

# SUPREME COURT OF QUEENSLAND

CITATION: *Taylor & Anor v Hobson & Ors* [2016] QSC 226

PARTIES: **ALAN JOHN JEFFREY TAYLOR**  
(first plaintiff/first respondent)  
**WANDANI PTY LTD**  
(second plaintiff/second respondent)  
v  
**RICHARD HOBSON**  
(first defendant/first applicant)  
**HOBSON INVESTMENTS (NQ) PTY LTD**  
(ACN 102 617 050)  
(second defendant/second applicant)  
**ROBERTS NEHMER McKEE**  
(third defendant)  
**MALCOLM FISHER**  
(fourth defendant)

FILE NO/S: Mackay SC No 15 of 2014

DIVISION: Trial Division

PROCEEDING: Interlocutory Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 06 October 2016

DELIVERED AT: Brisbane

HEARING DATE: 09 September 2016

JUDGE: Boddice J

ORDER: **I shall hear the parties as to the form of orders and costs.**

CATCHWORDS: PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – TO PREVENT ABUSE OF PROCESS – GENERALLY – where the plaintiffs commenced the present proceedings concerning a sale of business agreement they entered into with the first and second defendants – where the plaintiffs also commenced proceedings against the first and second defendants’ solicitors, the third and fourth defendants – where the plaintiffs alleged the first and second defendants and their solicitors made misrepresentations to the plaintiffs, which induced the plaintiffs to enter into the business agreement – where the proceeding between the plaintiffs and the third and fourth defendants were settled by Deed – where the Deed provided for the third and fourth defendants’ insurer to pay to the

plaintiffs a sum of money – where the Deed also provided for the third and fourth defendants’ insurer to appoint its solicitors to undertake the proceedings on behalf of the plaintiffs – where the Deed also provided for the insurer to direct the plaintiffs to conduct the proceedings as directed by the insurer – where the first and second defendants seek an order for strike out or a stay of the proceedings on the basis the Deed provides for the insurer to direct the Court’s processes, leaving those processes open to abuse – whether a continuation of the proceedings would constitute an abuse of process

PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – GENERALLY – where the proceedings between the plaintiffs and the third and fourth defendants were settled by Deed – where the Deed provided for the third and fourth defendants’ insurer to appoint its solicitors to undertake the proceedings on behalf of the plaintiffs – where the first and second defendants seek an order restraining the plaintiffs’ current solicitors, appointed by the insurer, from acting – where the first and second defendants submit there is a potential for use of confidential information by the plaintiffs’ current solicitors – where the plaintiffs submits its solicitors have not previously acted for any party in the proceeding and not had access to confidential information – where the plaintiffs also submit appropriate undertakings can be given to ensure they do not in the future have access to or misuse any confidential information – whether the plaintiffs’ current solicitors should be restrained from acting

*Choules v Siglin* [2002] WASC 230, cited  
*Clairs Keely (a firm) v Treacy* (2003) 28 WAR 139; [2003] WASC 299, cited  
*Elfic Ltd v Macks* [2003] 2 Qd R 125; [\[2001\] QCA 219](#), cited  
*Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203; [2005] NSWCA 83, cited  
*Grimwade v Meagher, Hegland, Morgan, Lidgett, Reid & Bellheath Pty Ltd* [1995] 1 VR 446, cited  
*Kallinicos v Hunt* (2005) 64 NSWLR 561; [2005] NSWCA 1181, cited  
*Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261, cited  
*Pott v Jones Mitchell* [2004] 2 Qd R 298; [\[2004\] QSC 48](#), cited  
*Project 28 Pty Ltd v Barr* [2005] NSWCA 240, cited  
*Williams v Spautz* (1992) 174 CLR 509; [1992] HCA 34, cited

COUNSEL:

PJ McCafferty for the plaintiffs/respondents  
 DA Savage QC for the first and second defendants/applicants

SOLICITORS:           Bartley Cohen for the plaintiffs/respondents  
                              Connolly Suthers for the first and second  
                              defendants/applicants

- [1] The first and second defendants make application to stay these proceedings or to restrain solicitors from representing the plaintiffs in the proceeding.
- [2] The application is brought on the grounds that a continuation of the proceedings would constitute an abuse of process or, alternatively, would result in a misuse of confidential information or interfere with the administration of justice.
- [3] At issue is the effect of certain terms in a Deed of Settlement entered into between the plaintiffs, the third and fourth defendants and the insurer of those defendants, Lexon.

