

SUPREME COURT OF QUEENSLAND

CITATION: *Dawnlite P/L v Riverwalk Realty P/L & Ors* [2010] QSC 249

PARTIES: **DAWNLITE PTY LTD (ACN 010 647 677)**
Plaintiff/Respondent

v

RIVERWALK REALTY PTY LIMITED
(ACN 002 606 000)
First Defendant/Applicant

ELDSURE PTY LTD (ACN 071 335 861)
Second Defendant/Applicant

SAMEL HOLDINGS PTY LTD (ACN 114 423 755)
Third Defendant/Applicant

INTEGRATED ASSET MANAGEMENT
(QUEENSLAND) PTY LTD (ACN 117 065 264)
Fourth Defendant/Applicant

BROADBEACH RENTAL MANAGEMENT PTY LTD
(ACN 075 025 900)
Fifth Defendant/Applicant

NRGC MERMAID BEACH PTY LTD
(ACN 122 594 530)
Sixth Defendant/Applicant

NRGC COMMERCIAL PTY LTD (ACN 122 398 396)
Seventh Defendant/Applicant

NRGC REAL ESTATE GROUP PTY LTD
(ACN 122 593 177)
Eighth Defendant/Applicant

TREVOR IAN MILLS
Ninth Defendant/Applicant

GLENN DAVID MILLS
Tenth Defendant/Applicant

WANTANA PTY LTD (ACN 001 653 612)
Eleventh Defendant/Applicant

LYNNE ROBYN YALDWYN
Twelfth Defendant/Applicant

PHILIP JOHN L NICOLSON
Thirteenth Defendant/Applicant

DAVID WILLIAM SOMMERVILLE
Fourteenth Defendant/Applicant

ADAM JEREMY GAITER
Fifteenth Defendant/Applicant

SHAWN ROBERT BISHOP
Sixteenth Defendant/Applicant

CHRISTOPHER JAMES HOLT
Seventeenth Defendant/Applicant

TOHL PTY LTD (ACN 106 015 221)
Eighteenth Defendant/Applicant

DAVID MILLS
Nineteenth Defendant/Applicant

JAREN KARL HODGE
Twentieth Defendant

**KIMBA EQUITY INVESTMENTS PTY LTD
(ACN 101 847 198)**
Twenty-First Defendant

MATTHEW GERARD STEINHOOR
Twenty-Second Defendant/Applicant

FILE NO/S: BS 8735 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 July 2010

DELIVERED AT: Brisbane

HEARING DATE: 23 March 2010

JUDGE: White J

- ORDERS:
1. **The plaintiff is directed to amend its Statement of Claim as it may be advised consistently with these reasons and the following orders within 21 days or such other extended date as may be agreed between the parties.**
 2. **(a) Paragraphs 12, 65 – 73 (inclusive) and 75 - 79 (inclusive) of the Amended Statement of Claim are struck out;**
 - (b) Paragraphs 2, 3, 4(a)(ii), 7, 8, 18(d), 18(e), 21, 22 and 23 of the Further and Better Particulars are struck out;**
 - (c) The plaintiff to provide further and better particulars in response to Requests 7 and 8.**
 3. **The respondent/plaintiff to pay the applicants'**

/defendants’ costs of and incidental to the application to be assessed on the standard basis.

- 4. The respondent/plaintiff have 28 days to make written submissions that some other or different order should be made (by email).**
- 5. The applicants/defendants to respond in writing (by email) within 14 days of receipt of those submissions, if any.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – whether certain paragraphs of the Amended Statement of Claim should be struck out pursuant to r 171 of the *Uniform Civil Procedure Rules 1999* (Qld)

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – PARTICULARS – whether certain paragraphs of the particulars provided in response to the request for further and better particulars should be struck out pursuant to r 162 of the *Uniform Civil Procedure Rules 1999* (Qld) – whether the plaintiff should provide further and better particulars pursuant to r 161 of the *Uniform Civil Procedure Rules 1999* (Qld)

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 150(2), r 157, r 161, r 162, r 171

Banque Commerciale SA, En Liquidation v Akhill Holdings Ltd (1990) 169 CLR 279; [1990] HCA 11, cited

Bruce v Odhams Press Ltd [1936] 1 KB 697, cited

Pole v Leask (1863) 8 LT 645, cited

Tenstat Pty Ltd v Permanent Trustee Aust Ltd (1992) 28 NSWLR 625, followed

COUNSEL: A J Morris QC, with V G Brennan, for the Applicants/First to Nineteenth and Twenty-Second Defendants
A Crowe SC, with B Porter, for the Respondent/Plaintiff

SOLICITORS: McMahon Clarke Legal for the applicants
Bernard Ponting & Co for the respondent

- [1] The first to nineteenth and twenty-second defendants (“these defendants”)¹ have applied for orders pursuant to r 171 of the *Uniform Civil Procedure Rules* (“UCPR”) that certain paragraphs in the Amended Statement of Claim (“ASOC”) be struck out; orders pursuant to r 162 that certain particulars be struck out; and orders pursuant to r 161 that the plaintiff provide further and better particulars of certain paragraphs of the ASOC.

¹ The description used by the first to nineteenth and twenty-second defendants in their defence and used by counsel in their submissions on this application.

[2] The parties have engaged in the usual processes provided for in the *UCPR* for resolving or limiting their dispute about pleadings.² The pleadings are substantial – the ASOC is of some 94 paragraphs and 39 pages and the defence of some 99 paragraphs contained in 62 pages. Each pleading has a table of contents and an index of defined terms. The parties through their legal advisors are well aware of their pleading obligations under the Rules and as explained in the authorities.

[3] As has been stated³ and regularly repeated:

“The function of pleadings is to state with sufficient clarity the case that must be met: *Gold and Birbeck and Baker v Mount Oxide Mines Ltd (in liq)*, [(1916) 22 CLR 490 at 517] per Isaacs and Rich JJ. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision.”⁴

Parties may subsequently amend and/or agree expressly or tacitly to conduct their dispute at trial outside the parameters of their pleadings. As Dawson J observed in *Banque Commerciale*,⁵ “[p]leadings are but a means to an end and not an end in themselves ...” In modern litigation the end is “the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense”.⁶

[4] Accordingly, a pleading which fails to implement this philosophy by introducing irrelevant allegations, and/or allegations that are vague or confused or too general, will be struck out. This is because in those circumstances, no matter how plain the case might appear to the pleading party, the opposite party will be unable to address the allegations against it in a responsive pleading and the opportunity for identifying and narrowing the issues to be litigated will be unachievable.

