SUPREME COURT OF QUEENSLAND

CITATION:	*Barton v Atlantic 3 Financial (Aust) Pty Ltd* [2004] QSC 376
PARTIES:	**NATHANIEL KELBURN DUNBAR BARTON** (Plaintiff) v **ATLANTIC 3 FINANCIAL (AUST) PTY LTD** **ACN 056 262 723** **(IN LIQUIDATION)** (Defendant)
FILE NO/S:	S6621 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	3 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2004
JUDGE:	Moynihan J
ORDER:	**1. A declaration that the assignment, pursuant to a deed dated 9 January 2004, by the defendant to Atlantic 3 Funds Management Limited ACN 092 110 097 ("A3FM") of the defendant's choses in action as regards the plaintiff in respect of such choses in action after:** **a. the taking into account of the amount(s) due from the defendant to the plaintiff, both in his own right and as assignee (the amount(s) so due including any amount(s) that may, in this proceeding, be determined as payable by the defendant to the plaintiff for damages, interest or costs); and** **b. the setting-off of the amount(s) so due from the defendant to the plaintiff against the amount(s) due by the plaintiff in respect of such choses in action.** **2. That:** **a. this proceeding be re-activated under Practice Direction 4 of 2002;**

b. A3FM be included as the second defendant to this proceeding (pursuant to rule 69 of the *Uniform Civil Procedure Rules*);

c. Atlantic 3 – Financial (Aust) Pty Ltd (in liquidation) be hereafter styled the first defendant in this proceeding;

d. the plaintiff have leave (under section 4711B of the *Corporations Act*) to proceed with his claim herein against the first defendant, together with any further claims he may make against the first defendant by way of an amended claim;

e. the plaintiff have leave (under rule 377 of the *Uniform Civil Procedure Rules*) to amend his claim herein to include a further claim against the first defendant for damages for breach of duty under section 85 of the *Property Law Act* 1974 (Qld) as a "person damnified" within the meaning of that section; and

f. the parties' costs of and incidental to this application be their respective costs in the cause.

CATCHWORDS: DEEDS – FORM AND EXECUTION – whether the plaintiff was only effective to assign to the defendant any balance due by the plaintiff

Corporations Act 2001 (Cth)
Insolvency Act 1986 (UK)
Property Law Act 1974 (Qld)
Uniform Civil Procedure Rules 1999 (Qld)

Atlantic 3-Financial (Aust) Pty ltd v Deckhurst Pty Ltd [2003] QSC 182
Austral Brick Co Pty Ltd v Falgap Constructions Pty Ltd (1990) 21 NSWLR 389
Citicorp Australia Ltd & Anors v Official Trustee and Bankruptcy & Anor (1996) 71 FCR 550
Collins & Anor v G Collins & Sons Pty Ltd 9 ACLR 58
GM and AM Pearce & Co Pty Ltd v RGM Australia Pty Ltd [1998] 4 VR 888 (Court of Appeal)
Gyre v MacIntyre (1991) 171 CLR 609
Higton Enterprises Pty Ltd v BFC Finance Limited 1997 1Qd.R 168
Krextile Holdings Pty Ltd v Widdows [1974] VR 289
Martin v Lewis (unreported) Appeal 57 of 1984
Metal Manufacturers Ltd v Hall & Hall (2002) 41 ACSR 466
Re Capel; Ex parte Marac Finance Australia Ltd v Capel & Anor (1994) 48 FCR

Stein v Blake [1996] 1AC 243

COUNSEL: Mr C Wilkins for the Plaintiff

Mr P Lynch (Solicitor) for the Defendant

SOLICITORS: Porter Davies Lawyers for the Plaintiff

Lynch & Company Solicitors for the Defendant

[1] The plaintiff seeks a declaration that:

> An assignment, pursuant to a deed dated 9 January 2004, by the defendant (Atlantic 3 Financial (Aust) Pty Ltd) ("A3") to Atlantic 3 Funds Management Limited ("A3FM") of A3's choses in action "as regards" the plaintiff was only effective to assign to A3FM any balance due by the plaintiff after:
>
> (a) taking into account of the amounts due from A3 to the plaintiff, both in his own right and as assignee including any amounts that may be determined as payable by A3 to the plaintiff for damages, interest or costs; and
>
> (b) setting-off the amounts so due from A3 to the plaintiff against the amounts due by the plaintiff in respect of such choses in action.

