SUPREME COURT OF QUEENSLAND

CITATION:	*Mango Boulevard Pty Ltd v Spencer & Ors* [2011] QSC 347
PARTIES:	**MANGO BOULEVARD PTY LTD** **ACN 101 544 601** (Plaintiff) v **RICHARD WILLIAM SPENCER** (First Defendant) and **SILVANA PEROVICH** (Second Defendant) and **KINSELLA HEIGHTS DEVELOPMENTS PTY LTD** **ACN 100 373 368** (Third Defendant) and **MIO ART PTY LTD** **ACN 010 101 875** (Fourth Defendant) and **PAUL DESMOND SWEENEY AND TERRY GRANT VAN DER VELDE as trustees of the property of RICHARD WILLIAM SPENCER** (Fifth Defendant) and **PAUL DESMOND SWEENEY AND TERRY GRANT VAN DER VELDE as trustees of the property of SILVANA PEROVICH** (Sixth Defendant)
FILE NO/S:	BS 1999 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	23 November 2011
DELIVERED AT:	Brisbane

HEARING DATE: 1 April 2011
Further written submissions received on 6 May, 16 June and 26 September 2011

JUDGE: McMurdo J

ORDER:

1. The application filed by the first, second and fourth defendants on 1 February 2011 will be dismissed.

2. The plaintiff will file and serve its Amended Reply within 14 days.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the plaintiff, first and second defendant were parties to a joint venture conducted through the third defendant – where the first, second and fourth defendants applied for summary judgment against the plaintiff – whether the plaintiff has no real prospect of succeeding on all or a part of the its claim – whether the defence is precluded by an equitable estoppel

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – GENERALLY – where the first, second and fourth defendants applied to strike out the plaintiff's reply – where a proposed amended reply had not yet been filed – whether the reply should be struck out

Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules 1999 (Qld), r 171

Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485, cited
Commonwealth v Verwayen (1990) 170 CLR 394, cited
Jorden v Money (1854) 5 HL Cas 185; 10 ER 868, cited
Legione v Hateley (1983) 152 CLR 406, cited
Mango Boulevard Pty Ltd v Spencer [2009] QSC 389, cited
Mango Boulevard Pty Ltd v Spencer [2010] QCA 207, cited
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387, applied
Williams v Frayne (1937) 58 CLR 710, cited

COUNSEL: JK Bond SC with TJ Bradley for the plaintiff
FM Douglas QC with KM Conner SC and DD Keane for the first, second and fourth defendants

SOLICITORS: Minter Ellison for the plaintiff
Delta Law for the first, second and fourth defendants

[1] The first, second and fourth defendants ('the defendants') apply for summary judgment against the plaintiff. It is the second such application by them. I

dismissed the first in 2009.[1] In the same judgment I dismissed an application by the plaintiff for summary judgment against the defendants. The plaintiff unsuccessfully appealed against that dismissal.[2]

[2] The previous applications for judgment involved, for the most part, different arguments. The defendants then contended, as they still do, that the plaintiff cannot enforce the relevant provision of their contract because the plaintiff is itself in breach. On the earlier application, the defendants said that it was incumbent upon the plaintiff to plead that they were not in breach. That argument was not accepted. The plaintiff's principal argument at that time was that by one or more earlier judgments, this question was precluded by an issue estoppel. That argument was rejected in my judgment and in those of the Court of Appeal. The result was that the defendants had to plead the issue which, I then said, involved a factual question which would require a trial. These defendants then pleaded that matter, together with a similar and related defence. This brought an extensive Reply to which the defendants filed a Rejoinder.

[3] Upon that state of the pleadings, the defendants made this further application for summary judgment. During the course of its hearing, which occupied a full day, I raised with counsel for the plaintiff a question as to the sufficiency of its pleaded case of an estoppel and I allowed them to make a supplementary written submission on that question.

[4] On 6 May, the plaintiff delivered further written submissions, extending to 13 pages and not limited to the estoppel point. At the same time it attached a proposed Amended Reply, which would change some paragraphs and add a further 16 pages to the pleading.

[5] This drew further written submissions for the defendants, comprising 24 pages, which were filed on 16 June. The defendants also filed an affidavit, which exhibited some 54 documents to which the plaintiff had referred in its further written submissions. In total, the documents ran to more than 1,000 pages.