The plaintiff’s case

[5] The plaintiff’s case against these defendants, in summary is this: Mr Adams (the plaintiff’s director) and Mr Mills (the ninth defendant) both operated real estate businesses at or around the Gold Coast to Ballina in New South Wales. Mr Mills’ “group” involved a number of individuals and their companies which operated more or less as a unit which he, Mr Mills, proposed streamlining and expanding. He invited Mr Adams to invest in the purchase of two additional real estate businesses and join the expanded group. If Mr Adams did that he would have an interest in that new expanded business and could exit the expanded business with his investment within two months of notice.

[6] Relying on either a firm agreement and/or Mr Mills’ representations Mr Adams caused the plaintiff to invest in excess of \$700,000 in acquiring the two new businesses plus some working capital. All parties behaved as if the new expanded business had been set up although it had not. Eventually Mr Adams wanted to exit

² Rule 444 and 445 letters were sent and a notice requesting further and better particulars was responded to.

³ *Banque Commerciale SA, En Liquidation v Akhill Holdings Ltd* (1990) 169 CLR 279 at 286 per Mason CJ and Gaudron J. See also Brennan J at 287 and Dawson J at 293.

⁴ These observations about the function of pleadings were made in the unusual circumstances of a defendant not appearing at trial, the unsuccessful plaintiff appealing and the Court of Appeal finding against that defendant on an issue not pleaded against it.

⁵ (1990) 169 CLR 279 at 293.

⁶ *UCPR*, r 5.

the business and sought to have the plaintiff's investment repaid. The Executive Committee (of the proposed new expanded group) which had earlier been established agreed to redeem the plaintiff's interest for \$700,000 within 12 months and to pay interest as if a loan until then.

- [7] Thereafter certain letters were sent by Mr Mills seeking to compromise the plaintiff's claim for lesser amounts. Apart from some interest payments the plaintiff has not been repaid its money. The businesses acquired with the plaintiff's funds are either worthless or worth a great deal less than \$700,000.
- [8] In order to address the complaints about the pleadings and particulars that summary needs to be expanded.
- [9] The plaintiff company acted through Mr Bruce Adams, a director of the company. The ninth defendant, Mr Trevor Mills ("Mr Mills"), is alleged to be the agent of four real estate businesses which operated south of Surfers Paradise down to and including Ballina in northern New South Wales. Those businesses were allegedly owned by the first to fourth corporate defendants. The fifth defendant, Broadbeach Rental Management Pty Ltd, is pleaded to be a wholly owned subsidiary of the fourth defendant, Integrated Asset Management (Queensland) Pty Ltd. Those businesses are pleaded to be held on trust for two unit trusts and the twenty-second defendant, Mr Matthew Steinhour, respectively. The ultimate holders of the units are pleaded to be the personal defendants. The directors of the defendant companies are some of the personal defendants.
- [10] These real estate businesses are described in the ASOC as the "Original Group Businesses". The personal defendants are described as the "Personal Defendants". The first to fifth defendants are described as the "Original Group Companies". The plaintiff contends that at least since 30 June 2006, the Original Group Businesses were caused by the Personal Defendants to be carried on as a single business, described in the ASOC as the "Initial Group Business", an allegation which is denied in the defence.
- [11] In or about late September 2006, Mr Adams and Mr Mills had certain discussions about "their" real estate businesses which concluded, on the plaintiff's case, with Mr Mills inviting Mr Adams to join the Original Group Businesses. The plaintiff alleges that Mr Mills told Mr Adams that:
- there were several members of his family involved in "his" group;
 - all the offices worked together sharing expenses and profits;
 - if Mr Adams joined the group he could retire on 30 to 60 days notice and receive his investment money back in full;
 - each office paid its own accounts but Mr Mills was planning to centralise this function;
 - each office took responsibility for staffing in consultation with the group human resources manager;
 - Mr Mills was considering acquiring LJ Hooker Mermaid Beach for the group, which would cost about \$220,000;

- he was considering acquiring Michael Lowing Real Estate to be a commercial division (costing about \$375,000);⁷
- if Mr Adams wished to join he would have to pay approximately \$650,000, reflecting the estimated cost of acquiring the two businesses plus some working capital;
- if he joined, Mr Adams would lead the commercial division;
- Mr Adams would acquire approximately a 16 per cent interest in the group;
- Mr Mills used Emerson Randell Young as accountants for the group;
- Mr Mills was in the process of setting up a single company to run the offices in the group; and
- Mr Adams would be a director of the business.

[12] Mr Adams told Mr Mills that he would contribute \$650,000 to join the group described by Mr Mills. Mr Mills said that he would tell his accountants to prepare the paperwork and that he would let Mr Adams know where he should pay the money.

[13] The plaintiff pleads that, as a consequence of those matters:

- the plaintiff's contribution would be used to acquire the LJ Hooker Mermaid Beach business and the Michael Lowing Real Estate business;
- those businesses would be consolidated with the Initial Group Businesses to create an expanded business, described in the pleadings as the "Expanded Group Business";
- the plaintiff would receive an equity interest in the Expanded Group Business reflecting the proportion of the total value of the Expanded Group Business represented by the amount of the plaintiff's contribution; and
- the plaintiff would be paid the value of its initial interest or the amount of its contribution at the latest by 60 days after the plaintiff gave notice of its requirement that that occur.

This is pleaded as the "First Agreement".

[14] The plaintiff pleads in the alternative that Mr Mills represented to Mr Adams that if the plaintiff paid the \$650,000 in accordance with Mr Mills' direction:

- the plaintiff's contribution would be used to acquire the LJ Hooker Mermaid Beach business and the Michael Lowing Real Estate business;
- those business would be consolidated with the Initial Group Business to create the Expanded Group Business;
- the plaintiff would receive an interest in the Expanded Group Business; and
- the plaintiff would be paid the value of that interest or the amount of its contribution at the latest by 60 days after the plaintiff gave notice of its requirement that that occur.

⁷ This information allegedly came from Mr Adams to Mr Mills during that conversation.

These allegations are described in the pleadings as the “Representations”.