### **Background**

- [4] The plaintiffs commenced the present proceedings in 2015. The claim concerned a written sale of business agreement entered into between the plaintiffs and the first and second defendants in February 2010. In addition to the first and second defendants, the plaintiffs instituted proceedings against the first and second defendants' solicitors at the time of the transaction, the third and four defendants.
- [5] The statement of claim alleged the sale of business agreement had been entered into as a consequence of various representations, made in contravention of sections 52 and 53A of the *Trade Practices Act 1974*. Representations were also said to have been made subsequent to the entering into of the sale of business agreement and before the plaintiffs paid monies pursuant to its terms. .
- [6] The representations were alleged to have been made by the first and second defendants, on occasions in the presence of the third and fourth defendants, and by the third and fourth defendants. It was alleged the third and fourth defendants were knowingly concerned in the representations made by the first and second defendants.
- [7] The defendants defended the plaintiffs' claim on the basis the representations were not made. The first and second defendants also counterclaimed for the outstanding sale proceeds, alleging the plaintiffs induced the first and second defendants to believe they had the financial capacity to complete the transaction as a consequence of which the first and second defendants committed themselves to a further project.
- [8] Earlier this year, the proceeding between the plaintiffs and the third and fourth defendants was settled by Deed. The Deed provided for the payment of a sum of money to the plaintiffs by the third and fourth defendant's insurer, Lexon, on behalf of those defendants. The Deed also provided for Lexon to appoint its solicitors to undertake the further carriage of the proceeding for the plaintiffs against the first and second defendants.

- [9] After concerns were raised as to the potential access to confidential information by the solicitors appointed by Lexon, the present solicitors were appointed by Lexon to represent the plaintiffs. They had not previously acted for any party in the proceeding.

### **The application**

- [10] The first and second defendants seek an order for strike out or a stay of the proceedings on the basis the Deed provides for Lexon to direct the Court's processes, leaving those processes open to abuse and the proceedings being continued against the first and second defendants in circumstances which are contrary to public policy.
- [11] The first and second defendants also seek an order restraining solicitors from acting for the plaintiffs on the basis any fair minded reasonably informed member of the public would conclude, having regard to the terms of the Deed, that the proper administration of justice requires that any solicitor appointed by Lexon be restrained from acting for the plaintiffs in that proceeding.

### **The Deed**

- [12] Relevantly, for present purposes, the Deed provided:
- “5. In consideration of that payment [the settlement sum], the plaintiffs, if called upon by written notice by Lexon to them ... to do so, will:
- (a) at the cost of Lexon:
    - (i) continue the proceedings against the first and second defendants;
    - (ii) amend those proceedings in any manner reasonably required by Lexon;
    - (iii) conduct those proceedings against the first and second defendants as may reasonably and properly be directed by Lexon;
    - (iv) for the purposes of (i), (ii) and (iii), instruct solicitors and counsel nominated by Lexon;
    - (v) for the purposes of (i), (ii) and (iv), provide all necessary co-operation as may reasonably be required by Lexon;
    - (vi) if directed to do so by Lexon, at their sole discretion (which shall be exercised in good faith), settle or discontinue the proceedings against the first and second defendants on such terms as may be determined by Lexon.
6. The proceeds of any judgement [sic] or settlement against or with the first and/or second defendants shall be distributed as follows:
- (a) 50% to the plaintiffs and 50% to Lexon until, by that distribution, Lexon have recovered the settlement sum and all costs incurred by them in the proceedings;

(b) thereafter to the plaintiffs.

