

SUPREME COURT OF QUEENSLAND

CITATION: *John Richard Park & Anor v Lanray Industries Pty Ltd & Ors* [2010] QSC 82

PARTIES: **JOHN RICHARD PARK AND LACHLAN STUART MCINTOSH**
Plaintiff
v
LANRAY INDUSTRIES PTY LTD ACN 010 737 943
First Defendant
SUNSHINE IMPORTS PTY LTD ACN 009 937 722
Second Defendant
ROUGHEND PINEAPPLE PTY LTD ACN 074 982 558
Third Defendant
**SUNSHINE LAND NOMINEES PTY LTD
ACN 010 050 567**
Fourth Defendant
THE KING OF NUTS PTY LTD ACN 085 903 895
Fifth Defendant
ROOFHILL PTY LTD ACN 078 777 867
Sixth Defendant
SUNFARM PTY LTD ACN 091 286 967
Seventh Defendant

FILE NO/S: BS No. 5675 of 2006

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court Brisbane

DELIVERED ON: 18 March 2010

DELIVERED AT: Brisbane

HEARING DATE: 15 March 2010

JUDGE: White J

ORDER: **The respondents/plaintiffs have leave to file a further**

amended statement of claim consistent with these reasons.

CATCHWORDS: PROCEDURE - STRIKING OUT - Practice under Rules of Court - Parties - Other matters - Capacity to sue - Liquidators

Corporations Act 2001 (Cth), s 286(1), s 477(2), s 588E, , s 588FF, s 588FH, s 588M

Corporations Law 2002

Judiciary Act 1903

Uniform Civil Procedure Rules, r 18, r 69

Banque, Commerciale SA (in liq) v Akhil Holdings Ltd (1990) 169 CLR 279

Christianos v Aldridge Pty Ltd (1995) 18 ACSR 272

David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353

Greig & Duff as liquidators of Australian Building Industries Pty Ltd (in liquidation) [2003] QCA 298

NRNQ v NEQ Nickel Pty Ltd [1991] 2 Qd R 592

Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221

Re Harris Scarfe Ltd (2006) 24 ACLC 1034

Re Jackaroo Agencies Pty Ltd [2006] 1 Qd R 332

Sibroll Pty Ltd v Mitch Properties Pty Ltd [2007] NSWSC 579

Thiess Pty Ltd v FFE Minerals Australia Pty Ltd [2007] QSC 209

Zempilas v JN Taylor Holdings Pty Ltd (1991) 5 ACSR 28

COUNSEL: DP Rangiah SC for the applicants/defendants

P Dunning SC and J Meredith for the respondents/plaintiffs

SOLICITORS: Piper Alderman for the defendants

Sajen Legal for the plaintiffs

- [1] The plaintiffs are the liquidators of the company ACN 009 826 528 formerly known as Sunshine Plantation Pty Ltd (“the Company”) which operated the tourist attraction “The Big Pineapple”.
- [2] The defendants have applied to the court for orders that the claim and amended statement of claim filed 22 October 2008 be struck out in whole or in part.

- [3] The pleadings allege that by virtue of s 588E of the *Corporations Act* 2001 (Cth), the company was insolvent due to its failure to maintain financial records as required by s 286(1).
- [4] The defendants' complaint, in brief, is the identity of the plaintiffs and/or the capacity in which they sue. The claims by the liquidators relate to various alleged uncommercial payments and/or voidable transactions that took place in October 2003 shortly prior to their appointment as administrators and, following, the company entering into liquidation and being appointed liquidators. The transactions involve the balancing off of certain company loan accounts to record nil balances which appear as particulars to paragraph 9 of the further amended statement of claim.
- [5] The plaintiffs advance three causes of action:
- pursuant to s 588FF of the *Corporations Act* (voidable transactions);
 - pursuant to s 588FH of the *Corporations Act* (uncommercial transactions); and
 - unjust enrichment.
- [6] The plaintiffs have sued in their own name. They are described in the claim and statement of claim as "John Richard Park and Lachlan Stuart McIntosh". The company is not a plaintiff. On 12 March 2010 the plaintiffs served a further amended statement of claim in which they add to their names as plaintiffs, "as the official liquidators of ACN 009 826 528 Pty Ltd (in liquidation)", for which they have sought leave. Although that amendment answers some of the complaints, others remain.
- [7] The plaintiffs allege in paragraph 1 of the Further Amended Statement of Claim ("FASC"):
- (b) The Plaintiffs were official liquidators entitled to be appointed administrators or liquidators of the Company pursuant to the provisions of the *Corporations Act* 2001 ("the Act")
 - (c) The Plaintiffs are entitled to commence these proceedings on behalf of the Company pursuant to sections 477 and 588FF of the Act.

And in paragraph 7:

On 18 March 2004 ... the Plaintiffs were appointed joint and several liquidators of the Company.

- [8] I will deal with the principal complaints and the lesser alleged pleading deficits which Mr Rangiah submits would cause the whole proceedings to be struck out. The principles are not in dispute.

The unjust enrichment claim

(i) The plaintiffs

- [9] The Company is the entity which sustained any loss whereby the defendants have been enriched.¹ As the pleadings stood before the recent amendment, the liquidators as individuals were incompetent to sue to recover this alleged loss. Section 477(2) entitles the liquidator of a company to bring legal proceedings in the name of and on behalf of a company. The amendment rectifies the defect.