- [15] By para 20, the plaintiff alleges that Mr Mills was authorised by the Personal Defendants and the Original Group Companies to enter into the First Agreement and make the Representations on their behalf. Alternatively, he entered into the First Agreement and the Representations in his personal capacity.
- [16] Thereafter the seventh defendant, NRG Commercial Pty Ltd, was incorporated on 26 October 2006, with Mr Adams and Mr Mills being directors and the plaintiff and Mr Mills being shareholders, for the purpose of acquiring Michael Lowing Real Estate and being consolidated into the Original Group Businesses. NRG Mermaid Beach Pty Ltd, the sixth defendant, was incorporated at the direction of Mr Mills on about 9 November 2006, with Mr Adams and Mr Mills as directors and the eighth defendant, NRG Real Estate Group Pty Ltd, the sole shareholder, for the purpose of acquiring the LJ Hooker Mermaid Beach business for the Expanded Group Business. The eighth defendant was incorporated on the same date with the same directors and with Mr Adams and Mr Mills being shareholders. The plaintiff alleges that these steps were taken pursuant to the First Agreement and consistently with the Representations.
- [17] On or about 15 December 2006, NRG Mermaid Beach acquired the LJ Hooker Mermaid Beach business and on or about 1 February 2007 NRG Commercial Pty Ltd acquired the Michael Lowing Real Estate business. Between 20 November 2006 and 30 May 2007 Mr Adams caused the plaintiff to make various payments at the direction and request of Mr Mills for the purchase of LJ Hooker Mermaid Beach and Michael Lowing Real Estate, as well as some working capital, in the total amount of \$712,000.
- [18] On or about 3 March 2007, a meeting was held which all the Personal Defendants and Mr Adams attended. Mr Mills provided a number of documents which conveyed (and this is not materially in dispute) that there was to be a merger or consolidation of the Original Group Businesses together with the new Mermaid Beach and Commercial (Michael Lowing) Business into the Expanded Group Business. The ownership interests in the NRG Real Estate Group of the Personal Defendants and the plaintiff was described as a shareholding determined by reference to the value of the various interests as at 30 June 2006 as a proportion of the total value of the Original Group Businesses plus the plaintiff’s contribution. The interest of the plaintiff was to be determined by reference to the value of its contribution as a proportion of the total value of the Original Group Businesses based on valuation as at 30 June 2006 plus the plaintiff’s contribution.
- [19] At the meeting Mr Mills conveyed the information that he intended to establish an Executive Committee to manage and control the affairs of the Expanded Group Business and NRG Real Estate Group and that Mr Adams and the Personal Defendants should “be on the lookout” for further businesses to be acquired and for additional persons to be investors to join the Expanded Group Business.
- [20] By letter dated 17 May 2007 Mr Mills wrote to Mr Adams under the heading “Purchase of Shares in NRG Real Estate Group Pty Ltd”, that his \$700,000 investment had initially been placed as a loan on which he would be paid interest at nine per cent per annum. Those loans would be converted to equity in NRG Real Estate Group Pty Ltd on 1 July 2007 using the 30 June 2006 balance sheet valuations already supplied by the Group’s accountants. He concluded, “If you accept the above proposal please sign where indicated in the presence of a witness”.

It is alleged that Mr Mills sent this letter on behalf of the Personal Defendants and the Original Group Companies. Mr Adams allegedly signed and returned the letter to Mr Mills.⁸

- [21] No formal steps were taken to transfer the Expanded Group Business to NRG Real Estate Group or to issue shares. However, from 1 July 2007 to 30 June 2008 when the plaintiff sought to be repaid its investment, these defendants admit that they acted as if, and caused the companies of which they were directors to act as if, the merger of the businesses into the Expanded Group Business had, in fact, been carried out and as if the Executive Committee had binding legal authority over the management and conduct of NRG Real Estate Group and therefore over the management and control of the Expanded Group Business.
- [22] From March 2007 the management and control of the affairs of the Expanded Group Business was carried out by the Executive Committee, which included all of the Personal Defendants apart from the fourteenth defendant (Mr Sommerville) and the sixteenth defendant (Mr Bishop). From March 2007 until January 2009 it included Mr Adams and from July 2008, did not include the twenty-second defendant (Mr Steinhour). These defendants admit that the Executive Committee managed the affairs of NRG Real Estate Group and the Expanded Group Business as if there had been a merger or consolidation of all the Original Group Businesses with the Mermaid Beach business and the Commercial business into the Expanded Group Business.
- [23] The plaintiff alleges that the Executive Committee caused new interests in NRG Real Estate Group “styled as shareholdings”⁹ to be sold to persons other than the Personal Defendants and Mr Adams, described in the pleading as “additional shareholders”; caused payments to be made to the “shareholders” in accordance with each person’s “interest” in NRG Real Estate Group; caused NRG Real Estate Group to borrow funds as principal debtor to fund the needs of the Expanded Group Business; each of the shareholders provided guarantees of those funds calculated by reference to the interest the Executive Committee ascribed to that person in the NRG Real Estate Group; and all Personal Defendants and Mr Adams acquiesced in Mr Mills and others using titles describing them as officers of NRG Real Estate Group.
- [24] The plaintiff pleads what are described as “Common Assumptions of Fact”, that all personal parties would act as if the merger of the businesses in the Expanded Group had in fact occurred and the Executive Committee would be treated as if it had binding legal authority over management of the Expanded Group Business. The plaintiff pleads that Mr Adams relied on these common assumptions in his dealings on behalf of the plaintiff with the Expanded Group Business, and, particularly, did not cause the plaintiff to demand the repayment of its contribution until June 2008.
- [25] On 27 June 2008 Mr Adams wrote to Mr Mills that he desired to relinquish his holding, “namely 700,000 shares” in the company NRG Real Estate Group as soon as possible, and resigned as a director of the companies in that Group. At meetings in July and October 2008, the Executive Committee decided that the

⁸ While the letter is admitted, these defendants allege that it was written in those terms at the request of Mr Adams for negotiations with his bank and was written by Mr Mills solely on his own behalf and was not signed by Mr Adams or returned to Mr Mills.

⁹ ASOC, para 54(a).

plaintiff's interest would be redeemed or acquired within 12 months after 16 July 2008 for \$700,000 and until then it would be treated as a loan earning interest at 10 per cent per month (the Redemption Decision).