[2] The plaintiff seeks, in the alternative, a declaration that the assignment was subject to an equity constituted by the plaintiff's right of set-off against A3.

[3] Paragraph 3 of the application seeks relief in respect of what might be described as a number of machinery matters. They are:

(a) the proceeding be re-activated under Practice Direction 4 of 2002, Case Flow - Civil Jurisdiction (the Practice Direction).
(b) A3FM be included as the second defendant to the proceeding;
(c) A3 be hereafter styled the first defendant in this proceeding;
(d) the plaintiff have leave (under section 471B of the *Corporations Act*) to proceed with his claim herein against A3, together with any further claims he may make against A3 by way of an amended claim;
(e) leave to amend the plaintiff's claim to include a further claim against A3 for damages for breach of duty under section 85 of the *Property Law Act* 1974 (Qld) as a "person damnified".
(f) the parties' costs of and incidental to this application be their respective costs in the cause.

[4] The declarations are founded on the consequences of operation of s 553C of the *Corporations Act* 2001 (Commonwealth) (the *Corporations Act*) and the stay of an order winding up A3.

[5] Put shortly, A3FM is the assignee from A3 of rights the subject of a compromise of proceedings in the Supreme Court of New South Wales in which the plaintiff here was the plaintiff and A3 was a cross claimant.

[6] Before an assignment of 9 January 2004 the plaintiff had cross claims against A3 (both in his own right and as assignee) which, if established, could have been utilised by way of equitable set off, counter claim or separate claim to reduce or recoup his liability to pay A3 the $420,000 under the compromise. The plaintiff seeks the declarations set out above to maintain that advantage.

[7] Mr P G Lynch, solicitor, appeared for A3FM; his position was that if the application to re-activate the proceedings was successful he did not oppose the joinder of his client. He accepted the availability of equitable set off "under the general law".

[8] It is logical to commence by dealing with the procedural matters raised by paragraph [3] of the application, starting with reactivation. The need for activation arises as a consequence of the operation of the Practice Direction.

[9] On 23 February 2004 the Registrar sent an intervention notice under the Practice Direction because a request for trial date had not been filed within 180 days of the defence. The then solicitors for the plaintiff responded on 10 March 2004 stating that A3 had gone into liquidation and referring the institution of the proceeding in the Supreme Court of New South Wales. They requested that the matter be listed for further directions.

[10] The Registrar responded on 17 March 2004 extending the time for a request for a trial date to be filed to 15 June 2004 "so as to allow the plaintiff to consider his position." The letter advised that should a further extension be necessary a failure to seek it would result in the issue of a notice under the Practice Direction deeming the proceedings to be resolved.

[11] On 24 June 2004 the Registrar wrote to the current solicitors for the plaintiff extending the time to file a request for trial date to 15 August 2004. The letter restated the need to obtain a further extension if the matter remained unresolved or no application for trial was filed. The letter reiterated that a notice deeming the proceeding to be resolved would issue if an extension was not applied for before the extended date.

[12] There was no further communication with the Registrar on the plaintiff's behalf and on 16 August 2004 a notice issued deeming the proceedings resolved. It drew attention to paragraph 5.4 of the Practice Direction dealing with the reactivation of the proceedings.

[13] Paragraph 5.4 provides that a proceedings deemed resolved may be reactivated by an application, supported by affidavit material explaining and justifying the circumstances in which the proceedings were deemed resolved and proposing a plan to facilitate a timely determination. The Registrar may then reactivate the proceeding and give directions or refer it to a judge. The plaintiff did not apply to the Registrar but has included a claim in this application.

[14] The events to which give rise to this application are complex. They flow from the winding up of unlawful investment schemes. They have been the subject of many applications to this court in respect of the liquidation of a number of schemes and corporate entities associated with them. It is not necessary to embark on an examination of those matters for the purpose of deposing of these applications.

[15] Against this background, the plaintiff submits that the delays which led to the intervention notice of 16 August were "quite understandable". The proceedings were commenced on 25 July 2003. A defence was filed on 25 August. The plaintiff had commenced the proceedings in New South Wales on 29 November 2000 against A3 which in turn cross claimed. There were interlocutory applications before those proceedings were compromised in May 2003.

[16] The plaintiff's material refers to confusion as a result of misinformation from the liquidators of A3 about the assignment to A3FM; it had taken place before the appointment of the liquidators. Given the complexity of matters that confusion is understandable. The confusion was only clarified on 23 July 2004.