[6] Still the plaintiff was not spent. Its solicitors wrote to the defendants' solicitors proposing a further hearing. That suggestion was rejected. On 25 August, the plaintiff's solicitors informed the Court that they wished to file and serve a further written submission which, they said, would be finalised "shortly". A month later, on 26 September, those submissions were filed, running to some 27 pages.

[7] There is at least one basis upon which the plaintiff has prospects of success and for which a trial is needed, which is that the defence is precluded by an equitable estoppel. To explain that conclusion, it is necessary to revisit the relevant contract between the parties.

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1 *Mango Boulevard Pty Ltd v Spencer* [2009] QSC 389.

2 *Mango Boulevard Pty Ltd v Spencer* [2010] QCA 207.

The contract

[8] The plaintiff, the first defendant and the second defendant were parties to a joint venture, to be conducted through the company which is the third defendant ('Kinsella'). The plaintiff held 50 per cent of its shares and the first and second defendants each held 25 per cent. The three parties executed a document called the Shareholders Deed.

[9] Clause 10 of the deed provided for the compulsory acquisition of the shares of a party which was in default under the deed. Clause 10.1 provided that a shareholder would be in default under the deed if:

> "…
>
> (d) it commits an act of bankruptcy, becomes bankrupt or unable to pay its debts or suspends payment of its debts within the meaning of the Bankruptcy Act 1966; [or]
>
> (e) any change occurs in its shareholders or its directors
>
> …"

Clause 10 further provided as follows:

> "10.2 If a party is in default of its obligations under this Deed as described in sub-clause 10.1 ('Defaulting Party') then another party may give:
>
> (a) a notice in writing setting out the default ('Default Notice') to the Defaulting Party; and
>
> (b) a copy of the Default Notice to the Company's accountants together with an instruction to determine within 30 days of the [sic] their receipt of a copy of the Default Notice, at the cost of the Defaulting Party:
>
> (i) the value of the Shares held by the Defaulting Party at the end of the last preceding Financial Year under the principles set out in clause 11; and
>
> (ii) the damages sustained by the other shareholders ('Non-Defaulting Parties') resulting from the default by the Defaulting Party ('Damages').
>
> 10.3 On serving a Default Notice on the Defaulting Party, the Non-Defaulting Party has, in addition and without prejudice to the Non-Defaulting Party's other rights at law or in equity, an option ('Option') to acquire the Defaulting Party's Shares at a price per Share determined by the Company's accountants under paragraph 10.2(b)(i).

10.4 The Non-Defaulting Party ('Acquiring Party') may, within 60 days of receiving the determination of the Company's accountants under paragraph 10.2(b)(i), by notice in writing to the Defaulting Party exercise the Option.

10.5 Completion of the sale of the Defaulting Party's Shares must take place within 14 days of the date that notice under sub-clause 10.4 exercising the Option is given to the Defaulting Party at a time and place to be agreed by the Acquiring Party and the Defaulting Party or, failing agreement, at 10.00am on the next Business Day after the 14 day period at the Company's registered office."

[10] The plaintiff's case is that there was a default under cl 10.1(d) by each of the first and second defendants. That is now admitted. Each of them is bankrupt. The first defendant says that his shares were held for a trust of which the fourth defendant is now the trustee. But that complication does not affect the plaintiff's claimed entitlement to purchase the shares of the first defendant pursuant to cl 10, which it elected to purchase before the change in trustee.

[11] The pleaded defence is that the plaintiff itself was in default which, upon the proper construction of the deed, precluded the plaintiff from acquiring the defendants' shares. The defaults which are alleged involved changes to the directorship of the plaintiff company, which are said to have engaged cl 10.1(e). The defendants say that the plaintiff was not a "Non-Defaulting Party" so that it was not entitled to give a notice under cl 10.

[12] The plaintiff pleads a different construction of the deed, which is that a shareholder was not precluded by its own default from giving a notice pursuant to cl 10.2 to another defaulting shareholder. I considered that argument in my previous judgment but found it unnecessary to determine the question.[3]

[13] The plaintiff pleads further matters as to the proper construction of the deed, as follows:

"13. (a) …

(b) a Shareholder party to the Deed would not be in default within the meaning cl 10.1(e) of the Shareholders Deed if there was a change in the shareholders or directors of the Shareholder with the consent of the other Shareholder party or parties;

(c) a change in the shareholders or directors of a Shareholder party would only be an event of default within the meaning of cl 10.1(e) of the Shareholders Deed if the change was a material change, namely a change in shareholders or