- [26] On 19 January 2009, 20 March 2009 and 9 April 2009, Mr Mills, on behalf of all the Personal Defendants, wrote¹⁰ to Mr Adams that they would not pay the \$700,000, that there had been no merger but merely a proposed merger which had been abandoned, that the plaintiff did not have an interest in the Expanded Group Business but was the beneficial owner of the two additional businesses acquired with the plaintiff's funds: the NRC Mermaid Beach business and the NRC Commercial business.
- [27] The plaintiff contends that the refusal to pay the \$712,000 and the assertion that the plaintiff does not have an equitable interest in the Expanded Group Business is a breach of the First Agreement, alternatively is inconsistent with the Representations made by Mr Mills in September 2006; that the Personal Defendants and the companies they control are estopped from resiling from those Representations and the plaintiff is entitled to be paid that sum by the Personal Defendants. In the alternative, the plaintiff claims that the Expanded Group Business is held by the various parties on constructive trust for the plaintiff to the extent of \$712,000. In the further alternative, the plaintiff claims that the Personal Defendants and their companies are estopped from denying the Common Assumptions; are estopped from denying that the plaintiff is entitled to payment of \$700,000 consistent with the agreement arising out of the Redemption Decision of the Executive Committee; are thereby estopped from denying that the assets of the Expanded Group Business are available to NRC Real Estate Group to meet its obligations to the plaintiff; and is entitled to be paid \$700,000 by NRC Real Estate Group.

The defendants' case

- [28] These defendants, while denying some pleaded conversations between Mr Adams and Mr Mills, in effect, contend that many of the allegations of fact made by the plaintiff are consistent with a quite different agreement to that pleaded. The agreement advanced by these defendants is that Mr Adams would purchase the LJ Hooker Mermaid Beach business and the Michael Lowing Real Estate business to be re-branded as "Elders" Real Estate Business; that Mr Adams and Mr Mills would form three companies – one to carry on the former LJ Hooker Mermaid Beach business, one to carry on the former Michael Lowing Real Estate business, and a third which might be used as a holding company for the proposed merged businesses in the event that the merger went ahead and became a single business. They further agreed that Mr Adams and Mr Mills would become directors and shareholders in the new companies but that Mr Mills would not have any beneficial interest in what were described as the Adams' businesses. Should the other investors in the subsisting businesses agree to the merger proposal and subject to their agreement, the Adams' businesses would form part of the merged business and Mr Adams would receive an equity stake in the merged businesses represented by an issue of shares equivalent to the value of Mr Adams' purchase price for the Adams' businesses. Until the merger was carried into effect, Mr Adams would manage the Adams' businesses, assisted by Mr Mills. If the merger proposal was

¹⁰ These defendants allege that these communications were marked "without prejudice", are privileged and may not be employed by the plaintiff to support its case.

not carried into effect, Mr Adams would continue to manage the Adams' businesses and be the sole beneficial owner of those businesses.

[29] These defendants contend that the March meeting was to advance the merger of the existing businesses with Mr Adams' businesses and the Executive Committee was formed to oversee this merger and the function of the aggregated businesses.

[30] Since the pleading of these defendants is not under challenge it is unnecessary to say anything more about it.

Challenge to the ASOC – pursuant to r 171 – strike out paragraphs 12; 23-24; 65-68; 69-73 and 75-79

Paragraph 12

[31] “12 By reason of the matters pleaded in paragraphs 5, 8, 9, 10, and 11 hereof, from at least 30 June 2006, Mr Mills, Mr Glenn Mills, Ms Yaldwyn, Mr Nicolson, Mr Sommerville, Mr Holt, Mr David Mills, Mr Bishop, Mr Steinhour, Mr Gaiter and Mr Hodge (the **Personal Defendants**) between them:

- (a) owned and/or controlled the whole of the beneficial interest in the Ballina, Coolangatta, Palm Beach and Broadbeach businesses (the **Original Group Businesses**); and
- (b) managed and controlled the whole of the affairs of each of Riverwalk, Eldsure, Samel, Integrated and Broadbeach Rental (the **Original Group Companies**).”

Mr Morris QC and Mr VG Brennan, for these defendants, argue that it is impossible for each Personal Defendant mentioned to know what is alleged against him or her because of the multitude of permutations envisaged in “between them”, “owned and/or controlled” and “managed and controlled”. As an example, in their Schedule A, they contend, on behalf of Mr Bishop (the sixteenth defendant):

“... the only relevant allegation against him, in the whole of “paragraphs 5, 8, 9, 10, and 11 hereof”, appears in 8(b)(v), where he is asserted to hold 22 (out of 606.25) units in the Riverwalk Realty Unit Trust. Somehow, in paragraph 12, his 2.6% interest in that trust is leveraged into the allegation that he shares ownership “and/or” control of three businesses (one of which is not alleged to have any connection with that trust); and “management and control” of all five companies.”

[32] Mr Crowe SC who, with Mr Porter, appeared for the plaintiff, responded that these defendants were a “loose group” whom Mr Mills represented in his dealings with Mr Adams. He noted that these defendants had admitted paras 48 and 49 of the ASOC that the Personal Defendants and the companies of which they were directors acted as if the merger had occurred and the plaintiff had an interest in NRG Real Estate Group and that the Personal Defendants had provided guarantees of the liability of NRG Real Estate Group. The prayer for relief seeks undifferentiated orders against the Personal Defendants and the companies for \$712,000 (alternatively \$700,000) plus interest. The purpose of pleading the allegations in

para 12 is quite unclear. The agency relationship with Mr Mills is important but this paragraph does not advance their relationship. The permutations are too many for the Personal Defendants to untangle and they ought not be required to do so.

[33] Paragraph 12 should be struck out.

Paragraphs 23 and 24

[34] “23. Mr Mills knew that Mr Adams made that assumption by reason of the making of the Representations and intended that he make that assumption.”

The plaintiff has provided further and better particulars in response to the request that the knowledge and intention arose immediately following the events where the Representations are alleged to have been made, that the knowledge and intention were that of Mr Mills and were held and formed by him either for and on behalf of the Personal Defendants or on his own behalf.

[35] “24. That knowledge and intention is to be inferred from:

(a) The matters pleaded in paragraphs 14 to 17 hereof;
and

(b) The matters pleaded in paragraphs 25 to 35.”