[17] The plaintiffs' affidavits in support of this application may be accepted as explaining and justifying the delay which led to the action being deemed to be resolved although they cannot be said to entirely explain why there was no timely response to the Registrar's notification. This application itself may be seen to constitute facilitation of the efficient determination of the proceeding in terms of the Practice Direction from now in a timely way.

[18] As White J remarked in *Atlantic 3-Financial (Aust) Pty ltd v Deckhurst Pty Ltd* [2003] QSC 182 the profession needs to be alert to their responsibilities under PD 4 of 2002, comply with notifications and follow the scheme of the Practice Direction. To that I would add that reinstatement should not be treated as a formality or taken for granted. Failure to comply with paragraph 5.4 may result in an action not being reinstated with adverse consequences for client and practitioner.

[19] In the circumstances of this case I will not require the plaintiff to apply to the Registrar for reinstatement although there is merit in Mr Lynch's submission that there are strong policy reasons for enforcing strict compliance with the Practice Direction.

[20] I have now heard argument on the application. To send the Practice Direction paragraph 5.4 issues back to the Registrar would involve the Registrar canvassing some aspects of the complex issues I have referred to and voluminous material which relates not only to reinstatement but to other relief. The Registrar may decide to refer reinstatement to a judge.

[21] That being so, the philosophy of *Uniform Civil Procedure Rules* R 5 (1) and (2) is best served by my dealing with reinstatement in this case. As I indicated earlier, the requirements of paragraph 5.4 of Practice Direction 4 of 2000 are satisfied by the plaintiff's material and I order the reactivation of the action. This decision should not be seen as providing any encouragement of other than strict compliance with the requirements of the Practice Direction.

[22] I do not understand the orders in 3(b) (c) and (d) to be opposed and it is appropriate to order in terms of those subparagraphs. As to paragraph 3(e) the plaintiff wishes to add a personal claim as a guarantor "damnified" within the meaning of s 85 of the *Property Law Act; Higton Enterprises Pty Ltd v BFC Finance Limited* 1997 1Qd.R 168. No limitation issue arises, I give leave to make the claim.

[23] I turn now to consider the claims for declaratory relief. As I have indicated the outcome turns on the interaction between s 553C of the *Corporations Act* and an order made by Mullins J on 25 November 2003 for the winding up of A3 under s 461(1)(k) of the *Corporations Act* appointing liquidators and staying the commencement of the winding up under s 482 (1) until 12 January 2004 or earlier order. Before considering that interaction it is necessary to say something more about the facts.

[24] The plaintiff's affidavit filed on 20 August 2004 provides a comprehensive and useful chronology but the following summary, at the risk of some over simplification and is sufficient for present purposes.

[25] The plaintiff incurred liabilities as to A3 as principle debtor and surety for Loawave Pty Ltd which were secured over the plaintiff's New South Wales property. These arrangements were reflected in what is called in the chronology the Secured Deed of Loan. A3 exercised its rights as mortgagee in respect of default of Loawave. It sold Loawave's land the subject of the security. The plaintiff defaulted under his loan and A3 moved to protect its position by recourse to its security over the plaintiff's land.

[26] On 29 November 2000 in the New South Wales Supreme Court the plaintiff sought orders that the Second Deed of Loan and the registered bill of mortgage over his property be set aside or varied. Further, or in the alternative, he sought damages for breach of the Second Deed of Loan, equitable compensation and damages against A3 and a declaration the mortgage was unenforceable. A3 cross-claimed for possession of the property relying on defaults under the mortgage. It is unnecessary to trace these proceedings in detail.

[27] On 28 May 2003 Loawave assigned its rights in any proceedings against A3 for damages for breach of the Second Deed of Loan and for damages for breach of agreement and for breach of s 85 of the *Property Law Act* 1974 to the plaintiff and gave notice of the assignment.

[28] On 6 June 2003 A3 accepted the plaintiff's offer to settle the New South Wales proceedings. The offer had been made on 21 May 2003.

[29] On 27 May 2003 McMurdo J ordered Messrs Moloney and Geroff to report to the Court regarding specified managed investment schemes, including that in which the plaintiff was involved, operated by A3. They had reported by 16 July 2003.

[30] On 17 July 2003 Fryberg J ordered the winding up of 15 managed investment schemes conducted by A3 (one of which was the scheme involving A3's loan to the plaintiff), but did not decide the identity of the liquidators.