[3] *Mango Boulevard Pty Ltd v Spencer* [2009] QSC 389 at [54] to [59], [63].

directors effecting a change in control of the Shareholder party; and

(d) a change in directors of a Shareholder party would not amount to an event of default within the meaning of cl 10.1(e) of the Shareholders Deed if the change occurred in compliance with or in order to satisfy the Shareholder party's obligations set out in cll 3.1, 3.2 and 3.3 of the Shareholders Deed."[4]

It is unnecessary to set out in full cl 3.1, cl 3.2 and cl 3.3 of the deed. For present purposes the most relevant provision is cl 3.2(d), by which the parties agreed to be just and faithful in the party's activities and dealings with other parties in all transactions concerning the project of the joint venture and the company.

[14] The defendants submit that each of those pleas involves an alleged implied term, for which no basis is sufficiently pleaded or proved. With some justification, they say that these are allegations of implied terms because the express terms of the deed made no such qualifications of an event of default within cl 10.1(e).

[15] For present purposes, I will assume the correctness of the defendants' arguments on the construction questions. In other words, I will assume that according to the deed, any change in the directors of the plaintiff would amount to an event of default, precluding the plaintiff from compulsorily acquiring the defendants' shares. The plaintiff pleads that nevertheless it was and is entitled to compulsorily acquire the shares because of a waiver or an estoppel.

The estoppel case

[16] There are two changes in the directorship of the plaintiff which are pleaded by the defendants. Each occurred well prior to February 2006, which is when the plaintiff gave its notices to the first and second defendants under cl 10 of the deed. The first occurred on or about 11 August 2003 and the second occurred on or about 30 July 2004.

[17] The first change involved the resignation of a Mr Hailey and at the same time his replacement by a Mr Bird. The second change involved the appointment of a Mr Thomson as an additional director of the plaintiff.

[18] It is convenient to discuss first the estoppel pleaded by the plaintiff in relation to Mr Thomson's appointment. In paragraph 35 of the Reply, the plaintiff alleges that the first and second defendants "consented to the appointment of Mr Thomson as a director of the plaintiff and of [Kinsella]". It pleads that on or about 24 June 2004, Mr Bird for the plaintiff told the first and second defendants, in the course of a Management Committee meeting, that the plaintiff proposed Mr Thomson be

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4 Paragraph 13 of the Reply.

appointed as an additional director because Mr Bird intended to retire from full time work. It is alleged that:

> "[The first defendant and the second defendant] did not demur to the plaintiff's proposed course of action, when, in the premises pleaded, compliance with [his or her] obligation in cl 3.2 would have required [him or her] so to do in the event that [he or she] did not consent (or even if [he or she] reserved the right so to do)"[5]

[19] At this point it is necessary to set out the full terms of paragraphs 39-41A of the Reply, in which the amendments proposed by the proposed Amended Reply are shown by the underlining and deletion:

> "39. Further or in the alternative to paragraph 38 above, by the conduct pleaded in paragraphs 35(c) and (d) above, the first and second defendants represented to the plaintiff that:
>
> (a) the first and second defendants consented to the appointment of Mr Thomson as a director of the plaintiff;
>
> (b) the legal relationship between the plaintiff (on the one hand) and the first and second defendants (on the other hand) continued unaffected by the appointment of Mr Thomson as a director of the plaintiff. ~~the first and second defendants waived any condition that the appointment of Mr Thomson as a director of the plaintiff was an event of default within the meaning of cl 10.2 of the Shareholders Deed; and~~
>
> ~~(c) the first and second defendants would not rely on the appointment of Mr Thomson as a director of the plaintiff as being an event of default (within the meaning of cl 10.2 of the Shareholders Deed) for any purpose.~~
>
> 40. If the first or second defendant had:
>
> (a) opposed or declined to consent to the appointment of Mr Thomson as a director of the plaintiff;
>
> (b) informed the plaintiff that he or she regarded the appointment of Mr Thomson as a director of the plaintiff as an event of default within the meaning of cl 10.2 of the Shareholders Deed; or
>
> (c) informed the plaintiff that he or she regarded the appointment of Mr Thomson as a director of the

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5 Particulars (c) and (d) within paragraph 35 of the present Reply, which would be unchanged by the proposed amendments.

plaintiff as disentitling the plaintiff from giving a notice of default to the first or second defendant in the event that either committed an event of default within the meaning of cl 10.2 of the Shareholders deed;

Then:

(d) the plaintiff would not have proceeded with the appointment of Mr Thomson as a director of the plaintiff; or

(e) the plaintiff would not have proceeded with the appointment of Mr Thomson as a director of the plaintiff until the plaintiff and the first and second defendants had agreed upon terms for the appointment such that neither of those steps would be an event of default within the meaning of cl 10.2 of the Shareholders Deed; and

(f) the plaintiff and the first and second defendants would have agreed upon such terms.

