ("*Review Act*") which among other changes abolished the concept of par value for company shares. The *Review Act* added s 254C to the *Corporations Act*. That section provided:

> "Shares of a company have no par value."

A consequence of the abolition of par value is that companies cannot issue shares "at par". Par value ceased to exist as a means of determining the minimum price at which shares could be issued. A company's Articles of Association requiring shares to be issued at par or above could have no operation or effect from 1 July 1998 when the *Review Act* became law.

[33] Prior to the *Review Act* a company with share capital had to state in its Memorandum of Association the amount of its authorised share capital and how that capital was divided among shares and classes of shares. That requirement was also abolished. Section 1427 of the *Review Act* provided that:

> "(1) Any provisions in a company's constitution stating the amount of the company's share capital, and dividing that share capital into shares of a fixed amount, are repealed on commencement."

[34] The capacity of a company to issue shares at any value regardless of "par value" appearing in its Articles of Association is confirmed by s 254B of the *Corporations Act* which was also introduced by the *Review Act*. That section provides:

> "(1) A company may determine:
> (a) the terms on which its shares are issued; and
> (b) the rights and restrictions attaching to the shares."

[35] The consequence of these changes is that a company with share capital can issue shares on whatever terms and at whatever price it decides. The company could therefore issue fully paid shares to the first respondent at $1 each. It was lawfully authorised to do so and would not be in breach of its articles if it did. The shareholder to whom shares were issued on that basis would not be liable to pay any further amount on the shares.

[36] The only basis for the appellant's contention that there are monies unpaid on the shares which could be recovered on a winding up is that they were issued below their par value. That contention is untenable.

[37] There is no point in varying the orders made by the primary judge to allow the appellant to pursue the claims adumbrated in paragraph 26 of the SOC. They could not succeed. The appeal should be dismissed. As neither party was legally represented there should be no order as to costs.

[38] **McMEEKIN J:** I agree with the reasons of Chesterman JA and the orders proposed.