7. Lexon will indemnify the plaintiffs against any adverse costs order made against them in the proceedings provided they have acted in good faith on the direction of Lexon.
8. The plaintiffs will promptly execute all such pleadings, notices (including notices of discontinuance) or other documents as may be necessary or convenient for the performance of this deed and/or the conduct or termination of the proceedings; and to secure such performance and conduct, the plaintiffs hereby irrevocably appoint each of Lexon, any claims counsel of Lexon and any solicitor appointed by Lexon severally their attorney for that purpose in the event the plaintiffs fail to do so. The plaintiffs will, at the request of Lexon, deliver to Lexon any document held by them relating to the proceedings.”

### **Applicants’ submissions**

- [13] The first and second defendants submit the terms of the Deed breach the principles of maintenance and champerty and are contrary to public policy. Further, the provisions allowing Lexon to appoint solicitors to act for the plaintiffs unduly interferes with the administration of justice.
- [14] The plaintiffs’ case is that the asserted representations were made prior to the execution of the Share Sale Agreement or prior to the payment of any monies by the plaintiffs pursuant to it, in circumstances where the third and fourth defendants must have known those representations were untrue. Those circumstances render it inappropriate for the insurer of those defendants, who must have obtained instructions from them in order to have lodged a defence on their behalf, to direct the continued conduct of the litigation on behalf of the plaintiffs.
- [15] The interests of the plaintiffs is to recover the monies paid by them and compensation for the loss of opportunity to use that sum in a profitable enterprise. However, under the terms of the Deed, the solicitors now conducting the plaintiffs’ claim owe their duty not to the plaintiffs but to Lexon. Lexon’s interest is to recover the sum paid by it in settlement of the proceeding against the third and fourth defendants.
- [16] Further, the plaintiffs expressly pleaded that their loss was occasioned by, or should be significantly apportioned to, the conduct of the third and fourth defendants. This places the plaintiffs’ now solicitors in a situation where the interests of the plaintiffs in the misconduct of the third and fourth defendants and the interests of Lexon giving instructions to those solicitors do not coincide.
- [17] There is also the real prospect that the plaintiffs’ case will be advantaged by use of confidential or privileged information communicated to the insurer when the insurer was conducting the defence on behalf of the third and fourth defendants. That would be an impermissible use of confidential information.

- [18] The first and second defendants submit these conflicts will inform the basis for the plaintiffs' response to the amended defence of the first and second defendants. The insurer's interest is not to benefit the plaintiffs by achieving the best result for the plaintiffs. The insurer's interest is to cast the blame on the first and second defendants, not the third and fourth defendants, and to compromise the proceeding so as to recover the sum paid on behalf of the third and fourth defendants.
- [19] The first and second defendants submit forensic choices will be informed by these conflicts. For example, forensic choices in relation to the pursuit of any apportionment case will be influenced by the conflicts. Whatever forensic choice the plaintiffs wish to pursue, the solicitors acting for the plaintiffs and the plaintiffs themselves must follow the direction of the insurer in relation to any amendment of the pleadings.
- [20] The potential use of confidential information is particularly significant. The third and fourth defendants acted for the first and second defendants in the transaction. The third and fourth defendants have refused to give the first and second defendants a statement or to provide a copy of their statement to their own insurer. This refusal gives rise to the presumed possibility of misuse of confidential information. There is also the real risk of intermeddling in the proceeding by reason of the conflicts of interest or the breach of confidence.