Further and better particulars provided in response to the request merely refer to the whole of the matters pleaded in paras 14 to 17 and that the inference of knowledge and intention arose from the course of the discussions as pleaded; that the subsequent conduct by Mr Mills was consistent with those Representations; and the subsequent conduct by Mr Adams was consistent with the Representations and together support the inference of knowledge and intention.

[36] These defendants contend that no material facts have been alleged to support the allegations that Mr Mills knew of Mr Adams’ assumption that the consequences pleaded in para 19 would follow from the plaintiff making the payment to acquire the two businesses plus working capital. The plaintiff’s allegations pleaded in paras 14 to 17 and 25 to 35 are capable of supporting the inferences. Whether they are sufficient in an evidentiary sense, bearing in mind that knowledge and intention are here to be inferred, is not a matter for strike out. These defendants are not embarrassed by the pleading and it requires no more specificity to satisfy the requirements of r 150(2) since it is an accumulation of circumstances.

Paragraphs 65 to 68

[37] These paragraphs concern what is described in the ASOC as the “Redemption Decision”. In summary, it is alleged that the plaintiff’s interest in NRG Real Estate Group could be redeemed or acquired within 12 months after 16 July 2008 or earlier for \$700,000 and that the plaintiff’s interest would be treated as a loan and attracting interest at 10 per cent interest per annum, paid monthly. Paragraph 66 alleges that by the Redemption Decision, the Executive Committee “created a right in favour of” the plaintiff. Mr Crowe conceded on behalf of the plaintiff that para 66’s allegation of a right could not be sustained and it should be deleted. The particulars from which the Redemption Decision is said to flow are meetings of 16 July, 3 September and 21 October 2008.

- [38] The challenge by these defendants is justified. The allegation in para 65 that the Executive Committee “decided” to “redeem” the plaintiff’s interest is very difficult to tease out from the further and better particulars which are diffuse. The “change in payment description of payments to the plaintiff”, is difficult to follow. The particulars drawn from the 21 October meeting seem, at best, statements of evidence but at worst, narrative without conclusion. Since para 66 is to be deleted, this group of paragraphs needs to be re-pleaded so as to articulate clear allegations about the content of the Redemption Decision, when it was made and by whom. Accordingly paras 65 to 68 are struck out.

Paragraphs 69 – 73

- [39] This group of paragraphs plead extracts from “without prejudice” communications sent by Mr Mills and his solicitors to the plaintiff and/or Mr Adams. They are said by these defendants to be objectionable for that reason. They are said by the plaintiff to be relevant because the extracted statements in the ASOC allegedly demonstrate that Mr Mills and/or the other defendants resiled from the Representations made by Mr Mills in September 2006 and the Common Assumptions made by all parties about the formation of the Expanded Group Business and the authority of the Executive Committee to manage and control that business. Mr Crowe submits, in support of retaining these paragraphs, that it is necessary to plead a departure from the Representations because the plaintiff relies upon promissory estoppel of the “Walton Stores” kind¹¹ and estoppel by convention.¹² Mr Morris contends that these allegations are irrelevant to any of the plaintiff’s alleged causes of action and the allegation that the defendants have acted contrary to the Representations required only a pleading that the defendants have failed to perform the steps in para 19(c) (an interest in the Expanded Group Business) and 19(d) (repay the plaintiff’s initial contribution within 60 days).
- [40] Mr Crowe relies upon observations of McLelland J in *Tenstat Pty Ltd v Permanent Trustee Aust Ltd*.¹³ His Honour, considering letters said to be written “without prejudice”, noted that the privilege was “founded upon the public policy of encouraging litigants to settle their difference rather than litigate them to a finish”¹⁴ and is “directed against the admission in evidence of express or implied admissions”¹⁵ contained in such correspondence. His Honour continued:¹⁶

“It does not however extend to preclude the proof of communications or statements relied on, not as an express or implied admission, but as an objective act having legal consequences.”

Here, the letters are simply said to be letters which evidence Mr Mills, on his own behalf or on behalf of the other of these defendants, resiling from the pleaded agreement. I accept that at best, these communications are evidentiary. If that be the case, then the argument about whether they are admissible, or are to be characterised as attempts to settle differences short of litigation and thus to be excluded, should be left for the trial in the context of the pleadings as they exist at that time. Paragraphs 69 – 73 should be struck out.

¹¹ *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

¹² *Pacific Carriers Ltd v BN Paribus* (2004) 218 CLR 451 at 467.

¹³ (1992) 28 NSWLR 625 at 633.

¹⁴ Citing *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 at 1299.

¹⁵ Citing *Field v Commissioner for Railways of New South Wales* (1957) 99 CLR 285 at 291.

¹⁶ *Tenstat Pty Ltd v Permanent Trustee Aust Ltd* (1992) 28 NSWLR 625 at 633.

Paragraphs 75 – 79

- [41] These paragraphs plead an estoppel by virtue of the Representations and refer back to paras 19 to 36 of the ASOC. The pleader then continues that the conduct in paras 69 to 74, which are the several communications said to be the subject of “without prejudice” claims wherein proposals for settlement of the dispute on a basis other than the Representations are made, was contrary to those Representations. The pleader alleges that if the Personal Defendants are permitted to act in that way, the plaintiff will suffer detriment in as much as the contribution to acquire the two real estate businesses and the incorporation of the three companies would not have occurred but for the Representations. It is further pleaded that if the Personal Defendants are permitted to act in that way, the shares in NRC Mermaid Beach are worthless, and the shares in NRC Real Estate Group worthless or in the alternative, worth considerably less than \$700,000, and that the plaintiff will not be able to obtain repayment of its contribution and interest. For that reason, the plaintiff alleges that the Personal Defendants, and by them, the Original Group Companies, are estopped “as against” Mr Adams and the plaintiff from asserting that they are not bound by the promises comprised in the Representations unless they act to prevent the detriment suffered by reason of reliance on the Representations. In para 79, the same allegations are made against Mr Mills on the basis of his personal liability.
- [42] To the extent that these paragraphs rely upon the “without prejudice” correspondence, they no longer have foundation. Furthermore, it is an unduly complicated manner of contending that the defendants have failed to behave consistently with the Representations. Paragraphs 77 to 79 allege the detriment suffered by the plaintiff as a consequence of these defendants’ (or Mr Mills’) departure from the Representations. They will need only slight adjustment to accommodate a new paragraph alleging departure from the Representations relied on. The pleader needs to make clearer how the Redemption Decision to convert the plaintiff’s contribution into a loan sits with these allegations.
- [43] The better course is to strike out paras 75 to 79.