[31] On 19 August 2003 Mullins J appointed Messrs Moloney and Geroff to wind up certain of the schemes that Fryberg J had ordered be wound up. As to the scheme involving the plaintiff's loan Her Honour left A3 to wind it up (under the supervision of Messrs Moloney and Geroff), by recovering the $420,000 debt from the plaintiff.

[32] Then on 25 November 2003 Mullins J ordered that A3 be wound up under s 461(k) of the *Corporations Act*, appointed liquidators and stayed the commencement of the winding up until 2 January 2004 or earlier order, in the event there was no earlier order. Finally, on 9 January A3, by Deed of Assignment, assigned its choses in action as regards the plaintiff to A3FM.

[33] As I said earlier before the assignment of 9 January 2004 the plaintiff had cross claims against A3 (both in his own right and as assignee) which if established could have been utilised by way of equitable set off, counter claim or separate claim to reduce or recoup his liability to pay A3 under the compromise.

[34] Although he would have been entitled in equity to set off pro tanto under s 85(3) of the *Property Law Act* against the $420,000 in respect of his liability as guarantor he may have been unable to do so in respect of his liability to A3 as principle debtor. It is, however, unnecessary for present purposes to resolve that issue.

[35] It may be inferred that the assignment from A3 to A3FM left A3 with insufficient funds to meet the plaintiff's claims and therefore, at least to some extent, operated to prevent the plaintiff from utilising his cross claim. This is because on 14 November 2003 Mullins J restrained A3 from transferring the remainder schemes to A3FM and the consent winding up order of 25 November 2003 included, in para 2 (c), protecting an equitable lien.

[36] Put shortly, it is submitted that if A3 was insolvent before 9 January 2004 or became insolvent as a result of transferring the remainder schemes, then the plaintiff has suffered injustice by A3's transfer of the remainder schemes to A3FM.

[37] I now turn to consider whether the plaintiff is entitled to one of the declarations he seeks in paras 1 and 2. In doing so I note the orders made by Fryberg J on 17 July 2003 winding up the remainder schemes and by Mullins J on 19 august 2003 appointing A3 to wind up the scheme effecting the plaintiff were orders under s 601EE of the *Corporations Act* which deals with winding up of unregistered schemes. They were not orders for the winding up ofA3 and so, although made before 25 November 2003, did not constitute a winding up of A3 so as to engage s 513A(a) of the *Corporations Act*.

[38] The "relevant date" for a winding up is defined by s 9 of the *Corporations Act* to mean "the day on which the winding up is taken because of Division 1A of Part 5.76 to have begun." The provisions of s 513A not otherwise applying, the winding up of A3 commenced on the day of Mullins J's order; see sub s (c).

[39] Section 553 C of the *Corporations Act* provides:

"(1) Subject to subsection (2), where there have been mutual credits, mutual debits or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:

(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and

(b) the sum due for the one party is to be set-off against any sum due from the other party; and

(c) only the balance of the account is admissible to proof against the company or is payable to the company as the case may be."

[40] The issue now is whether the set off under the section operates automatically when the liquidation is ordered so as to bring about an extinguishment of the plaintiff's liability to the extent of the set-off, or whether the section is procedural in the sense that it requires the taking of an account at some stage during liquidation and, until that occurs, the mutual claims retain their separate identities.

[41] In the former case the set off took place before the assignment of 9 January 2003 and in the latter it did not. The position is, in my view, now settled by a line of authorities to which I now turn.

[42] The plaintiff in *Stein v Blake* [1996] 1AC 243 had instituted proceedings against the defendant for breach of contract. The defendant counterclaimed for damages for misrepresentation. The plaintiff was bankrupted before trial. His trustee purported to assign the plaintiff's right of action against the defendant to a third party. Lord Hoffman, the other members of the House agreeing, held that on bankruptcy s 323 of the *Insolvency Act* 1986 (UK), (the equivalent of s 553 C of the *Corporations Act)*, operated to the effect that the choses in action represented by the cross claims were no longer capable of assignment. All that was assignable was the amount due after the mandatory account taken pursuant to the section.

[43] Because of this the House (at 255 G) rejected the view, taken by the Court of Appeal, that the separate causes of action survived the bankruptcy and could be assigned subject to the equity of the set off as a "fallacy".

[44] Lord Hoffman (at p 255) explained that the subsequent litigation was merely part of a "process of retrospective calculation" from which it would appear that from the date of the bankruptcy the only choses in action continuing to exist as an assignable item of property was the claim for any net balance.