### **Respondents' submissions**

- [21] The respondents submit the terms of the Deed of Compromise do not give rise to any reasonable apprehension of a conflict of interest in the prosecution of the proceedings on behalf of the plaintiff or of the misuse of confidential information.
- [22] The power of a Court to intervene to dismiss a proceeding as an abuse of process or to stay those proceedings is only to be exercised with caution and in extraordinary circumstances. The fact Lexon has control of the further conduct of the proceeding and an interest in the outcome do not of themselves invoke that jurisdiction. The insurer has a genuine commercial interest in the transaction the subject of the litigation.
- [23] The enquiry that must be undertaken by the Court is whether the role of the insurer has corrupted or is likely to corrupt the Court processes to a degree that attracts the extraordinary jurisdiction to dismiss or stay permanently a proceeding for abuse of process. This test requires a consideration of whether by reason of the terms of the Deed the insurer is impermissibly intermeddling in the conduct of the proceedings.
- [24] There is no basis for a conclusion that by reason of the terms of the Deed there is an impermissible intermeddling in the conduct of the plaintiffs' proceedings by Lexon. The terms of the Deed require that Lexon act reasonably. The insurer would also have an obligation to use its power in good faith.
- [25] Further, the present solicitors, as solicitors for the plaintiffs, have a professional obligation to act in the best interests of the plaintiffs. There is no reason to conclude they would not comply with their professional obligations.

- [26] The solicitors presently acting for the plaintiffs have not previously acted for any party in the proceeding. They have also not had access to confidential information. Appropriate undertakings can be given to ensure they do not in the future have access to or misuse any confidential information.

## **Discussion**

### *Abuse of process*

- [27] Courts have long recognised the need to control the Court’s processes to ensure they are not used by a party in a manner which constitutes an abuse of process. This principle was emphasised by the majority in *Williams v Spautz*:<sup>1</sup>

“It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercising, their jurisdiction, especially their jurisdiction to try persons charged with criminal offences, and that persons charged with such offences should not obtain an immunity from prosecution. It is equally important that freedom of access to the courts should be preserved and that litigation of the principal proceeding, whether it be criminal or civil, should not become a vehicle for abuse of process issues on an application for a stay, unless once again the interests of justice demand it.”

- [28] One form of control has been the tort of maintenance principle: a party without a legitimate commercial interest in civil proceedings cannot assist a litigant in those proceedings if to do so would be without lawful justification and result in damage to the other party. Where the non-party to the proceeding provided assistance in exchange for a share of the proceeds of the litigation, the assistance was recognised as constituting a particular form of maintenance champerty.
- [29] Although the historical reasons for the development of the principles of maintenance and champerty have little relevance in modern litigation, Courts remain vigilant to ensure, in the interests of public policy, there is no trafficking in litigation or speculating in causes of action for improper gain.<sup>2</sup>
- [30] However, the increasing burden associated with the high costs of litigation has led to a recognition by Courts that principles of access to justice requires the allowance of funding of litigation in support of bona fide proceedings by third parties with no interest in the outcome, other than repayment and profit from that litigation.<sup>3</sup>
- [31] As a consequence of these developments, the mere fact the proceeding is funded by a third party with no interest in the proceeding, beyond repayment, is itself insufficient to justify the intervention of the Court. Therefore, Lexon’s funding of the proceeding in exchange for a share in any judgment or settlement sum is insufficient to warrant a stay or dismissal of the proceeding.

---

<sup>1</sup> (1992) 174 CLR 509 at 519.

<sup>2</sup> *Elfic Ltd v Macks* [2003] 2 Qd R 125; [2001] QCA 219 at 137 [65].

<sup>3</sup> *Elfic Ltd v Macks* [2003] 2 Qd R 125; [2001] QCA 219 at 137 [67].