41. The plaintiff proceeded with the appointment of Mr Thomson as a director of the plaintiff in reliance upon the conduct pleaded in paragraphs 35(c) and (d) above and the representations pleaded in paragraph 39 above.

Particulars

(a) The plaintiff (by its director Mr Bird) assumed that the legal relationship between the plaintiff (on the one hand) and the first and second defendants (on the other hand) would continue unaffected by the change ('the Thomson assumption');

(b) The Thomson assumption was induced by the conduct pleaded in paragraphs 35(c) and (d) above and the representations pleaded in paragraph 39 above.

41A. The first and second defendants knew (or ought to have known) and intended that the plaintiff would act on the Thomson assumption.

Particulars

The state of mind of the first and second defendants is pleaded as a fact and further or, in the alternative, it is pleaded as an inference to be drawn from:

(a) The matters set out in paragraphs 35(a) to (e) above;

(b) The relationship between the plaintiff and the first and second defendants was a business relationship and not a social relationship;

(c) Mr Bird was the chief financial officer of BMD and, in that capacity the second most senior executive officer of BMD;

(d) The relationship between Mr Bird and the first defendant was a business relationship and not a social relationship;

(e) The management committee meeting on 24 June 2004 was a business meeting;

(f) The raising of the subject on the occasion of a management committee meeting indicated to the first defendant that the proposed appointment of Mr Thomson as a director of the plaintiff was a serious matter for the plaintiff;

(g) The raising of the subject on the occasion of a management committee meeting indicated to the first defendant that the proposed appointment of Mr Thomson as a director of the plaintiff was a serious matter for the first and second defendants; and

(h) The evident purpose of raising the subject on the occasion of a management committee meeting was to inform the first and second defendants of the proposed appointment of Mr Thomson as a director of the plaintiff and to obtain their response whether by way of consent, objection, reservation of rights or otherwise."

[20] As appears in that extract, the case which the plaintiff had pleaded involved a representation about a future matter, rather than one of an existing fact. Paragraph 39(c) of the pleading, as it was at the time of the hearing of this application, alleged that the conduct of the first and second defendants was such as to represent that they would not rely on the appointment of Mr Thomson as an event of default for any purpose, and more particularly, as they are now doing. That representation could have been relevant only to an equitable estoppel, because a common law estoppel by representation would require one of an existing state of affairs: *Jorden v Money*;[6] *Legione v Hateley*;[7] *Waltons Stores (Interstate) Ltd v Maher*.[8]

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6 (1854) 5 HL Cas 185; 10 ER 868.
7 (1983) 152 CLR 406 at 432.
8 (1988) 164 CLR 387 at 398, 415, 459.

[21] It was in the context of that pleaded case at the hearing which made me query the absence of a plea about the defendants' states of mind, and, in particular, the absence of an allegation that the first and second defendants knew or intended that the plaintiff would act in reliance upon the expectation that the appointment of Mr Thomson would not be treated as a default under the deed. Such a knowledge or intention is one of the essential elements of an equitable estoppel, as set out in the judgment of Brennan J in *Waltons Stores (Interstate) Ltd v Maher*.[9] By the proposed amendments to the Reply, the plaintiff would add paragraph 41A which, subject to one argument, would fill that gap. But at the same time the plaintiff would amend the terms of the representation pleaded in paragraph 39 and it submits that its case is a common law estoppel by representation.

Estoppel – the defendant's arguments

[22] It is convenient to mention now that argument about paragraph 41A. The defendants submit that the allegation of knowledge and intention is qualified by the words "or ought to have known". They say that this has the result that actual knowledge is not alleged. I reject that submission. It is unnecessary to consider whether that alternative state of mind, which is something short of actual knowledge, would be sufficient. It is to be pleaded as an alternative to the plea of actual knowledge and it would not qualify that plea. And, at present, the defendants do not argue that there is no prospect that actual knowledge will be proved.