[45] The House of Lords in *Stein* applied the decision of the High Court in *Gyre v MacIntyre* (1991) 171 CLR 609 where it was held by a unanimous court that s 86 of the *Bankruptcy Act* (UK) and s 553 of the *Corporations Act* 1966 (Commonwealth), the equivalent of s 323 of the *Insolvency Act*, was a:-

> "..statutory directive (`shall be set off') which operates as at the time the bankruptcy takes effect. It produces a balance upon the basis of which the Bankruptcy administration can proceed. Only that balance can be claimed in the bankruptcy or recovered by the trustees. If its operation is to produce a nil balance, its effect will be that there is nothing at all which can be claimed in the bankruptcy or recovered in proceedings by the trustee. The section is self executing in the sense that its operation is automatic and not dependent upon `the option of either party:'" – page 622 of the report.

[46] In *Citicorp Australia Ltd & Anors v Official Trustee and Bankruptcy & Anor* (1996) 71 FCR 550 at 551 F and following the Full Court of the Federal Court concluded that it should follow the reasoning of the House of Lords in *Stein.* See also *GM and AM Pearce & Co Pty Ltd v RGM Australia Pty Ltd* [1998] 4 VR 888 (Court of Appeal) and *Metal Manufacturers Ltd v Hall & Hall* (2002) 41 ACSR 466 at 469 per Gzell J in which a similar approach was applied. . This approach is also consistent with the decision of the Full Court of Queensland in *Martin v Lewis* (unreported) Appeal 57 of 1984.

[47] In *re Capel; Ex parte Marac Finance Australia Ltd v Capel & Anor* (1994) 48 FCR at 195 was decided after the Court of appeal decision in *Stein v Blake* but before that of the House of Lords. Drummond J construed the decision in *Gye v MacIntyre* to the effect that s 86 of the *Bankruptcy Act* that the rights of claims by and against the bankrupt, arising out of mutual dealings, was to be taken to be the right to recover or prove any balance "if the two claims were set off against each other at the date of the sequestration order."

[48] In doing so, Drummond J stated that he did not understand the High Court to be saying that s 86 operated "on the date of the bankruptcy" to extinguish a claim and cross claim by and against the bankrupt and to convert them into a claim for a balance. He went on to hold that the trustee could assign the bankrupt's interest in the cross claims prior to the taking of an account because the assignee would take the bankrupt's claim subject to all equities, including the right of set off under s 86.

[49] That approach is not without its attractions and was not without support in some earlier cases but the weight of authority is, in my view, now clearly against it.

[50] It was submitted on behalf of A3FM that Mullins J's order that A3 be wound up and the stay, has the implication that the company was to be wound up but the winding up was not to proceed during the period of the stay; A3 was therefore not a company "that is being wound up" at 9 January 2004 in terms of s 553C of the *Corporations Act.*

[51] As Young J pointed out in *Austral Brick Co Pty Ltd v Falgap Constructions Pty Ltd* (1990) 21 NSWLR 389 at 392 "stay" normally denotes the freezing of an existing situation so that no fresh step may be taken. He went on to point out, having referred to *Krextile Holdings Pty Ltd v Widdows* [1974] VR 289 and citing *Collins & Anor v G Collins & Sons Pty Ltd* 9 ACLR 58 that the directors of a company remained in office on the making of a winding up order and their powers were merely removed so that the imposition of a stay permitted them, once again, to implement their powers. The logical consequence of this was the conclusion of Gillard J in *Krextile v Widdows* that a permanent stay had the consequence that a company could conduct its business as though no winding up order existed. Those considerations rather beg the question which arises in this case.

[52] The High Court in *Gyre v MacIntyre* (ante) in considering s 86 of the *Bankruptcy Act* construed a section in all relevant respects in identical terms to s 553C as operating from the time at which the bankruptcy takes effect. As I said earlier, that approach was adopted by the House of Lords in *Stein v Blake* and by the other Australian authorities to which I have referred. The logic of that approach seems to me to have the consequence that the set off took place automatically on the making of the winding up order. Since a stay is postulated on the winding up order being in operation the automatic set off under S 553 of the *Corporations Act* before the stay was imposed. It only remains to carry out the "process of retrospective calculation" to determine any net balance which was assigned.

[53] I therefore order in terms of paragraphs 1 and 3 of the application.