- [32] A stay or dismissal of proceedings will not be granted unless the interests of justice demand it.<sup>4</sup> The focus in any application for dismissal or a stay of proceedings, on the grounds of abuse of process, is whether the arrangement corrupts or is likely to corrupt the Court process to such a degree as to justify the extraordinary jurisdiction of dismissal or stay of proceedings for abuse of process.<sup>5</sup>
- [33] In the present case, the insurer had a genuine commercial interest in effecting a settlement of the plaintiffs' claim against the third and fourth defendants. That insurer also has a genuine commercial interest in a continuation of those proceedings by the plaintiffs. It is only through a continuation of those proceedings that the insurer has any prospect of recovering the payment it made to the plaintiffs (and its costs).
- [34] Against that background, the fact the Deed of Settlement contains terms allowing for the recovery of the settlement sum by the insurer, in the event of the plaintiffs succeeding against the first and second defendants, is not so extraordinary as to justify an order for dismissal or a permanent stay of proceedings on the grounds of abuse of process. Those terms are consistent with the insured's genuine commercial interest in the outcome of the plaintiffs' claim against the first and second defendants. The existence of a legitimate interest is relevant to whether the proceeding should be stayed.<sup>6</sup>
- [35] Where an insurer has a legitimate interest in the continuation of proceedings in respect of its insured, Courts have recognised that provisions allowing for the insurer to have control over that litigation do not amount to an abuse of process.<sup>7</sup> As was observed by Mason P in *Fostif*:<sup>8</sup>
- “An insured owner of a motor vehicle whose claim for indemnity is accepted by the insurer may place the matter in the hands of that insurer, leaving it to the insurer and the retained solicitor to do whatever is necessary, consistent with the ultimate recognition of the owner's position as client. The insurance analogy also illustrates the regularity of informed arrangements whereby solicitors represent both insurer and insured as principals, even though conflicts of interest issues may arise and, if they do, will have to be dealt with properly. ...”
- [36] The present situation is, however, very different to the usual scenario of insurer and retained solicitor acting to represent both the insurer and the insured's interests. The Deed provides for the insurer of two of the defendants sued by the plaintiffs to have authority not only to direct the plaintiffs to continue the proceedings against the first and second defendants, but also to amend those proceedings in any manner reasonably required by the insurer, to conduct those proceedings as may reasonably and properly be directed by the insurer, and to instruct solicitors and counsel nominated by the insurer.
- [37] Those powers are to be exercised in circumstances where the plaintiffs' case specifically relied upon allegations that representations were not only made by the first and second

---

<sup>4</sup> *Williams v Spautz* (1992) 174 CLR 509 at 519.

<sup>5</sup> *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203; [2005] NSWCA 83 at 234 [132].

<sup>6</sup> *Project 28 Pty Ltd v Barr* [2005] NSWCA 240 at [57].

<sup>7</sup> *Project 28 Pty Ltd v Barr* [2005] NSWCA 240 at [64].

<sup>8</sup> *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203; [2005] NSWCA 83 at 223 [82].

defendants. The plaintiffs' pleaded case was that the third and fourth defendants also made representations.

- [38] A power for the insurer to control the proceeding against the first and second defendants, even if it had to be exercised reasonably, gives rise to the very real possibility the insurer will impermissibly intermeddle in the conduct of the proceedings by the plaintiffs against the first and second defendants to protect the insurer's interests.
- [39] That intermeddling arises in circumstances where the interests of the plaintiffs and of the insurer do not coincide in all material respects. There remains a live issue as to the causative effects of any representations said to have been made by the first and second defendants and the causative effects of the representations said to be made by the third and fourth defendants.
- [40] It is in the insurer's interests to ensure the proceeding is prosecuted by the plaintiffs with an emphasis on the causative effects of the first and second defendants' representations because that will maximise the prospect of recovering the payment made by the insurer. That emphasis, whilst in the insurer's interests, may not accord with the plaintiffs' pleaded case.
- [41] A power in the insurer to direct an amendment to the pleadings gives rise to the real possibility the plaintiffs will be required to amend their case in order to pursue the insurer's interests, whether or not that amendment accords with the plaintiffs' previous pleaded case.
- [42] Further, whilst the consequences of a direction to amend the proceedings so as to increase the causative effects of the representations made by the first and second defendants may benefit the plaintiffs, this benefit does not of necessity arise from a consideration of the plaintiffs' interests. It arises as a result of a direction from the insurer to conduct the proceeding so as to benefit its interests.
- [43] The possibility of the plaintiffs' pleaded case being amended to pursue the insurer's interests involves intermeddling with the proceeding which corrupts or is likely to corrupt the processes of the Court to a degree justifying a stay of the proceeding for abuse of process.
- [44] Such a power gives rise to a "real potential for an abuse of Court's processes".<sup>9</sup> The insurer does not merely have a power to appoint solicitors. The insurer's power is to direct the plaintiffs to amend the proceedings and to conduct the proceedings in a way specified by the insurer.
- [45] The powers given to the insurer in the present case may be contrasted with the situation where the funder of litigation has a financial interest in the outcome but no entitlement to give instructions or directions to effect the outcome of the litigation.<sup>10</sup>

---

<sup>9</sup> *Clairs Keely (a firm) v Treacy* (2003) 28 WAR 139; [2003] WASCA 299 at 163 [135], citing with approval *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261 at 268.