Challenge to particulars – r 162 – paragraphs 2; 3; 4(a)(ii); 7; 8; 10; 11; 18(d); 18(e); 19 – 24 of the Further and Better Particulars¹⁷

- [44] Rule 157 requires a party to include in a pleading particulars necessary to:
- “(a) define the issues for, and prevent surprise at, the trial; and
 - (b) enable the opposite party to plead; and
 - (c) support a matter specifically pleaded under rule 150.”

The purpose of particulars is to add context and depth to the pleaded material facts and to:¹⁸

¹⁷ The application also seeks orders pursuant to r 161 for further and better particulars and that aspect of the application will be considered here as appropriate.

¹⁸ *Bruce v Odhams Press Ltd* [1936] 1 KB 697 at 712-713, as cited in *Thiess Pty Ltd v FFE Minerals Aust Pty Ltd* [2007] QSC 209 at [35].

“... fill in the picture of the plaintiff’s cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial.”

[45] These defendants, through their solicitors, sought further and better particulars of the statement of claim. The plaintiff’s solicitors responded pursuant to r 445. Further and better particulars of the statement of claim are dated 14 December 2009 and filed on 10 March 2010. The applicants seek to strike out a number of those particulars provided pursuant to the request and seek orders that particulars be provided consistently with the request.

[46] Although the application refers to the paragraphs in the plaintiff’s filed Further and Better Particulars in response to the Request, it is more convenient to refer to the governing paragraph of the ASOC and the request number and then the paragraph of the Further and Better Particulars. It is convenient to deal with orders under r 161 for the provision of further and better particulars at the same time where appropriate.

Paragraph 13 of the ASOC – requests 2 and 3 – paragraphs 2, 3 and 4(a)(ii) of the Further and Better Particulars

[47] Paragraph 13 of the ASOC alleges:

“From at least 30 June 2006 the Original Group Businesses were caused by the Personal Defendants to be carried on as a single business (the **Initial Group Business**) in which:

- (a) the Original Group Businesses were worked together sharing expenses and profits; and
- (b) Mr Mills acted as the de facto managing director and chief executive.”

The request sought particulars of all acts, facts, matters, circumstances and things by which the matters alleged in para 13 were “caused” by each Personal Defendant, particulars of the manner in which the Original Group Businesses “worked together” and “shared expenses”, and that Mr Mills acted as the “de facto managing director”. The response was that the pleading was as complete as the plaintiff could make it until disclosure and that the Personal Defendants caused the Original Group Businesses to be carried on in the manner alleged:

“by participating in or acquiescing in the conduct of the Original Group Businesses in the manner alleged, both in their personal capacity and in their capacity as directors of each of the Original Group Companies.”

That, of course, is to add nothing. Other than that, the particulars referred back to Mr Mills’ statements in the various conversations pleaded in paras 14 to 17 of the ASOC. A further particular is that Mr Mills’ statement and conduct in the course of those conversations were “as if” he had authority to negotiate with Mr Adams on behalf of the Original Group Businesses.

[48] Exhibit 2 comprises correspondence wherein the plaintiff’s solicitors complained on 26 February 2010 of the unsatisfactory performance of these defendants over disclosure, detailing a great many defaults including the documents necessary to support the allegations in para 13. These complaints Mr Morris characterised as

“fishing”. There is no application before the court about the adequacy or otherwise of these defendants’ disclosure but, to the extent that it is relevant to this application, documents relating to Mr Mills’ capacity to speak on behalf of the other defendants and the relationship between the groups are relevant. In the result, the further and better particulars provided do not constitute particulars that do the work of particulars and they should be struck out.

- [49] The plaintiff should provide further and better particulars after there has been adequate disclosure. The issue of Mr Mills’ authority, be it actual, implied or ostensible, is an important part of the plaintiff’s case and, if it is to be pleaded must be by reference to some facts which will support it. If it is “ostensible”, which may be the case, some fact needs to be pleaded which does not emanate from the agent.¹⁹
- [50] Paragraphs 2, 3 and 4(a)(ii) of the further and better particulars should be struck out. The plaintiff is relieved of providing particulars in Requests 2 and 3 until after further disclosure by these defendants.

Paragraph 24 of the ASOC – requests 7 and 8 – paragraphs 7 and 8 of the Further and Better Particulars

- [51] These defendants sought particulars identifying which of the facts pleaded in paras 14 to 17 of the ASOC were alleged to give rise to the inference of knowledge and intention on the part of Mr Mills either personally or in his capacity as agent. This request has already been considered when dealing with paras 23 and 24 of the statement of claim concerning knowledge and intention. While the response is directed to all of the matters pleaded in paras 14 to 17, the particulars add that it was “the course of the discussions” from which the inference of knowledge and intention arises. The subsequent conduct of Mr Mills pleaded in paras 25 to 27 and Mr Adams in paras 32 to 33 are particularised as supporting the inference of knowledge and intention.
- [52] The complaints are the general nature of the reference back to the allegations in the paragraphs in the pleadings, as well the addition of “the course of the discussions” as well as, or in addition to, the discussions themselves. A real complaint is the conflation of “knowledge” and “intention”. They are quite different concepts and these defendants are entitled to have them differentiated in a more precisely delineated pleading. As presently pleaded, the particulars do not assist in adding depth and context beyond that which is pleaded in the ASOC. Those particulars relating to para 24 should be struck out and recast so as to make it clear which relate to Mr Mills’ knowledge of the assumptions of Mr Adams and which relate to his intention that Mr Adams should make the assumptions.
- [53] Paragraphs 7 and 8 of the Further and Better Particulars should be struck out. The plaintiff to provide further and better particulars of Requests 7 and 8 consistently with these reasons.