[23] I return to paragraph 39 and the representation now to be pleaded, which is that "the legal relationship between [the parties] continued unaffected by the appointment of Mr Thomson …". The defendants say that this plea is inconsequential because it pleads something which the defendants have always accepted. They agree that the legal relationship between the plaintiff and the defendants was unaffected by the plaintiff's changing its directors in that it continued to be regulated by the Shareholders Deed. However, that submission misinterprets the pleading. Although the pleading is not as clear as it should be, the effect of this allegation is that there was a representation that the respective legal positions of the parties would be no different for the fact that Mr Thomson was appointed, so that the defendants would not use the appointment either as a basis for exercising a right to acquire the plaintiff's shares or, as they now seek to do, as a basis for resisting the compulsory acquisition of their shares. The defendants submit that there is an ambiguity in this alleged representation. But in my view the true nature of the case can be identified.

[24] The defendants argue that the estoppel case must fail because the alleged representation is not sufficiently clear. In respect of the Thomson appointment, the representation is said to have been made by silence. Absent a duty to speak, the defendants' silence is said to have represented nothing or at least not to have represented that which is alleged by the plaintiff. As to the necessity for a duty to

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9 Ibid at 428.

speak in this context, they cite *Williams v Frayne*[10] and KR Handley, *Estoppel by Conduct and Election*.[11]

[25] The plaintiff alleges that the defendants were obliged to speak by cl 3.2 of the Shareholders Deed. According to cl 3.2, each party was to be just and faithful in that party's dealings with the others, and it is sufficiently arguable that this obliged the defendants to speak up if they knew of the plaintiff's assumption or expectation (that this would not be relied upon under cl 10) and they intended to keep open their right to act upon the appointment as a default.

[26] In any case, it may not be necessary to base the duty upon cl 3.2. In *Waltons Stores (Interstate) Ltd v Maher*, Brennan J identified the duty to speak in the circumstances of that case, not as deriving from some pre-existing legal duty, but from the following circumstances:

> "In the present case the question is whether Waltons, knowing that Mr Maher was labouring under the belief that Waltons was bound to the contract, was under a duty to correct that belief. The evidence was capable of supporting an inference that Waltons knew the belief under which Mr. Maher was labouring when Waltons became aware that Mr. Maher was doing the work specified in the deed. Waltons deliberately refrained from correcting what Waltons must have regarded as an erroneous belief. Was it Waltons' duty to do so? …
>
> Silence will support an equitable estoppel only if it would be inequitable thereafter to assert a legal relationship different from the one which, to the knowledge of the silent party, the other party assumed or expected: see *Ramsden v Dyson*;[12] *Svenson v Payne*;[13] *Willmott v Barber*[14]. What would make it inequitable to depart from such an assumption or expectation? Knowledge that the assumption or expectation could be fulfilled only by a transfer of the property of the person who stays silent, or by a diminution of his rights or an increase in his obligations. A person who knows or intends that the other should conduct his affairs on such an assumption or expectation has two options: to warn the other that he denies the correctness of the assumption or expectation when he knows that the other may suffer detriment by so conducting his affairs should the assumption or expectation go unfulfilled, or to act so as to avoid any detriment which the other may suffer in reliance on the assumption or expectation. It is unconscionable to refrain from making the denial and then to leave the other to bear whatever detriment is occasioned by non-fulfilment of the assumption or expectation."[15]

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10 (1937) 58 CLR 710 at 734.
11 (2006) at [3-018].
12 (1866) LR 1 HL at pp 140-141.
13 (1945) 71 CLR 531, at pp 542-543.
14 (1880) 15 Ch D 96, at pp 105-106.
15 (1988) 164 CLR 387 at 427-428. See also Deane J at 443-445 and Gaudron J at 462.

The plaintiff alleges that the first and second defendants knew and intended that the plaintiff would act on the so-called Thomson assumption. Their options were to tell the plaintiff that its assumption was incorrect or to act to avoid any detriment which the plaintiff might suffer by relying on the assumption. The matter of detrimental reliance is discussed below.

[27] The defendants submit that the alleged representation was as to the future and not a representation of existing fact. I accept that submission. The defendants were told of the proposal to appoint Mr Thomson at a meeting on 24 June 2004. Mr Thomson was in fact appointed on or about 30 July 2004. It is the defendants' silence in the interim period which is the basis for the plaintiff's case. Throughout that period, the respective rights and obligations of the parties under the deed remained unaffected. The defendants' representation was necessarily directed to what would be the position if and when Mr Thomson was appointed. Therefore, as already noted, this representation could not found an estoppel at common law. The fact that the plaintiff's submissions seek to characterise their case as a common law estoppel by representation does not mean that the defendants should be given judgment if, as it seems to me, there is a case for an equitable estoppel which warrants a trial.