<sup>10</sup> cf *Choules v Siglin* [2002] WASC 230 at [51].

- [46] The Deed impermissibly limits the plaintiffs' entitlements to pursue the litigation against the first and second defendants in the manner they see fit. Their interests are made subservient to the interests and directions of the insurer of the third and fourth defendants.
- [47] In coming to the conclusion that the intermeddling justifies a stay for abuse of process, I have given consideration to whether the level of intermeddling is of a magnitude as to justify the Court exercising its extraordinary jurisdiction to dismiss the plaintiffs' claim. However, as the plaintiffs have a genuine and viable cause of action, the Court should lean in favour of moulding a remedy which eliminates the abuse. Dismissal should only be used as a last resort, where that is impossible.<sup>11</sup>
- [48] In the present case, the appropriate remedy is a stay of the proceeding for abuse of process whilst the intermeddling remains operative.

### ***Restraint***

- [49] Had I not stayed the proceeding for abuse of process, I would not have restrained the current solicitors from acting for the plaintiffs in the present proceeding. I shall briefly set out my reasons, in the event the issue becomes relevant.
- [50] The Court's inherent supervisory jurisdiction over legal practitioners provides ample power for the granting of injunctions to restrain legal practitioners from acting in proceedings, where the due administration of justice and the protection of the integrity of the judicial process calls for such restraint.<sup>12</sup>
- [51] However, an objective test is to be applied, namely, whether a fair minded, reasonably informed member of the public would conclude the proper administration of justice required that restraint, after giving due weight to the public interest that litigants should not be deprived of their legal practitioners of choice without good cause.<sup>13</sup> The jurisdiction is only to be exercised in highly exceptional circumstances.<sup>14</sup>
- [52] Solicitors have professional duties to clients. Whilst the terms of the Deed may place the current solicitors in a difficult position in acting in the best interests of the plaintiffs as their client, whilst complying with the directions of the insurer as the funder of the ongoing litigation, it is ultimately a matter for the solicitors, as professionals, to deal with that conflict.
- [53] There is nothing in the material to give rise to a doubt the solicitors would act professionally and in accordance with their duty in determining any such conflict. In those circumstances there is no basis to resort to the extreme measure of restraint.

---

<sup>11</sup> *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203; [2005] NSWCA 83 at 234 [132].

<sup>12</sup> *Kallinicos v Hunt* (2005) 64 NSWLR 561; [2005] NSWCA 1181 at 573 [46]; *Pott v Jones Mitchell* [2004] 2 Qd R 298 at 304; [2004] QSC 48 at [21].

<sup>13</sup> *Grimwade v Meagher, Hegland, Morgan, Lidgett, Reid & Bellheath Pty Ltd* [1995] 1 VR 446 at 452.

<sup>14</sup> *Kallinicos v Hunt* (2005) 64 NSWLR 561; [2005] NSWCA 1181 at 581 [72], 581 [76], 586 [92].

- [54] Similarly, the material does not support a conclusion the current solicitors have had access to confidential information or would in the future impermissibly use confidential information. The giving of appropriate undertakings would in the future adequately address any such concern.

### **Conclusions**

- [55] The continuation by the plaintiffs of the present proceedings against the first and second defendants, under the direction and authority of the insurer for the third and fourth defendants pursuant to the Deed of Settlement, gives rise to an impermissible intermeddling in the proceeding. The proceedings should be stayed for abuse of process whilst that intermeddling remains.
- [56] I shall hear the parties as to the form of orders and costs.