Paragraphs 25 – 28 of the ASOC – requests 10, 12 and 14 – paragraphs 10 and 11 of the Further and Better Particulars

- [54] This group of paragraphs in the ASOC is headed “Conduct in reliance on the Representations and pursuant to the First Agreement”. Paragraphs 25, 26 and 27 of the ASOC plead that the three companies, NRC Commercial, NRC

¹⁹ *Pole v Leask* (1863) 8 LT 645 at 648 – 649 per Lord Cranworth, cited in Dal Pont, *Law of Agency* 2nd ed LexisNexis Butterworths, Australia, 2008.

Mermaid Beach and NRG Real Estate Group, were incorporated at the direction of Mr Mills for the purpose of acquiring the Michael Lowing Real Estate business, the LJ Hooker Mermaid Beach business and in the case of NRG Real Estate Group, “for the purpose of being the corporate manager and owner of the Expanded Group Business”. Paragraph 28 alleges that “[t]he steps in paragraphs 25 to 27 were taken by Mr Mills pursuant to the First Agreement and consistently with the Representations.”

- [55] Further and better particulars have been given in response to the requests, largely stating that these are the best particulars that can be provided prior to completion of the interlocutory steps. There can be little complaint about the facts of Mr Mills putting in train those companies being registered. The other requests seek each step, together with the identification of the specific material term of the First Agreement pursuant to which each step was taken; similarly with the Representations. Request 10(c) requests the plaintiff to describe:

“... the process of volition or ratiocination constituting the causal connection by which it is alleged that each such “Representation”, as the case may be:

- (i) was relied upon in taking each (seriatum) of such steps; or
- (ii) induce the taking of each (seriatum) of such steps; or
- (iii) was otherwise connected or consistent with the taking of each (seriatum) of such steps.”

- [56] The particulars provided are objected to as not being particulars but merely references to other paragraphs in the statement of claim. The First Agreement and the Representations are contained in simple propositions in paras 18 and 19 of the ASOC respectively. The plaintiff is unable to set out Mr Mills’ process of reasoning. It is not difficult to plead to the facts as alleged. Indeed, these defendants have made a coherent and reasonable response to those allegations of fact in Part VIII of their defence. The requests are not reasonable and although the particulars provided, in so far as they refer to other paragraphs in the ASOC, do not add much, they can remain.

- [57] The application to strike out paras 10 and 11 of the Further and Better Particulars is refused.

- [58] The application to order Further and Better particulars in paras 10, 12 and 14 of the Request is refused.

Paragraph 29 of the ASOC – request 15 – paragraphs 12 and 13 of the Further and Better Particulars

- [59] The application seeks an order pursuant to r 161 that further and better particulars of para 29 of the ASOC be provided in accordance with para 15 of the Request. Paragraph 15 of the Request refers to para 28 of the ASOC. Paragraph 29 alleges that Mr Adams consented to the steps in paras 25 to 27 (the incorporation of the NRG Companies, etc) in reliance on the assumptions made by him in reliance on the Representations. Request 15 sought

“(a) The usual particulars of a communication with respect to the consent therein alleged, as to each (seriatum) of the steps to which such consent was allegedly given; and

(b) the usual particulars of a cognitive state with respect to the reliance therein alleged.”

[60] On the assumption that the reference was to para 29 of the ASOC, the plaintiff provided further and better particulars in para 12 of the Further and Better Particulars. There is no application to strike them out. The particulars provided are that Mr Adams’ consent can be inferred from his conduct in executing relevant documents as agent for the plaintiff. They are adequate. These defendants do not, apart from making the application, illuminate their discontent further. The expression “the usual particulars of a cognitive state” are defined at the commencement of the request for further and better particulars and, so far as relevant here, whether it is alleged that the cognitive state was communicated to any person or recorded and particulars thereof. The particulars provided do not deal with these matters. It may therefore be inferred²⁰ that there was no communication of Mr Adams’ “cognitive state” at the time of each act of consent.

[61] The application for further and better particulars of para 29 of the ASOC is refused.

Paragraph 32 of the ASOC – request 16 – paragraphs 13 and 14 of the Further and Better Particulars

[62] Paragraph 32 of the ASOC pleads that Mr Adams as director of NRG Mermaid Beach and NRG Commercial assented to the acquisition of the two businesses in reliance on the First Agreement and on his assumptions and for the sole purpose of them becoming part of the Extended Group Business. Similarly to Request 15, in Request 16 the plaintiff was requested to furnish the usual particulars of communication with respect to the assent and the usual particulars of a cognitive state with respect to the reliance and purpose.

[63] The plaintiff responded in paras 13 and 14 of the Further and Better Particulars that Mr Adams’ assent was communicated by his conduct in participating in the negotiations (with details) for the acquisition of the businesses and causing the plaintiff to provide the purchase funds as agent for the plaintiff. There is no application to strike out those particulars and again there is no further detail of these defendants complaints about their inadequacy. No particulars are given of the communication of those matters and, it may then reasonably be inferred that the cognitive state was not communicated and neither was the reliance.²¹

[64] The application for further and better particulars of para 32 of the ASOC is refused.

Paragraph 45 of the ASOC – request 19 – paragraph 18(d) and (e) of the Further and Better Particulars

[65] Paragraph 45 alleges that Mr Adams signed the 17 May letter on behalf of the plaintiff and returned it to Mr Mills. The request sought the date when Mr Adams signed the letter and what was meant by “Mr Adams returned the letter.” The particulars are provided in five subparagraphs. The last two, 18(d) and (e) are challenged. They state:

“(d) A few days after posting the signed letter as stated herein, Mr Mills telephoned Mr Gaiter.

²⁰ And counsel’s submissions confirm.

²¹ See counsel’s submissions para 93.

- (e) In the course of that conversation, Mr Gaiter said words to the effect that he had received the signed copy of the 17 May letter.”

These defendants contend that those particulars should be struck out as irrelevant. Mr Crowe concedes that “the reference to Mr Mills in 18(d) is in error and that it ought to be a reference to Mr Adams”. Apart from that particular, 18(e) is pleaded as confirmatory of the receipt of the letter by Mr Gaiter. Mr Gaiter is the fifteenth defendant. He is pleaded to hold units in the Riverwalk Realty Unit Trust. He does not appear to have any other role in the ASOC, except that in 18(c) the plaintiff pleads that the 17 May letter was addressed to either Mr Mills or Mr Ryan Gaiter. The fifteenth defendant is “Adam Jeremy Gaiter”. There is no pleading linking Mr Ryan Gaiter with Mr Mills or the other defendants which would make him the employee or agent and accordingly, although possibly evidentiary, particulars 18(d) and (e) appear to be immaterial to the case pleaded and should be struck out.