[28] Next the defendants argue that the case must fail because the plaintiff could not establish that it acted or abstained from acting in reliance upon the relevant assumption or expectation. They say that the plaintiff could not have reasonably relied on the defendants' silence as constituting the representation alleged and nor could it have reasonably relied on that representation to assume that the defendants would not seek to invoke the default provisions should the plaintiff seek to compulsorily acquire their shares. I accept that the plaintiff's reliance upon the defendants' conduct must have been reasonable in order for the estoppel to be withheld.[16] The plaintiff says that it relied upon the defendants' conduct in many ways, both before and after Mr Thomson's appointment. It is unnecessary to refer to the extensive case about that which would be added by the proposed Amended Reply. For the present, it is sufficient to refer to the allegation, already made in paragraph 40(d), that the plaintiff would not have proceeded with the appointment of Mr Thomson had the representation not been made. Of course, that may or may not be true. But the defendants have not attempted to prove that it must fail on the facts. Nor can it be concluded now that the estoppel case must fail because such a reliance upon the representation could not have been reasonable.

[29] In my view, there is a sufficient case for an equitable estoppel in what is pleaded or proposed to be pleaded in relation to the Thomson appointment. In particular, that case would satisfy each of the six elements set out by Brennan J in *Waltons Stores (Interstate) Ltd v Maher*.[17] That was my impression during the hearing, save for the fact that the plaintiff had not pleaded the fourth requirement, which is that the defendants knew or intended the plaintiff to act upon the relevant assumption or expectation. That matter will be pleaded by the proposed new paragraph 41A.

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16 *Waltons Stores* at 397 per Mason CJ and Wilson J; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 414; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 506.

17 (1988) 164 CLR 387 at 428-429.

Despite the imperfections in the pleading in other respects as I have discussed, there is a sufficient case appearing on the face of this proposed Amended Reply.

[30] I turn to the other changes in directorship, which involved the replacement of Mr Hailey by Mr Bird in August 2003. The plaintiff's case in this respect is largely the same as that for the Thomson appointment. Again, the plaintiff pleads that the defendants were told of the proposed changes and that prior to their occurrence, the defendants effectively represented that they would not rely upon the change as an event of default for the purposes of the deed. Paragraph 22 of the Reply pleads that between 5 and 8 August 2003, after Mr Hailey had resigned as CEO of the plaintiff's parent company, Mr Bird for the plaintiff said to the first defendant that the parent company proposed to replace Mr Hailey with Mr Bird on the board of the plaintiff and that the departure of Mr Hailey would not affect their business relationship so that it would be "business as usual". It pleads that in response, the first defendant, "on behalf of the first and second defendants", said words to the effect that this proposal was "fine". It further pleads that between 5 August and 11 August 2003, the first defendant informed the second defendant of that conversation and that the second defendant did not demur to the proposed course of action.

[31] The representation or representations alleged to have been made are expressed in identical terms to those pleaded about the Thomson appointment. What I have said about the substance of the representation applies here. The alleged inducement by and reliance upon that representation is pleaded in the same way. In particular, it is alleged that had the defendants informed the plaintiff that either of them would treat the resignation of Mr Hailey or the appointment of Mr Bird as disentitling the plaintiff from invoking cl 10 of the deed, the plaintiff would not have proceeded with either change.[18]

[32] The same arguments were made by the defendants about this estoppel case, as I have discussed in relation to the Thomson appointment, save for two further matters. The first is that for this change in the directorship, the plaintiff relies not only upon the defendants' silence, but upon the first defendant's statement that it would be "fine". It is said that this statement (if made) was ambiguous and could not found an estoppel. In my view, that should be investigated at a trial because the context, as might be revealed by the evidence, could be relevant. And the case for an equitable estoppel based upon silence need not be weaker for the fact that there was also an alleged reliance upon this statement. Secondly, it is said that the conduct of the first defendant cannot be attributed to the second defendant. But it is pleaded that the terms of the relevant conversation were passed on by the first defendant to the second defendant, and again, there is an alleged representation by the silence of both defendants.