(ii) The pleadings

- [10] The pleading about unjust enrichment is said to be inadequate because it does not allege any qualifying or vitiating factor. By paragraph 10 the plaintiffs allege that the defendants did not give any consideration for the payments made to them by the Company. By paragraph 11 the plaintiffs allege that the Company received no benefit from the payments. Paragraph 31 then merely pleads that it would be unjust for the defendants to retain the benefit of the payment in those circumstances.
- [11] Similarly with respect to the loan accounts reduced to nil. Paragraphs 18-20 plead no benefit to the Company and paragraph 33 alleges that it would be unjust for the defendants to retain that benefit. In *David Securities Pty Ltd v Commonwealth Bank of Australia*,² the court said after discussing the proper approach in Australia to a case brought to establish unjust enrichment:³

... It does have important consequences in relation to the elements of the action which the plaintiff must plead and prove. It also appears to proceed from the view that in Australian law unjust enrichment is a definitive legal principle according to its own terms and not just a concept ...

After quoting from *Pavey & Matthews Pty Ltd v Paul*, the court continued:⁴

Accordingly, it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or officiating factor such as mistake, duress or illegality.

The pleading should be amended to reflect this missing element.

Sections 588FF and 588FH claims

- [12] Section 588FF empowers only a company's liquidator to apply for an order where a company has engaged in a voidable transaction requiring, inter alia, the person to pay to the company an amount equal to some or all of the money paid by the company. As the pleadings stood when this application was commenced, the named

¹ *Zempilas v JN Taylor Holdings Pty Ltd* (1991) 5 ACSR 28 per DeBelle J at 30; *Christianos v Aldridge Pty Ltd* (1995) 18 ACSR 272 at 280.

² (1992) 175 CLR 353.

³ At 378.

⁴ (1987) 162 CLR 221 at 256-7.

individuals were not identified as the liquidators. It is insufficient to contend that this could be assumed from a consideration of paragraphs 1 and 7.

- [13] Rule 18 of the *Uniform Civil Procedure Rules* requires that a person suing in a representative capacity must state that capacity in the originating process. Mr Rangiah submitted that paragraph 1(c) does not assist, as that pleading alleges an agency relationship with the Company when it is the liquidator, as liquidator, who may bring proceedings under s 588FF.⁵ Similar observations may be made about sections 588FH and 588M concerning insolvent trading.
- [14] Mr Rangiah submits that since the limitation period in s 588FF(3) has expired and no application to extend was brought within the time stipulated, the plaintiffs are precluded from amending the pleading to correct their erroneous status. There is no discretion to extend outside this period.⁶ Mr Dunning did not seek to argue otherwise. Instead, he submitted that this is, in truth, a misnomer case or, if it is not, that the provisions of the *UCPR* in Chapter 3 relating to parties to proceedings may be applied beneficially to the liquidators.
- [15] The error is that of the pleader. There is apparent confusion about proceedings brought by a liquidator as the alter ego of a company and proceedings only reposing in a liquidator as liquidator. They are different capacities and the error is closest to the wrong party provisions in r 69 of the *UCPR*. I discussed at some length the interplay between the relevant Rules of Court, the provisions of the *Corporations Law* 2002, the Corporations Rules and the constitutional implications in the *Judiciary Act* 1903 in *Re Jackaroo Agencies Pty Ltd*⁷ and do not propose to do so again.
- [16] I have concluded that the plaintiffs may make the necessary amendments to the claim and statement of claim to reflect the several capacities in which they sue the defendants. The defendants have laboured under no misunderstanding about the liquidators' capacities. Indeed, the arguments were refined only quite recently by Mr Rangiah, so far as the correspondence reveals.

Other defects

- [17] The defendants complain that the pleading of insolvency in paragraphs 3 and 3A of the FAFC does not allege material facts sufficient to alert the defendants to the case they must meet. There is a bare assertion of insolvency by virtue of the provisions of the Act with particulars providing the material facts. It is trite pleading law that the pleading must state the material facts on which the party relies.⁸ As is well understood, the provision of particulars is not a substitution for the pleading.⁹
- [18] Mr Rangiah makes the further complaint that paragraphs 28(b) and 29(b) plead that the payments and transactions respectively are voidable within the meaning of

⁵ *Sibroll Pty Ltd v Mitch Properties Pty Ltd* [2007] NSWSC 579; *Re Harris Scarfe Ltd* (2006) 24 ACLC 1034 at 26.

⁶ *Greig & Duff as liquidators of Australian Building Industries Pty Ltd (in liquidation)* [2003] QCA 298 per Williams JA at [90]-[91].

⁷ [2006] 1 Qd R 332.

⁸ See *Banque, Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-7; *Thiess Pty Ltd v FFE Minerals Australia Pty Ltd* [2007] QSC 209.

⁹ *NRNQ v NEQ Nickel Pty Ltd* [1991] 2 Qd R 592 at 597.

s 588FE. There is no attempt at identification as to which of subsections (2) to (6) is to be relied upon. That should be done.

- [19] There are other problems with the identification of the relevant provisions of the *Corporations Act* in the prayer for relief. Mr Dunning concedes that the pleading needs some work and will, no doubt, take the opportunity to make some further “tidying up” amendments. The appropriate course is to give leave generally to file a further amended statement of claim consistent with these reasons and such other cosmetic amendments as the plaintiffs are advised to make.

Order

- [20] The respondents/plaintiffs have leave to file a further amended statement of claim consistent with these reasons.