- [66] Paragraphs 18(d) and 18(e) of the Further and Better Particulars should be struck out.

Paragraphs 50 and 52 of the ASOC – requests 20 and 21 – paragraph 19 of the Further and Better Particulars

- [67] Paragraph 50 of the ASOC alleges:

“From about March 2007 the management and control of the affairs of the Expanded Group Business was carried out by a group styled the ‘NRGC Real Estate Group Pty Ltd Executive Committee’ (the **Executive Committee**).”

Paragraph 52 alleges that the Executive Committee managed the affairs of the NRGC Real Estate Group and the Expanded Group Business as if there had been a merger or consolidation of the original businesses and Mr Adams’ businesses (admitted); and the ownership interests of the Personal Defendants had been converted into interests in the NRGC Real Estate Group in accordance with the interest ascribed to each of the Personal Defendants or their related companies (denied/not admitted). There are some other allegations about shareholding and issuing further interests to potential investors.

- [68] The requests sought particulars of how the Executive Committee managed the affairs of the Expanded Business Group and controlled those affairs. The particulars provided, which are said to be non-responsive, are that the affairs of the Expanded Group Business and NRGC Real Estate Group were “all the affairs of that business and that company” and otherwise state that the requests are not a proper request for particulars. The issues between the parties have been identified by these defendants in paras 59 and 60 of their defence where some matters are admitted and some not admitted or denied. In para 65(c) of the defence, these defendants allege that the Executive Committee was authorised or empowered

“only to the extent as was agreed at the March meeting and did not manage or control the affairs of the alleged Expanded Group Business to any greater extent that [sic] was agreed at the March meeting”.

Mr Crowe contends that the details of management and control are a matter of evidence and not for particulars. I accept that submission. The application to strike

out para 19 of the Further and Better Particulars is refused. The application for further and better particulars of paras 50 and 52 of the ASOC is refused.

Paragraph 57 of the ASOC – request 23 – paragraph 20 of the Further and Better Particulars

[69] Paragraph 57 of the ASOC alleges that Mr Adams:

- “(a) gave his Guarantee for, and for the benefit of, [the plaintiff];
and
- (b) is entitled to indemnity from [the plaintiff] for any liability arising out of this Guarantee.”

Request 23 sought particulars of “all acts, facts, matters, circumstances and things” relied on as establishing that Mr Adams was entitled to be indemnified. In response the plaintiff relied on para 57(a), namely that he gave his guarantee for, and for the benefit of, the plaintiff. These defendants complain that it is a non-responsive answer. However, Mr Adams, as pleaded in para 3 of the ASOC, was a director of the plaintiff, was authorised to act on its behalf in respect of the matters the subject of the pleading and has done so except when acting in a personal capacity as a member of the Executive Committee referred to in paras 50 to 54 of the ASOC. Nothing more is required.²²

[70] The application to strike out para 20 of the Further and Better Particulars is refused. The application for further and better particulars of para 57 is refused.

Paragraphs 65 - 67 of the ASOC – request 24, 25 and 26 – paragraphs 21, 22 and 23 of the Further and Better Particulars

[71] Paragraph 65 concerns the “Redemption Decision” taken by the Executive Committee after Mr Adams resigned as a director of the three NREGC companies in July 2008. Request 24 sought “the usual particulars” of a cognitive state (“decided”) about the decision to redeem the plaintiff’s interest in the NREGC Real Estate Group for \$700,000 within 12 months after 16 July 2008 and that, in the meantime, its interest would be treated as a loan on which interest would be paid.

[72] These defendants complain that the lengthy further and better particulars provided, which occupy three pages, indiscriminately mix irrelevant facts and proper particulars. Since paras 65 to 68 are to be re-pleaded, the issue of particulars, as appropriate, should be left to be reviewed, if necessary, after the new pleading. The particulars are struck out in the sense that they form part of paras 65 to 68 which have already been struck out. There will be no order to comply with the request as that must await the new pleading.

[73] Paragraphs 21, 22 and 23 of the Further and Better Particulars should be struck out.

Paragraph 76 of the ASOC – request 27 – paragraph 24 of the Further and Better Particulars

[74] Paragraph 76 of the ASOC alleges:

- “By the conduct pleaded in paragraphs 69 to 74, the Personal Defendants (and by them, the Original Group Companies) have acted contrary to the Representations”.

²² See, Dal Pont, *The Law of Agency*, paras 18.8 – 18.11.

The request sought particulars in respect of each item of the conduct alleged in “paragraphs 64 [sic] to 74” and the specific Representations to which the conduct is to be attributed as being contrary. The further and better particulars provided in response to that request identify the conduct in paras 69 to 71 comprising the assertions that Mr Adams was entitled only to ownership of shares in the three NRCG Companies in return for the payment by the plaintiff as inconsistent with the Representations pleaded in paras 18(b), (c) and (d) of the ASOC. The complaint is that those allegations are not “representations” but “terms” of the First Agreement. The pleader has (presumably) been careful with the use of upper case letters. The “representations” referred to in the further and better particulars are not the “Representations” in para 19. With that understanding, the further and better particulars are sufficient.

[75] The application to strike out para 24 is refused. The application to provide further and better particulars of para 76 of the ASOC is refused.

Conclusion

[76] The orders are:

1. The plaintiff is directed to amend its Statement of Claim as it may be advised consistently with these reasons and the following orders within 21 days or such other extended date as may be agreed between the parties.
2. (a) Paragraphs 12, 65 – 73 (inclusive) and 75 - 79 (inclusive) of the Amended Statement of Claim are struck out;
 (b) Paragraphs 2, 3, 4(a)(ii), 7, 8, 18(d), 18(e), 21 22 and 23 of the Further and Better Particulars as incorporated into the Amended Statement of Claim are struck out;
 (c) The plaintiff to provide further and better particulars in response to Requests 7 and 8.
3. The respondent/plaintiff to pay the applicants’/defendants’ costs of and incidental to the application to be assessed on the standard basis.
4. The respondent/plaintiff have 28 days to make written submissions that some other or different order should be made (by email).
5. The applicants/defendants to respond in writing (by email) within 14 days of receipt of those submissions, if any.