[33] The defendants' arguments for summary judgment were built upon what was said to be the inadequacy of the plaintiff's case on the face of its pleading. The defendants did not attempt to demonstrate that the facts pleaded by the plaintiff were incapable of proof. Undoubtedly, there are some matters pleaded within the case which I have

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18 Reply, para 27(d).

described which, at this stage at least, do not appear to be indisputably true. But that is to say that they involve questions to be tried.

[34] I have not discussed the very extensive plea of an estoppel by convention, which would be added by the proposed amendments to the Reply. It is unnecessary to do so given my conclusion that there is a case to be tried of an equitable estoppel. Once the defendants' criticisms of the pleading of that case are rejected, the defendants have failed to establish the plaintiff has no real prospect of succeeding on its claim.

The strike-out application

[35] It follows that the application for summary judgment will be dismissed. It is necessary then to consider an alternative application by the defendants, made pursuant to r 171 of the *Uniform Civil Procedure Rules 1999* (Qld), to strike out much of the Reply.

[36] This application relates to the Reply as presently filed. The supplementary submissions for the defendants strongly challenge the proposed Amended Reply, including the proposed case for an estoppel by convention. But the strike out application can be made only for the existing pleading. And it is likely that the proposed amended pleading will undergo changes, in consequence of this judgment, before it is filed.

[37] I have set out above at [13] those parts of paragraph 13 of the Reply, which the plaintiff pleads what it says was the effect of the deed upon its proper construction. The defendants advanced a strong argument to the effect that such a construction was untenable. But because of the estoppel case, the resolution of this question in favour of the defendants would not put paid to this litigation or substantially reduce its scope. To explain that second point, the estoppel case will involve a factual inquiry about the reasons for the changes in directorship of the plaintiff and the alternative courses which were open to the plaintiff had the defendants not made the alleged representations. Much of that evidence would be also relevant for the case which the plaintiff would wish to advance on the basis of its construction of the deed. In a sense there is some tension between its two arguments, because on its estoppel case the plaintiff says it could have avoided the changes in directorships whereas on this part of its case, it would argue that the changes were necessary in order to satisfy the plaintiff's obligations under the deed. Be that as it may, given the estoppel case, the plaintiff's alternative case based upon the terms pleaded in paragraph 13 should add little to the factual inquiry. And if I were persuaded to strike out these paragraphs, it is likely that the disposal of this litigation would be further delayed by an appeal in respect of a part of the plaintiff's case which may prove to be an unnecessary part, depending upon the outcome upon other issues.

[38] There were submissions for the defendants which challenged the plaintiff's pleading that, distinctly from the alleged estoppel or estoppels, "the first and second defendants waived the condition and are not entitled to rely on it". The condition referred to is apparently cl 10.2. This plea is not without its legal difficulties but its

presence within the Reply will not cause the defendants any practical disadvantage and it will not add to the length of the trial.

[39] I have not mentioned thus far the plaintiff's Reply insofar as it pleads a contravention of s 52 of the *Trade Practices Act 1974* (Cth). The same conduct which is relied upon for the estoppel in respect of the Hailey/Bird change is alleged to have been conduct which was misleading or deceptive or likely to mislead or deceive. The first and second defendants, of course, are individuals. But it is said that this conduct involved the use of a telephone. I very much doubt that this was sufficient to engage s 52, at least insofar as the second defendant is concerned. And there is no like case which can be or is pleaded in relation to the Thomson appointment. But again the inclusion of this plea will not extend the pre-trial steps or the trial itself and it is better to leave the determination of the question raised by it, if necessary, to the trial.

[40] It follows that the alternative application to strike out the Reply will be dismissed.

Result

[41] The plaintiff must amend its Reply consistently with this judgment. In particular, its pleading of the alleged representations should be amended. It will be ordered that the plaintiff file and serve its Amended Reply within 14 days. As to that document, I would add two comments. The first is that I would expect those pleading the Amended Reply to consider the extensive criticisms of the proposed Amended Reply made in the most recent submissions for the defendants. The second is that the proposal to attach to the pleading a schedule, itself consisting of a series of factual allegations, is irregular. The draft schedule was not simply a set of particulars. It would make many allegations of material facts. They must be pleaded within the Reply itself.

[42] The application filed by the first, second and fourth defendants on 1 February 2011 will be dismissed. The plaintiff is ordered to file an Amended Reply within 14 days. I will hear the parties as to costs and other orders.